S.113.h.9
15.Q

A JOURNAL OF THE SESSION.

Containing the

DECISIONS

OF THE

Lords of Council and Seſſion,

IN THE

Moſt Important Caſes,

HEARD and DETERMIN'D

From February 1705, *till* November 1713:

AND THE

Acts of Sederunt

Made in that Time.

WITH

A PREFACE, containing an HISTORICAL ACCOUNT of the SESSION, and the FORM of PROCEEDING therein;

AND

An ALPHABETICAL ABRIDGMENT of the Whole.

OBSERVED and COMPILED

By WILLIAM FORBES Advocate,

Profeſſor of Law in the Univerſity of *Glaſgow*.

By Order of the *Dean* and *Faculty* of Advocates.

Allowed by the Lords to be printed for the publick Good.

EDINBURGH:
Printed for the AUTHOR: And Sold at WILLIAM BROWN'S Shop on the North Side of the high Street, a little above the Croſs. MDCCXIV.

7L

MVSEVM
BRITAN
NICVM

To the Right Honourable,

JAMES Earl of *Findlator* and *Seafield*,

Viſcount of *Redhaven*, Lord *Desford*, *Ogilvy* and *Cullen*:

***K^t.* of the moſt ancient and noble Order of the Thiſtle,**

Lord Chancellor of *Scotland*,

And One of Her Majeſty's moſt Honourable Privy Council.

MY LORD,

WHEN 'tis ſo much in Faſhion with Authors of any Size, to Court, in this Way, Protection to Their Works: I hope you will look favourably on the *Journal* of a Sovereign Court, where you early began and continued to diſtinguiſh your ſelf at the Bar, in the Quality of *King's Sollicitor*, no leſs by forcible Eloquence, univerſal Learning and other great Parts of a finiſhed Lawyer, than by your high Birth, till Merit called you to ſerve your Prince and Country in the ſuperior Station of *Principal Secretary of State*; and where now a Third Time you flouriſh on the Bench, as an accompliſhed Judge, with the ſublime Character of *Lord Chancellor*. I inclined the more to ſet forth this *Journal* under your Patronage, that not a few of the Deciſions therein were pronounced by your own Mouth, while you preſided over Juſtice in the *Seſſion*; and the Strain of marvellous Coherence, or Uniformity running thro' them all, doth furniſh your Lordſhip with abundant Matter, when abſent from this Judicature, to let the World know that the Lords endeavour in all their Preceedings to ſteer by the unerring Compaſs of Law.

I leave it to Others, *My Lord*, to tell how much the Civil Power doth owe to your Counſels, and Wiſdom: It being beyond my Line, to deſcribe the Figure you make in Parliament, and at the Council-Board. Permit me only to ſay, (what occurs to every private Perſon) That your having gone faſt thro' the Honourable and Important Offices of the *Sovereign's Sollicitor*, *Secretary of State*, *Lord Chancellor of Scotland*, and *Lord chief Baron of the Exchequer* There; and our Moſt Excellent QUEEN's Renewing your Commiſſion of *Lord Chancellor* once and again, is a convincing Argument that you are admirably fitted to act in all the different Scenes of publick Buſineſs. The natural Affability and Sweetneſs of Temper, which you ſtill retain in your Elevation, did further encourage me to this Addreſs, as the Firſt Token (for want of one more real) of my juſt Reſpect to your Lordſhip. If my Book be allowed a Place in your Library, and prove not unſavoury to your juſt Taſte, common Readers will the leſs find Fault with,

My Lord,

Your Lordſhip's moſt obedient,
and devoted humble Servant,

WILLIAM FORBES.

PREFACE.

THE King and His Council were at firſt our Supreme Judges in Civil Cauſes. But this being found very inconvenient, the Work was devolv'd on the Chancellor and certain diſcreet Perſons of the Three Eſtates, to be choſen and deputed by the King; who were to ſit Three Times in the Year where His Majeſty pleas'd (*a*); called the *Seſſion*, becauſe they were not to follow the Court as His Council did, but to ſit at appointed Places. Which Seſſion Sir *George Mackenzie* (*b*) conſiders as a Committee of Parliament, from its conſiſting of *certain Perſons of the Three Eſtates*: But the Viſcount of *Stair* (*c*) will have the contrary to be clear from their being *choſen and deputed by the King*. It was turn'd into a daily Council elected by the King (ſo called to diſtinguiſh it from the Privy-Council) who ſat continually at *Edinburgh*, and had their Sitting notified to the People by open Proclamation (*d*).

Judges thus changeable, ambulatory and uncertain, not being able to diſcuſs Cauſes throughly; and being found liable to commit Iniquity in the diſpenſing of Juſtice, thro' Ignorance or Corruption: In place of the Old Seſſion and daily Council, *a College of Juſtice* or perpetual *Seſſion* was inſtituted, after the beſt Model Abroad, in the Minority of King *James* the Fifth *Anno* 1532, confirmed by the Papal Authority, and ratified both in the Parliament 1537 (*e*) and after the King's Majority in the Parliament 1540 (*f*).

I ſhall firſt deſcribe the Place where this Sovereign Judicature is held. 2. Speak in Order concerning the Members and Officers of It, *viz.* the Judges, Lawyers, Clerks, Keeper of the Minute-Book, and Macers. 3. I ſhall give a general Hint of the Method of Proceeding in this Court. 4. Proſecute briefly the Hiſtory thereof.

(*a*) *Ja.* I. Par. 3. Cap. 65. (*b*) Obſerv. on Act 65. Par. 3. *Ja.* I. (*c*) Inſtit. Lib. 4. Tit. 1. § 23. (*d*) *Ja.* IV. Par. 6. Cap. 58. (*e*) C. 36. *& ſeq.* (*f*) C. 93.

thereof. And laſtly give ſome Account of this Journal, with the Reaſons that mov'd me to publiſh it.

The Seſſion-Houſe.

1. The Place where our Seſſion is held, thence called the *Seſſion-Houſe*, and commonly the *Parliament-Houſe*, becauſe the Parliament of *Scotland* did ſit there, is a noble Fabrick, conſiſting of an Inner and Outer-Houſe. The Inner-Houſe is a large ſquare Room to which the Lords enter through a waiting Room on the North-ſide, where they put on their Robes, and the Advocates and principal Clerks their black Gowns, kept there by Two publick Servants of the Houſe. The Lords ſit in the Inner-Houſe in a Body, at a Semicircular Bench, in the Faſhion of an Amphitheatre: And are ſerved by Six principal Clerks ſitting at a Table before them; where alſo the Lord Clerk-Regiſter ſits when he thinks fit to attend in his Gown. The Bar like a Diameter-Line, at which the Advocates, and even the Queen's Solicitors ſtand and plead uncovered, is oppoſite to the Bench. Her Majeſty's Advocate ſits in a Chair within this Bar, and pleads always with his Hat on. At the Eaſt Corner of the Inner-Houſe a Lord ſits upon the Bills at a Table, there attended by the Clerk of the Bills. Two Doors on the Weſt-ſide of this Houſe open to the Outer-Houſe, which is a ſtately Hall; beſides the common Door thereof, kept by a publick Servant of the Faculty of Advocates wearing a black Gown, and carrying a Braſil-Batton mounted with Silver Bars in his Hand; who lets none enter but Advocates, Writers to Signet, or Perſons of Note. In the Middle of the South-ſide of this Outer-Houſe, at ſome Diſtance from the Wall, there is a Bar to which Advocates aſcend by ſome Steps to plead, called the *Fore-Bar*, with reſpect to one leſs conſpicuous on the Eaſt-ſide of the Hall, called the *Side-Bar*, where Cauſes formerly heard at the *Fore-Bar* are conſidered. Her Majeſty's Advocate hath a Seat within the Fore-Bar, when he comes out to plead in any Cauſe there. Six Under-Clerks, called Clerks of the Outer-Houſe, are alſo ſeated within this Bar: Behind whom there is a high Bench erected, where a Lord called the Lord of the Outer-Houſe doth ſit. Adjoining to this Bench there is a Desk where the Clerk or Keeper of the Minute-Book ſits and marks what's done. Within the Side-Bar there is a Chair for the Lord Ordinary, who comes there to hear and determine Cauſes. The large *Area* of the Outer-Houſe is incloſed with Rails on the Weſt-ſide, thro' which thoſe who have Buſineſs with any Advocate may ſpeak to him; and on the North, with many Rows of Benches, on which Advocates or others admitted within their Bar may ſit. By the Southern Door of Communication betwixt the Two Houſes, the Ordinaries in the Outer-Houſe and at the Side-Bar and the Clerks do paſs and re-paſs.

and by the other Communication-Door, Advocates and Parties concerned go to and from the Inner-Houſe-Bar, as they have Occaſion.

Lords of the Seſſion.

2. The Judges of the Seſſion did at firſt conſiſt of Fourteen ordinary Lords, Half Spiritual and Half Temporal, with an Eccleſiaſtical Prelate as Preſident, beſides the Chancellor (whoſe Character intitles him to preſide, and alſo to take Place of all Perſons in *Scotland* next to the Royal Family) and other extraordinary Lords to the Number of Four only. Theſe Judges are ſtiled *Senators of the College of Juſtice*, or *Lords of Council and Seſſion*, for that they are veſted with the whole Authority and Powers of the Old Seſſion, and daily Council. The Reaſon for taking a Confirmation of the the firſt Inſtitution of our Seſſion from the Pope (whoſe Uſurpation upon the *Regale* our Kings were ever juſtly jeraous of) was becauſe of a great Conteſt that aroſe betwixt the King and the Clergy, about a certain Contribution-Mony impoſed upon the Benefices of Prelates, for the better Support of the Lords of Seſſion, which was drawn by an Appeal to *Rome*, but compromis'd & ſettled by giving the Clergy ſo great an Intereſt in the Seſſion (g). But ſince the Bench was reformed from Popery, the Preſident was allowed to be either a Laick or an Eccleſiaſtick (h). And tho' Biſhops have been extraordinary Lords, I know no Inſtance of an Eccleſiaſtical ordinary Lord, ſave that of Mr. *Robert Pont* Miniſter of St. *Cuthberts*: whom the General-Aſſembly in the Year 1575 allowed to accept of a Lord's Gown then in his Offer, thinking their Affairs in that critical Juncture could not go the worſe, that they had a Friend the in Seſſion; but with this Caution, that it ſhould not be drawn in Example for Miniſters thus to immix themſelves with ſecular Affairs, by ſitting in Civil Judicatures. For which very Reaſon, a Law made in the Year 1584 (i) incapacitating Miniſters to bear any Office in the College of Juſtice, obliged this Spiritual Lord to quit his Civil Poſt: and the ſame was beſtowed on Mr. *John Graham* of *Halyards*.

The Ordinary Lords (whereof One is conſtant Preſident, and Eight with him a *Quorum*) are bound to aſſiduous Attendance (without a lawful Excuſe ſuſtained by the reſt) from the firſt of *June* till the laſt of *July incluſive*, called the *Summer-Seſſion*; and from the firſt of *November* till the laſt of *February*, called the *Winter-Seſſion*. During theſe Two Terms of that Court, there is no Surceaſe of Juſtice, except where Law or Cuſtom authorizeth the Intermiſſion of Buſineſs: As upon *Sunday*, *Monday*, or Anniverſary Days appointed by Acts of Parliament to be obſerved; or Days ſet

---

(g) *Spotiſwood* Hiſt. Edit. 1677 P. 68. (h) *J.* VI. Par. 6. C. 93. (i) *J.* VI. Par. 8. C. 133.

apart by the Government, for Humiliation or Thankſgiving. But ſome Lords have obtained Diſpenſations with their Abſence, in reſpect of Weakneſs, Age, or long Service, or other juſt and reaſonable Conſiderations; with Allowance notwithſtanding thereof, to enjoy the Emoluments, Dignities and Privileges of their Office. Their Places by Law are *ad vitam aut culpam*. The Eldeſt Lord was once conſtant Vice-Preſident (*k*). But now the Lords do, *pro re nata*, elect any One of their Number to preſide in the Preſident's Abſence.

The firſt Set of Ordinary Lords were named by the King with Conſent of the Eſtates of Parliament (*l*). Not as if every total Nomination behoved to be made by the Parliament: But becauſe the firſt Nomination being a Part of the Inſtitution, which is a publick Law, required Conſent of the Eſtates; and the King doth often, for more Solemnity and to gratify the Subjects, ask the Conſent of Parliament to what He might do by His own Royal Authority (*m*). The Lords of the Seſſion were always named by the Sovereign, till after the Earl of *Mortoun*'s being forc'd to throw up the Regency, King *James* the Sixth accepted the Government in His own Hands before He had paſt His Pupillarity. Complaints ariſing in the Year 1579 about the young King's planting the Seſſion with unſufficient Judges, an Act of Parliament (*n*) was made to obviate this Abuſe; whereby the Trial of the Qualifications neceſſary in a Lord of Seſſion, was referred to the reſt of the Lords, who were impowered to refuſe the Perſon preſented by the King, if found not qualified according to Law, and to chuſe their Preſident. Farther, an Act of Sederunt was made 15 *June* 1593, in Preſence of, and ſubſcribed by the King, That his Majeſty ſhould preſent no Perſon to any Ordinary Lord's Place in the Seſſion, till Twenty Days after the Vacancy; and ſhould then preſent Three at leaſt to the Lords, out of which they were to chuſe and admit any One they thought beſt qualified; and declaring Reſignations *in favorem* to be null. This Method of Election by the Lords out a Liſt of Three recommended by the King, was obſerved for ſome Time. But 23 *February* 1597, it was, at the King's earneſt Deſire, diſpenſed with in the Admiſſion of Sir *David Lindſay* of *Edzel* to the Place of an Ordinary Lord of Seſſion. By the *Act* 15 *Par.* 1641, it was provided, That the King, in Time of Parliament, ſhould name Lords of Seſſion with the Advice and Approbation of the Eſtates of Parliament; and ſhould ſupply any Vacancy happening on the Bench in an Interval betwixt Parliaments, with the Advice and Approbation of the Majority of the Lords of Seſſion.

But

(*k*) *Ja.* V. Par. 7. C. 93. (*l*) *Idem* Par. 5. C. 40, 41. (*m*) *Stair* Inſtit. Lib. 4. Tit. 1. § 23. (*n*) *Ja.* VI. Par. 6. C. 93.

But after the Reſtauration of King *Charles* II. the Parliament 1661 (which reſcinded what was done in the Parliament 1641) declared the Nomination of the Lords of Seſſion as in former Times before the Year 1637, to be an inherent Privilege of the Crown, and an undoubted Part of the Royal Prerogative *(o)*. Since which Time the Sovereign hath been in Uſe to name Perſons to vacant Chairs in the Seſſion, by Letters directed to the reſt of the Lords. Who admit the Nominee, if found ſufficiently qualified, after paſſing a Trial. Which is to report ſome Cauſes taken to *aviſandum* by the Lord Ordinary in the Outer-houſe (with whom he ſits Three Days for that End); and to reſume the Debate in a Cauſe pleaded *in præſentia*: And upon every Point reported, or reſumed after the Pleading, he gives his Opinion before the reſt of the Lords declare Their's. The Author of a Pamphlet *(p)* printed *Anno* 1689, tells, That one Sir *William Ballenden*, named and recommended to be a Lord of Seſſion by King *Charles* II. was, upon Examination by the reſt of the Lords, refuſed and rejected as a Perſon not qualified according to Statute. King *Charles* I. in the Beginning of his Reign, declared his Reſolution not to imploy any Nobleman in the Office of an Ordinary Lord of Seſſion: Whereupon the Earls of *Melroſs*, *Lauderdale*, and the Lord *Carnegy*, quitted their Places in the Seſſion. And in the Year 1690, a Draught of an Act was preſented to the Parliament, to render Peers incapable to be named or continue Lords of Seſſion; but did not paſs. The Perſon preſented to be an Ordinary Lord of Seſſion muſt be 25 Years of Age; a Man fearing GOD, learn'd and converſant in the Laws, having of yearly Rent at leaſt 1000 Merks or 20 Chalders of Victual *(q)*: And One that hath ſerved in the College of Juſtice Five Years as an Advocate or principal Clerk of the Seſſion; or Ten Years a Writer to the Signet, found qualified for the Station of an Advocate, by the Faculty of Advocates in a publick and private Trial upon the Civil Law, Two Years before he ſet up to be a Lord *(r)*.

The Extraordinary Lords (who are marked in the Sederunt-Books after all the Ordinary Lords) were allowed at the Beginning to ſit and hear only without voting *(ſ)*. They are named by a Letter from the Sovereign, and thereupon received without Examination or Trial. They ſit and vote when they think fit: But are not of the *Quorum*, nor obliged to conſtant Attendance, becauſe they have no Salaries.

Our Kings gave the Seſſion great Privileges and Immunities. They are the firſt Gentlemen in *Scotland*, holding Rank and Precedency next to the Sons of Earls; and in publick Appearances go next to theſe and the Nobility. Their Perſons, Lands & Goods are under the Sovereign's ſpecial Care and Protection from all Harm and Injury (*t*). Such as diſhonour or contemn their Authority are puniſhable by themſelves (*v*): And uſually ſent to Priſon or ordained to crave Pardon upon their Knees, according to the Quality of the Offence. It is high Treaſon to kill any Lord of Seſſion ſitting in Judgment (*x*).

(o) *Ch.* II. Par. 1. Seſſ. 1. C. 2, 11. (p) The late Proceedings and Votes in the Parliament of *Scotland*.
(q) *Ja.* VI. Par. 12. C. 132. (r) Art. 19. of the Union. (ſ) *Mackenzie* Inſtit. Lib. 1. Tit. 3.

They are exempted from paying Taxes and other extraordinary Charges, and from bearing any Office within or without Burgh, unleſs they conſent to it (*y*). They admit Advocates and Notaries. Queen *Mary* by a Writing under the Privy-Seal, 7th *January* 1566, gave the Preſentation of all Commiſſaries in *Scotland*, their Clerks and Officiars to the Lords of Seſsion: Recommending to them, to examine diligently whom they preſented, that ſuch Places might be conferr'd only upon Men of Diſcretion and Judgment. Which Privilege the Lords exerc'd till the Year 1609, when Commiſſariots were reſtored to Biſhops, with Power to them to appoint Commiſſaries, create Clerks and all other Members of Court. But at the ſame Time, the Lords of Seſsion were declared to be the King's great Conſiſtory, and had a Supreme Commiſsion granted to them for all conſiſtorial Cauſes (*z*).

The Lords are expreſly impowered to make Acts and Statutes for ordering of Proceſs and haſty Expedition of Juſtice (*a*) called Acts of Sederunt. Which is neceſſary for Explicating their Juriſdiction, and ſeems to be implied in their very Conſtitution (*b*).

Our Princes promiſed never to charge, demand or deſire the Lords to do otherways than as Juſtice required, or to break their own Rules (*c*), and encouraged them to proceed boldly and ſteddily conform to Law, without regard to any private contrary Orders from the Throne, which are condemned in our Claim of Right. This Direction hath been ſo far obſerv'd, that our Princes ſitting in Perſon in the Seſsion, have had Matters ſometimes there decided againſt their known Sentiments.

The Lords are authorized not only to regulate the Seſsion, but alſo to give Rules to other Courts: As they did to the Juſtice-Deputes, before the new Scheme of Juſticiary in the Year 1672, and may do to all inferior Courts (*d*); even in Cauſes which they are not competent to judge in the firſt Inſtance.

During *Cromwell*'s Uſurpation, they were robbed of the dear Privileges they had enjoyed from the Inſtitution of the College of Juſtice,

---

(*t*) *Ja.* V. Par. 5. C. 68. (*v*) *Ibid.* (*x*) 7. *Anna* C. 21. (*y*) *Ja.* V. Par. 5. C. 68. *Ch.* I. Par. 1. C. 23. *Ch.* II. Par. 1. C. 23. Par. 2. Seſſ. 2. C. 8. (*z*) *Ja.* VI. Par. 20. C. 6. (*a*) *Ja.* V. Par. 5. C. 68. Par. 7. C. 93. (*b*) *L.* 2. *ff. de juriſdict.* (*c*) *Ja.* V. Par. 5. C. 68. (*d*) *Ja.* VI. Par. 23. C. 19. Act of Sederunt. 1636.

Juſtice, and ſubjected to the unlawful Exactions of the Time. But theſe Privileges were revived and renewed after the Reſtauration, and ratified in all ſucceeding Parliaments.

In the Year 1672, Five Lords of the Seſſion were, in Place of the Juſtice-Deputes, added to the Juſtice-General and Juſtice-Clerk, and called *Commiſſioners of Juſticiary* to judge in all Criminal Matters.

In the Year 1707, the Parliament of *Scotland*, when it was a dying, thought fit to veſt the Lords of Seſſion with yet farther Powers of Judging in all Affairs and Cauſes formerly appropriated to the Cognizance and Juriſdiction of a Commiſsion of Parliament called, *The Commiſſion for Plantation of Churches and Valuation of Tithes*. Now the Truth is, this tranſcendent Truſt of our Lives and Fortunes could not be lodged in better Hands.

To conciliate the more Reſpect to the Authority of the Lords, they are diſcharged to poſſeſs any inferior Office of Commiſſary, Sheriff-Depute, or the like. *May* 21 1605, an Act of Sederunt was made, That no Lord of Seſſion ſhould be an Arbitrator. And 29 *May* 1584, the Lords underſtanding that they were oft-times required to give Anſwer to Queries in Writ, concerning Points in Controverſy before inferior Judges; whereby the Subſcribers of ſuch Opinions could not judge in the Reduction of theſe Cauſes, by reaſon of partial Counſel given: Therefore, they enacted, that none of their Number ſhould ſign Reſolutions to any Queſtion, except in Judgment.

Advocates.

When the Seſſion was in it's Infancy, a certain Number of Perſons of the beſt Reputation, Knowledge and Experience, were privileged to plead in Actions before the Lords, called *Advocates*: Who at firſt were ſo very few, not exceeding the Number of Ten, that we find Lords compearing as Advocates for Parties in Civil Cauſes in the Year 1537 and 1538; which ſeem'd to be a great Solecism in the Method of Juſtice. The Books of Sederunt, 7 *December* 1580, 17 *March* 1585, furniſh us with Inſtances of Advocates admitted with a Quality, that they ſhould not take in hand to plead in any weighty or difficult Cauſe, without the Aſsiſtance of ſome of the elder moſt knowing Lawyers. And 17 *January* 1587, and 11 *January* 1604, there was a Diſtinction made betwixt Advocates for the Inner-houſe, and Advocates for the Outer-houſe: Which, after it had gone in Deſuetude, was attempted to be got renewed in the Year 1670; but the Project being very offenſive and diſobliging to the Bar, the Promoters thereof thought fit to drop it. The Number of Advocates, tho' very few at the Beginning, increaſed mightily in Proceſs of Time, as Buſineſs increas'd: So that at this Day there are about Two Hundred: Of theſe 170 conſtantly attend the Houſe. The whole Society goes under the

Name of the Faculty of Advocates, a very honourable Body, into which, none are admitted but ſuch Gentlemen as have ſpent ſeveral Years in the Study of the Laws; tho' many of good Eſtates commence Advocates with no other View than the Honour of being Members of it.

The ordinary Manner of their Admiſsion, is, by Firſt a private Trial on the Civil Law, manag'd by Nine Examinators annually choſen; whereof Seven are a *Quorum*. Theſe after Examination give their Opinion concerning the Candidate's Qualifications and Literature by Balloting, who, if found not qualified, is remitted to his Studies: If qualified, the private Examinators recommend him to the Dean of Faculty, who aſsigns him a Title of the Civil Law for the Subject of his *Theſes*; which on a Day appointed for his publick Trial, he defends in Preſence of the Faculty, againſt Three at leaſt of the publick Examinators appointed to impugn them. Afterwards, the Faculty give their Opinion of this his publick Performance by Balloting, as in the private Trial. If he be found qualified, the Dean aſsigns him ſome Text out of the Civil Law for the Subject of his Speech before the Lords. To which End, he is allowed on a Day prefixed, to ſtand in one of the Lord's Places covered, when he makes his Harangue. After which the Lords admit him, by adminiſtring to him the Oaths to the Government, and the Oath *de fideli adminiſtratione*. Advocates are ſome Times, tho' rarely, admitted by a Trial on the *Scots* Law. In which Caſe, the Candidate has no Speech to the Lords before his Admiſsion: But Admiſsion upon a Trial on the Civil Law is more honourable.

The Advocates are ſubject to the Authority of the Lords: Who ſet Rules to them in the Conduct of their Buſineſs, and may cenſure, fine or debar them from their Imployment, for Diſobedience or malverſing in their Office.

The Faculty of Advocates meet every Year the firſt *Tueſday* in *January* when the Seſsion is ſitting, at which Time they chuſe their annual Officers: Namely the Dean, who preſides in all their Meetings, and with a Council of the moſt Intelligent of the Faculty, looks after the Intereſt and Concerns of the Society; the Treaſurer, who has the Cuſtody and Management of their Stock; the Clerks; a Curator of the Library; and the private and publick Examinators. The Dean, Treaſurer and Clerks are frequently continued; but the Examinators of Intrants, and One of the Three Curators of the Library are yearly chang'd.

At the Inſtitution of the College of Juſtice, there were but *Clerks.* Two Clerks of the Seſsion; to whom, 14 *December* 1594, a Third was added: Which Three Clerks had Three diſtinct Chambers or

Offices. The Lords in the Year 1621, at the earneſt Deſire of theſe Clerks, received a Conjunct-Clerk into each Office, to eaſe them of a Part of the Burden of their Callings. In the Year 1661, Two Clerks were preſented to each of the Three Offices by Sir *Archbald Primroſe* then Clerk-Regiſter: But 20 *June* 1676, the Lords, upon a Letter from King *Charles* II. reſtricted the Clerks to Three; and ordered the Three allowed to continue in Office, to pay 7000 Merks *Scots* to thoſe turned out. Thereafter the Act of Parliament 1685, brought them up to the Number of Six again. Theſe have their Commiſsion from the Clerk-Regiſter *ad vitam aut culpam*, with Power to appoint Under-Clerks or Clerks for the Outer-houſe, and Extracters in their ſeveral Offices. For many Years after the Erection of the College of Juſtice, there were no diſtinct Clerks of the Outer-houſe; where the Inner-houſe Clerks did officiate *per vices*, or by their Servants. No Perſon can be a Clerk in the Inner-houſe, who hath not ſerved Three Years as an Advocate, or Writer to the Signet.

The Manner of Admiſſion of Clerks to the Inner-houſe is this. The Probationer minutes a Debate in Preſence, and the Lords Interlocutor thereon, which he reads to their Lordſhips. And farder, reports the Heads of a Bill and Anſwers aſsigned him by the Lords: Who do alſo examine him about the Forms of Acts, Decreets or the like. The Clerks of the Outer-houſe are named by the Principal-Clerks, and received by the Lords.

There be alſo Two Principal-Clerks of the Bills, who have their Commiſsion from the Clerk-Regiſter, & Three Clerk-Deputes under them put in by themſelves. They ſerve all in an Office called the *Bill-Chamber*; where they attend every Seſsion-day, and each *Tueſday* and *Thurſday* in the Vacation-Time, from 9 till 10 in the Morning, and from 2 till 6 in the Afternoon, for receiving in ſuch Bills as ſhall be offered to them: Which they carry to the Ordinary, in order to Paſsing or Refuſing.

Keeper of the Minute-Book. The Clerk or Keeper of the Minute-Book (who hath his Commiſsion from the Clerk-Regiſter) notes every judicial Act that may be extracted.

Macers. The Macers are Four in Number, whereof Three are named by the Sovereign, and the Fourth derives a Commiſsion from *Moncrief of Reidie*, who is heretable Macer, and ſerves by a Depute. One Macer attends conſtantly on the Lord Ordinary in the Outer-houſe, Another attends the Ordinary at the Side-Bar, and the other Two wait the Motions of the Lords in the Inner-houſe. Theſe Macers carry Silver Maces in their Hands, and therewith uſher the Lords at their entring the Houſe, or going to their reſpective Bars. They call, *i. e.* cry or proclaim Cauſes, and execute the immediate Orders of the Lords: As to cite and apprehend Perſons ſummarly complained of; impriſon Advocates Servants for unduly keeping up Proceſſes, and to ſee good Order obſerved in the Seſsion-houſe by inferior Servants and the common People. Macers are ſupreme Judges in the Service of all Brieves iſſued out of the Chancery; to whom the Lords advocate Services from inferior Judges, in the Caſes of Incompetency and Iniquity; appointing uſually ſome of their own Number Aſſeſſors to direct the Macers; and ſometime the whole Bench are Aſſeſſors to them.

Having thus diſcourſed of the Members of the Seſsion; it naturally falls in here, to give a Sketch of the Method of doing Buſineſs there.

Form of Proceſs in the Seſſion.

The Seſsion is a Sovereign Court; and, I may ſay, One of the moſt Auguſt, Decent and Orderly Judicatures in *Europe*, where our Kings often ſat in Perſon. *John Leſly*, Biſhop of *Roſs*, ſays of it, in his Hiſtory of *Scotland* (e), *Quæ ratio formaq; rei judiciariæ omnibus viſa fuit tam opportuna, tam utilis, tam neceſſaria, ut omnium Regum ordinumq; conſenſu ſemper vigeat; & quamdiu Res publica ſtat vigebit ſemper.* The State of our Form of Proceſs hath, by the long Experience of near 200 Years, been from Time to Time improv'd, and ſo refin'd from all Matter of fancied Inconveniency as much as is poſsible; that it is at preſent more eaſy, accurate, diſtinct, ſafe and deſirable, than the Rules and Orders of any other Supreme Court that hath fallen within the Compaſs of my Obſervation or Reading. To deſcend nicely to Particulars, would require a Treatiſe, which in due Time I intend to publiſh: But ſhall at preſent give only a ſhort View or Notion on't.

The Lords are veſted with *duplex Officium, viz. ordinarium, & extraordinarium* called *Officium nobile.*

They proceed in their ordinary Capacity, according to the moſt rational Rules of ſtrict Form and Law.

That they may have Time to conſider weighty Caſes maturely, they get them reduc'd into Writ by the Lawyers: And every Lord hath a Box ſtanding upon a Table in the waiting Room of the Inner-houſe from Two till Four in the Afternoon, wherein all who have Papers to offer may put them by a Slit in the Cover. This, tho' a mighty Advantage to the Lieges, is of late, ſince Informations and Bills were allowed to be printed, become an incredible Fatigue to the Lords: Who, after toiling all Day in hearing Cauſes, are obliged to ſhut themſelves up to peruſe and conſider a Multiplicity of Papers at Night; and thereby often to want the neceſſary Relaxation due to Nature, which viſibly ſhortens their Days.

(e) *De orig. & moribus* Scot. *lib.* 1. *c. de Magiſtrat.*

The Ordinary Lords are all imployed at the ſame Time in different Capacities, according to the Nature and Import of Buſineſs aſsigned to them. Every Lord, except the Preſident, takes his Turn of ſitting in the Outer-houſe, upon the Bills, at the Side-Bar, upon Oaths of Parties and Witneſſes, and upon concluded Cauſes. Other particular Lords are detached out of the main Body *pro re nata*, to rank Creditors and diſcuſs Compt and Reckonings at particular Diets. Each Lord is called *the Ordinary*, with reſpect to Affairs that come in before him. In the Forenoon, there is always One Ordinary upon the Bills, Another in the Outer-houſe, a Third at the Side-Bar for reconſidering Matters formerly debated before him when upon the Bills, or in the Outer houſe: And the reſt of the Lords ſit with the Preſident at the ſame Time.

The Ordinary in the Outer-houſe diſcuſſeth common Cauſes, and dilatory Defences, or preliminary Steps in thoſe of a higher Nature. He determines the Contraverſy if clear, without further Trouble or Expence: And in caſe of Difficulty, makes *Aviſandum* to himſelf, or to the whole Lords, *i. e.* take ſome Time to adviſe it himſelf, or conſult the Lords upon it. When he agrees to make *Aviſandum* with the Matter to the Lords, he acquaints the Parties what Day he will report it, that they may the Night before put Informations about it in the Boxes. If the Ordinary be clear to pronounce an Interlocutor to the Diſſatisfaction of either Party; he who thinks himſelf leſed may get Redreſs, by putting a written Repreſentation in the Lord's Box, and procuring a new Calling of the Cauſe before him at the Fore or Side-Bar, when he hath a Diet of Audience. If the Ordinary do, notwithſtanding all that's repreſented, adhere to his former Opinion; the Party grieved may require the Anſwer of the whole Lords upon the Point: And if refuſed, may get their Anſwer by Bill; and if that diſpleaſe, has the Benefit to reclaim againſt it once and again.

There is a weekly Ordinary upon the Bills both in the Time of Seſſion and Vacation. For underſtanding what is incumbent upon him, it may be noticed, That the Inhabitants of *Scotland* are all the Year over under the benign Influence of Juſtice at Home, by the proper Courts of Commiſſaries, Admirality, Sheriffs, Stewards, Baillies of Royalty, Regality, and Barony, and Juſtices of Peace: Moſt of which ſubordinate Judges having a cumulative Juriſdiction in their reſpective Capacities, are a Check upon one another. And as in Matters to which they are competent, Parties may ſue before either, where they expect to be beſt ſerved: So in caſe of Intricacy, preſumptive Suſpicion of Partiality in theſe Judges, or

Incompetency where they go beyond their Line, or when they commit Iniquity; the Cauſe may be called up to the Seſſion by *Advocation* (which anſwers to both the *Engliſh* Law-Terms of *Certiorari* and *Prohibition*) before; or Suſpenſion and Reduction after Sentence, in order to get it review'd, or a Stop put to the Execution of it. Which pretorial Remedies of Advocation and Suſpenſion are procured, or refuſed, by Deliverance or Interlocutor of the Ordinary upon Bills or Petitions offered to him for that End. This Ordinary paſſeth alſo common Bills of Horning and Caption, *&c.* in order to reduce a Perſon to a State of Civil Rebellion or Outlawery, *&c.* for not Payment of Debt or Performance of Deeds: And in all Caſes, there lies Acceſs to get his Miſtakes altered or rectified by the reſt of the Lords. The Ordinary upon the Bills may even ſuſpend Decreets of the Seſſion pronounced in Abſence of the Defender: But Suſpenſions of greater Conſequence can only be paſt by a *Quorum* of the Lords in Term-Time, or by Three Lords in the Vacation.

The Lords in the Inner-houſe hear and determine Cauſes of greateſt Importance upon the Pleading of Advocates, adviſe Reports made by the reſpective Ordinaries; or Reports by the Preſident of Points that after an Inner-houſe Debate merited to be farther cleared by Informations, adviſe reclaiming Bills againſt their own Interlocutors, or thoſe of particular Ordinaries: And what they do is ſaid to be done *in præſentia*.

Not only are the Lords imployed in the Forenoon, but they do alſo meet often in a Body Afternoon to adviſe complex and perplex'd Cauſes, that cannot be conveniently extricated in a Forenoon; or to adviſe Bills and Anſwers when ſo multiplied in the latter Days of Seſſion, that they cannot be overtaken at the ordinary Time. Some Lord doth alſo then prepare concluded Cauſes (where the Import of Evidence produced is to be determined in the Inner-houſe) by drawing up a State of what is therein material, in order to ſhorten the Pains of the Lords at adviſing. Compt and Reckonings, and the Ranking of Creditors upon Bankrupt-Eſtates are diſcuſs'd by other particular Ordinaries. Two Lords are at Work in taking the Oaths of Parties and Witneſſes. All which Ordinaries report to the Lords any dubious Points, occurring at Examination or preparing Cauſes, and are under their Direction if they do amiſs.

Tho' we be not ſo happy as a certain *Indian* People, whom *Pliny* (*f*) obſerves to have *neque lites, neque forum* amongſt them; or as thoſe in *Ethiopia*, who according to my Author (*g*) have almoſt no

Pleas

(*f*) Nat. Hiſt. Lib. 6. C. 26. (*g*) *Fr. Alvarez* cited by *Bodin.* de Rep. Lib. 5. C. 1. N. 511

Pleas: Yet very prudent Meaſures are taken here to ſtop the Growth of them.

1. For keeping down their Number, and to hinder over-acting or nimious Diligence about them, the Members of the College of Juſtice can neither buy Pleas, nor bargain *de quota litis*. And any Purſuer or Defender found to have been calumnious, or unaccountably litigious, is ſure to be condemned in large Expences to the other Party, which ſometimes exceed the Value of the Subject of the Plea.

2. All Occaſion of unneceſſary Delay is obviated thus, 1. All Cauſes are heard according to the Order of Rolls, without reſpect of Perſons. 2. When either Party tergiverſeth by keeping up the Proceſs, it can be recovered ſummarly by a Caption or Warrant to arreſt him by a Macer. When the Purſuer wilfully declines to inſiſt in his Suit, the Defender may get a Warrant to go Home till he be cited *de novo*; at leaſt the Plea will be ſcored out of the Roll, and muſt run the Courſe of a new Inrolment before it be heard again. If no Application for a Hearing be made within a Year, the Cauſe falls aſleep, as we ſay, and muſt be rous'd by a Summons of Wakening executed againſt the Defender, before any farther Step can be made therein. If the Defender withdraw or appear not, the Lords proceed to give Judgment againſt him. 3. That is never done *per plura quod æque commode fieri poteſt per pauciora*. Special Care is taken, that the whole Lords be never troubled with what a ſingle Ordinary may more conveniently determine: And that an extraordinary Mean be not uſed, where there lyes an ordinary Remedy. Moſt Part of Cauſes are decided upon Report of the Ordinary, or upon ſummary Bills and Anſwers. And becauſe even the whole Lords *in præſentia* may upon the firſt View of a Cauſe miſtake it, & decide amiſs, it being *humanum errare*: The Party grieved may find Redreſs by a Petition, complaining to them of themſelves. But as it were hard to tie down the Lords to ſuch Dimenſions, that they cannot upon new Light and fuller Information, alter a wrong Judgment: So to hinder the Abuſe of Petitioning, Bills reclaiming againſt Interlocutors muſt be offered while they are recent in the Lords Memory. Clerks are not to take in more than Two Bills from the ſame Party againſt any Interlocutor in Preſence; nor to receive the Second, but upon the Ingiver's conſigning 20 Shillings *Sterling* to be delivered to the other Party incaſe of Refuſal, and to be given back to the Petitioner if the Bill be not refuſed. Every Bill muſt be ſubſcribed by an Advocate, who is liable to a Reprimand if the Bill is palpably groundleſs.

3. No perſon who is but tolerably vigilant (and *vigilantibus* only *jura ſubveniunt*) needs to be taken napping: Having not only the Rolls

to advertiſe him of the Time of calling his Cauſe; but alſo, Intimation of any Judgment given againſt him by that excellent Monitory, *the Minute-Book*, wherein all Sentences muſt be entred immediately, and read ſo many Days after pronouncing, and cannot be extracted till 24 Hours after reading. During which Intervals, any Thing amiſs may be got rectified by applying to the Ordinary, or to the whole Lords. And when the Defender cannot quarrel any Thing done by the Lords, he has the Privilege to demand a Copy of any Sentence or Decreet before it is ſigned by the Clerk, (which we call Extracting) to compare the ſame with the Minutes and Warrants, that Things may be fairly done. Yea, the Lords will even recal Decreets unwarrantably extracted, if queſtioned by a Bill *de recenti*

4. Buſineſs is carried on before the Seſſion in the beſt Order can be thought of. That of greateſt Moment, is calculated to be determined in Preſence, and what is leſs Material, is committed to particular Ordinaries. Moſt Diſpatch is given to haſty Affairs. Diſtinct Marches are kept betwixt the different Provinces of particular Lords, that they interfere not in the leaſt, but may be mutually ſubſervient in the Diſtribution of Juſtice. For they diſpatch the ſeveral Kinds of Buſineſs by Turns, and *Monday*'s Roll intimates what every one has to do that Week, and at what Hours. Yea, (which is the peculiar Excellency of the Conſtitution of our Seſſion) as much Buſineſs is done there (and I hope none will deny with more Safety and Exactneſs, and leſs Expence to the Nation in general) as ſo many Judges in different Courts could rationally be ſuppoſed capable to diſpatch. For in the Seſſion, particular Ordinaries determine all common Buſineſs, and moſtly do ſo ripen & prepare weighty Matters, that the Senate in the Inner-houſe have nothing to do, but to give them the finiſhing Stroke. Whereas, ſingle Judges in ſeparate Courts (tho' of ordinary Knowledge and Experience) cannot (unleſs reſolved to decide at random) expedite Juſtice with that Celerity, may be expected from particular Lords in the Seſſion in their reſpective ſingle Capacities, who are ſupported and forwarded in their Procedure, by the communicated Advice of the collegiate Body. *Facilius enim invenitur, quod a pluribus quæritur* (b).

5. As Perſons who have to do before the Seſſion, muſt be wanting to themſelves, if either they be ſurpriz'd or unneceſſarily delay'd: So they have as little Ground to fear Harm by unequal Proceeding, either in Parties, and the Managers of Proceſs, or in the Judges; who are all ſufficiently reſtrained from debording and unfair Dealing.

(b) Can. ult. Diſt. 20.

1. If the Plaintiff or Defendant invade or beat the other Party, the Perſon guilty loſeth his Plea, and Judgment is given in Favours of the other, without farther dipping into the Cauſe, or the Ground of his Pretenſions. 2. An Advocate, Clerk, Agent, or other Officer in the Seſſion, tripping in Matters committed to his Truſt, may expect not only to be turn'd out of Office, but alſo to be fined, and otherways puniſhed according to the Degree of his Offence without Mercy. Yea, Advocates uſing undecent or diſreſpectful Expreſſions in Papers drawn by them, are to be debarr'd from the Exerciſe of their Office for a Time, or farther puniſhed as the Lords ſee Cauſe. 3. As the ſeveral judicial Concoctions and Siftings to which any material Caſe is liable before it is finally determined in the Seſſion, will not ſuffer any indifferent Perſon to think eaſily that Matters will go wrong there, thro' Ignorance of the Lords: So there is as little Reaſon to apprehend, that theſe can ſhew themſelves partial in Cauſes before them. For as by Act of Parliament, any Lord giving partial Counſel or taking Bribes, is puniſhable by Infamy, Deprivation and Confiſcation of Moveables; and all the Lords promiſe upon Honour to obſerve the Acts of Sederunt againſt Solicitation: So the great Number of the Lords, their having Right to their Places during Life, with ſufficient Salaries, defend them from the leaſt Suſpicion of being liable to Partiality thro' any ſiniſter Influence.

6. Matters being ſo maturely digeſted in the Seſſion, when a Decreet thereof *in foro* (*i. e.* where both Parties compeared) is once fairly extracted and ſigned by the Clerk, and given out to the prevailing Party; *omnia præſumuntur ſolenniter acta*: It becomes *res judicata*, ſo firm by our Law, that it cannot be overturn'd upon the Head of Iniquity, or upon Grounds propon'd and repelled, or competent to have been proponed, and omitted in the Plea. Nor yet can it be laid open upon Nullities, farther than to the Effect of hearing Parties about Redreſſing their Prejudice by the Nullities. Which Security againſt the licentious Queſtioning ſolemn Decrees, and aſcertaining of Property, is a mighty Eaſe to People's Minds, which nowhereelſe, that I know, is injoyed but in North-*Britain*.

The *Officium nobile* of the Lords, is exerciſed in new and ſingular Caſes, for qualifying ſtrict Law and Form with Equity: Which abundantly ſupplies the Want of a Court of *Chancery*, without any additional Expence to the Country: And the Truth is, our ordinary Rules of Court are ſo well digeſted, calculated and fitted to all Occurrences; that the Lords have very ſeldom Occaſion to act *in officio nobili.* However this great Authority could be no where more ſafely eſtabliſhed, than in thoſe whom our Law conſiders as Perſons of that publick Spirit, Honour, and Inclination to Equity, that it allows them not to reduce their own Sentences upon Grounds of Iniquity: As if they could not be guilty of wreſting or perverting Juſtice.

I return now after this Account of the Form of Proceſs in Seſſion, to proſecute a litle the Hiſtory of it.

Hiſtory of the Seſſion continu'd.

The Troubles in *Edinburgh* begun in the Cloſe of the Year 1537, by a Tumult, upon the Occaſion of reading the Service-Book in the Church, increaſing, the King by Proclamation removed the Seſſion from *Edinburgh* to *Stirling*, 6 *February* 1638. The Adminiſtration of Juſtice ſuffered much Interruption from the laſt of *July* 1639, to the firſt of *June* 1649: Partly by the Plague, which raged in the Year 1645; and moſtly by the Troubles, when the Voice of Law could not be heard for the Noiſe of Arms, according to the old Saying, *Inter arma ſilent leges*. At which Time the Parliament having turn'd out Eight ordinary and Two extraordinary Lords of the Seſſion, for running counter to the Projects then ſet on Foot, they named as many to ſupply their Places.

This illuſtrious Court ſtood from its firſt Erection, without any conſiderable Alteration in its Conſtitution or Privileges, till the Sovereign was forced to let go the Helm of Government, and the *Engliſh* Army under *Cromwel* over-run *Scotland*: Which our conquering Maſters look'd upon with an envious Eye, as that which moſt probably would preſerve the Liberty of the People. Therefore after a Surceaſe of Juſtice for ſome Time, a *Commiſſion for Adminiſtration of Juſtice*, compoſed of a mix'd Company of *Scots* and *Engliſh* Judges, was ſet up in Place of the Seſſion. This was an Accompliſhment with a Witneſs, of what was early foretold concerning the Seſſion by the learn'd Biſhop of *Roſs*, as is above obſerved.

Soon after the Oath commonly called the *Tender*, abjuring the Royal Name of *Stuart*, being impoſed, the moſt eminent Lawyers retired from the Bar, and conſulted only in their Chambers. The new Judges (as all Men ignorant of, or not concerned for, the Laws of their Country are) were filled with new Schemes and Rules for Diſpatch and Adminiſtration of Juſtice. They preſided weekly by Turns; and ſuppreſs'd the Outer-houſe. And finding that they, being Strangers to our Laws and Cuſtoms, could move the Wheels of Juſtice but heavily, they introduc'd the managing of Debates in Writing; that they might have the more Time to deliberate on their Deciſions, and indirectly have the Aſſiſtance of the great Lawyers. Which written Debates were drawn by the non-conforming Lawyers, and preſented by Men of leſs Note at the Bar. But this Way of Pleading in Writ proving tedious, the Court was forced by ſome Act or Connivance, to diſpenſe with the taking of the *Ten* *der* ſo far, as to allow the Lawyers to return to the Bar. When a good Correſpondence betwixt the Bench and the Bar was begun, the Outer-houſe was reſtored, upon an Addreſs for that End made to the Commiſſioners by the Faculty of Advocates, 4 *July*, 1655.

The unhappy civil Wars, and the Want of a ſettled Authority, had given Riſe to many Abuſes in the Forms of Proceeding in the Seſſion, which, when the Courſe of Juſtice was ſet a going in its old Chanel after the Reſtauration, occaſioned many Regulations to be made which were ratified by Parliament (*i*).

Appeals. The fatal Diviſions that happen'd in the Seſſion in the Year 1674 concerning Appeals, was the moſt notable Misfortune that ever attended it. The Occaſion was this. In a Proceſs at the Inſtance of the Earl of *Dumfermling* againſt the Earl of *Callendar* and Lord *Almond*, Parties being appointed to be heard ſummarly in Preſence: At a Calling of the Cauſe on a certain Day, when the Defenders had undertaken to anſwer peremptorily, the Earl of *Callendar*'s Lawyers offer'd a dilatory Defence, which the Lords overruled. Thereupon the Lord *Almond* gave in Two ſigned Writings, containing an Appeal from the Lords of Seſſion to King and Parliament. The Lords ſurpriz'd with this Procedure, till then unheard of in *Scotland*, gave an Account of it to the King by a Letter 7 *February* 1674. Wherein they repreſented, that by the Act 62. Par. 14. *Ja.* II. it is expreſly ſtatuted, That Cauſes pertaining to the Knowledge of the Lords of the Seſſion, ſhould be utterly decided and determined by them, without any Remedy of Appeal to King or Parliament: And by the 39 Act of the 5 Parliament of King *James* V. containing the Inſtitution of the College of Juſtice, it is declared, That the Proceſſes, Sentences and Decreets of the College of Juſtice, ſhall have the ſame Force, Strength and Effect, as Decreets of the Lords of Seſſion formerly had. Nay farther, our Princes had often, with Conſent of Parliament, declared by publick Statutes, that they would maintain the Authority of that Court, as repreſenting the Royal Perſon and Authority: Which alſo by many poſterior Laws is deſcribed as the Supreme Judicature in Civil Cauſes. And there appearing no Veſtige on Record of any ſuch Appeal ſince the Inſtitution of the College of Juſtice or before, they did unanimouſly reject the Appeal, and declared that they would proceed to decide the Cauſe. Upon all which they deſired His Majeſty's Directions. The King returned an Anſwer to the Lords by a Letter of the 17th of that ſame Month, wherein, after expreſſing a great Concern for the Honour and Authority of the Court, and Diſpleaſure againſt Appeals, with a freſh Aſſurance of his Protection of their Perſons and Privileges, he required them to take exact Trial of the Contrivers of the Appeal, in the

---

(*i*) Act 16. Parl. 2. Seſſ. 3. *Ch.* II.

ſtricteſt Manner conſiſtent with Law, that his Majeſty being more fully informed, might give farther Directions. Upon Receipt of of this Letter, the Lords called the Lord *Almond* to hear Trial taken, and alſo the Lawyers that appear'd for him to give their Oaths concerning their adviſing the Appeal. But the Lord *Almond* adhering to his Appeal, and the Lawyers refuſing to depone, and after a farther Day allowed them, inſiſting in their Refuſal; the Lords gave the King Notice thereof by another Letter of the laſt of *February*, adding farther, That the Earl of *Aboyne*, after the Example of the Lord *Almond*, had preſented another Appeal. To this the King made Anſwer by a Letter 19th *May*, in which his Majeſty intimated, That he found it indiſpenſibly neceſſary for the Good of his Service, the Quiet and Security of his Subjects in their Fortunes and Eſtates, that the Authority of the Seſsion ſhould be maintained and their Sentences had in Reſpect; and after giving freſh Aſſurance of his Protection, and Diſſatisfaction with and Abhorrence of theſe Appeals, ſignified his Pleaſure to have Care taken to prevent the like in Time coming: And for that End, ordered Intimation to be made to Advocates, Clerks and others, not to charge the Sentences of the Lords with Unjuſtice; which all Advocates thereafter, at their Admiſsion, ſhould ſwear, as a Part of the Oaths *de fideli* and of Obedience to the Lords.

His Majeſty was graciouſly pleas'd not to proſecute farther the Lawyers who had refuſed to give their Oaths concerning their Acceſſion to the offering of the late Appeal, provided they diſowned theſe and all other Appeals or Proteſtations, tending to charge the Sentences of the Lords with Unjuſtice: But peremptorily commanded the Lords to debar any Lawyers refuſing to comply from the Exerciſe of their Offices. 17 *June* 1674, the Lords called the Advocates in their Preſence, and intimated the King's Letter to them; and in particular, required the Lord *Almond*'s Lawyers to comply with the Contents thereof, allowing them a farther Time to give their Anſwer. Theſe Lawyers perſiſting in their Refuſal, were upon the 24 of the ſame Moneth, debarred from the Exerciſe of their Imployments. This Sentence having fallen upon Two Gentlemen of great Eminence, about Fifty of the Lawyers, (many of whom were Perſons of no ſmall Account) withdrew from the Houſe. Whereupon the Lords, after Intimation to them by a Macer of the Court, requiring them to return and attend their Service, by an Act of the 26th of the Moneth aforeſaid, declared, that if they did not return, they ſhould be debarr'd from the Exerciſe of their Office: And by another Act, 3 *July*, for their perſiſting in Diſobedience, actually deprived them. All which, the Lords ſignified to the King by a Letter the Day after: And at the ſame

Time wrote to the Secretary a full Account of their Proceedings, and the many particular Methods us'd for gaining the Lawyers. To which his Majeſty wrote an Anſwer, dated 14 of the ſame Month, approving the Conduct of the Court, and recommending to them to encourage ſuch Advocates as dutifully continued in the Exerciſe of their Calling. Becauſe deſerting the Houſe in manner aforeſaid, looked like a Deſign to interrupt the Adminiſtration of Juſtice, and put Contempt upon Law and Authority: And his Majeſty being informed, that theſe Deſerters had by Combination kept Meetings, he required the Lords to examine who were the principal Actors, what they had ſaid or writ to reproach the Lords and ſuch Lawyers as continued in their Duty. The Diſſention went on, and in the Books of Sederunt, there is recorded another Letter from his Majeſty, dated 12 *December* 1674, in which he acquaints the Lords of his being informed, that the Lawyers of the Lord *Almond* and Earl *Aboyne*, when required to diſown Appeals, had given in a Paper ſtating another Kind of Appeal, having only the Effect of a Proteſtation for Remeid of Law, without ſiſting Proceſs: For ſupporting whereof, they offered ſeveral Reaſons tranſmitted to the Lords in a Letter ſigned by them. And the King having conſidered the whole Matter, was convinc'd of the pernicious Conſequence of ſuch unreaſonable Oppoſition to the Lords, and fully ſatisfied of the Authority of the Court, by the formerly cited Acts of King *James* the Second and Fifth, and by a Letter from the Eſtates of Parliament to his Majeſty, dated 8th *October* 1663, long before this Diſpute happen'd, wherein the Eſtates acquainted his Majeſty, that they could not review a Decreet of the Lords of Seſſion, wherein Parties had been heard, eſpecially upon Reaſons debated and determined by their Lordſhips, as a Thing that never was done by any Parliament authorized by his Majeſty, or his numerous Progenitors; becauſe ſuch a Review behoved to be upon the Iniquity of the Judges of the ſupreme Judicature of the Kingdom in Matters civil, from whom there lies no Appeal by the Law of the Nation. The Conſtitution whereof being ſo ordered, and ſuch Qualifications of the Judges required, that if their Sentences be not ultimately definitive, a Door might be opened to unſecure the Subjects in their Rights and Properties. This Letter from the King concluded with an Order to the Lords, to publiſh a Proclamation for baniſhing the Advocates who had refuſed to ſubmit, Twelve Miles from *Edinburgh*; with a Certification *in verbo principis*, that ſuch as ſhould not betwixt and the Twenty Eight Day of *January* thereafter make Application to the Lords to be re-entered, ſhould ſtand perpetually debarr'd. This Proclamation was accordingly publiſh'd. But thereafter the outed Advocates, (a few excepted) gave in ſeparate Supplications at different Times to the Lords, offering Satiſfaction for their withdrawing from the Houſe, in the Terms of his Majeſty's Letter and Proclamation, which being tranſmitted to the Secretary of State, that his Majeſty's Pleaſure might be known: The Lords, upon particular Returns from his Majeſty to the particular Applications aforeſaid, re-admitted the Petitioners to the Exerciſe of their Imployments, upon their Compearing in Preſence, and giving Satisfaction for their withdrawing. The Firſt Readmiſsion of any of theſe Advocates, was upon the Fifth Day of *February* 1675, and upon the ſeveral ſubſequent Days of that Month, and in the Summer-Seſsion thereafter, there followed ſeveral other Readmiſsions. By a Letter from the King, dated 24 *June* 1675, the Lords were allowed to repone ſuch Petitioners as gave them Satisfaction, without farther Advice from his Majeſty: Which was accordingly done. By another Letter from the King to the Lords, dated 11 *December* 1675, the Term for Applications of that Nature, was prorogated till 10 *January* 1676. The Lords by an Act of Sederunt 25 *January* 1676, reſtored the outed Advocates who had given Satisfaction to them, to all the Privileges of their Office; and declared, that none were ever ſuffered, nor would they ſuffer any to quarrel their Sentences, or Interlocutors upon Iniquity, even by Suſpenſion, Petition or Reduction before themſelves, but would ſeverely cenſure ſuch as did ſo. Which Act of Sederunt, his Majeſty approved by a Letter to the Lords, 24 *May* 1676, to whom he left the Advocates and other Members of the College of Juſtice to be ordered and ruled in all Things relating to their Imployment; and required them to prevent and puniſh all Combinations among Advocates, refuſing or forbearing to conſult, plead or concur with thoſe who continued in the Houſe after the reſt made a Seceſsion: For which, the Lords by Act of Sederunt, 30 *June*, ſuſpended Two Advocates from the Exerciſe of their Function; and 7 *June* 1677, declared by an other Act of Sederunt, that any Advocate in Time coming, declining upon the Account of perſonal Prejudice or other Pretence, to conſult and concur in the Capacity of an Advocate with any other Advocate, ſhould be removed from his Imployment.

Duke of York.

February 4, 1680, His Royal Highneſs the Duke of *Albany* and *York*, (afterwards King *James* the Seventh) being preſent in the Seſſion, took Occaſion to ſignifie to the Lords, That he was very ſenſible of their Kindneſs, and of the Civilities he had received from them, for which he returned them hearty Thanks; and expreſſed his great Satisfaction with the Order he obſerved in the Judicature, the ready Adminiſtration of Juſtice, and the ſpecial Regard the

Lords had to the King's Concerns, which, he being then called up to attend his Majeſty, was reſolved to repreſent to him.

Summer-Seſſion. *September* 2, 1681, The Summer-Seſſion was ſuppreſs'd and diſcharged, in Place whereof the Month of *March* was added to the Winter-Seſſion (*k*), becauſe it was thought, that Two Seſſions in the Year did too much encourage Litigiouſneſs, to which our Countrymen were naturally addicted; and One Seſſion might end all our Affairs. Beſides, that any Benefit could be expected by the Summer-Seſſion, (which was uſually conſumed in the preparatory Steps or Hurry of Buſineſs) would not compenſate the Charges it brought upon the Nation, and the Prejudice ſuſtained, by withdrawing People from Home in the Seaſon proper for Building, Parking, or other Country Policy. But, 26 *May* 1686, the Nation turning ſenſible of the huge Inconvenience by obliging People to attend Law Buſineſs all the Month of *March*, which is a Part of their Seed-Time, and with-holding from them the Benefit of Juſtice for ſeven Months, (when in other Countries they have Four or Five Terms for adminiſtring Juſtice in the Year) which had a pernicious Influence upon Commerce: Our Law-givers thought fit to reſtore the Summer-Seſſion (*l*), which falls conveniently betwixt the Seed-Time and Harveſt.

Regulations. The Commiſsioners appointed by King *Charles* II. for Regulation of Judicatures in *Scotland*, having agreed upon certain Articles of Regulation relating to the Seſſion, Juſtice-Court and Exchequer, which were ratified by the Sixteenth Act of the Third Seſsion of His Majeſty's Second Parliament; & not being able, thro' the Shortneſs of Time, fully to perfect and accompliſh ſo great and neceſſary a Work: Another Commiſsion was named in the Year 1686, by King *James* VII. with Advice and Conſent of his Parliament, to proſecute and finiſh the ſame. But that Commiſsion having had no Effect, another was appointed by King *William* with Advice and Conſent of Parliament: Whoſe Articles of Regulation concerning the Seſsion authorized 9 *April* 1695, and additional Articles authorized in *June* 1696, are publiſhed.

Finding my ſelf now arrived at the laſt Thing propounded by Way of Preliminary, *viz.* to give the World a Reaſon for the publiſhing this Journal, and to ſhew what it contains; it will not be improper in order to this, that we previouſly look into what hath been done Abroad and at Home of this Nature.

Nothing conduceth more to the Peace and Proſperity of a Nation, than fitting and well compoſed Laws, and quiet Subjection thereto. Yea, theſe give Form and Life to a Commonwealth, are the Anchor that ſtays and aſſures it; the Bulwark, Fence and Security

---

(*k*) *Ch.* II. Par. 3. C. 7. (*l*) *Ja.* VII. Par. 1. Seſſ. 2. C. 5.

curity of Men's Lives and Fortunes. But what doth it ſerve for to have good Laws, unleſs they be applied and duly put to Execution: Without which, Law it ſelf is but a dead Letter? 'Tis the Happineſs and Glory of a Land, that *Judgment run down as Waters, and Righteouſneſs as a mighty Stream* (m): That Judges (tho' they be not *Areopagites* who gave Judgment in the Dark) may look more to the Cauſe before them, than to the Perſons intereſted; and Juſtice may be duly and purely adminiſtred, without having it's Current muddy'd or ſtop'd by Corruption and the Fear of Man, or Reſpect of Perſons; conform to that Golden Rule in the *Magna Charta* of *England* (n), *Nulli negabimus, nulli vendemus, nulli differemus juſtitiam.* To the End therefore that thoſe in whoſe Hands the Ballance of Civil Juſtice is put, may hold and manage it skilfully, ſteddily, equally and uniformly; and People may be ſatisfied to ſee that their Cauſes are not determined by the *Leſbian* Rule of Humour or Partiality: Great Care hath been taken in all Nations to preſerve and publiſh from Time to Time, the moſt notable Sentences and Reſolutions of the higher Judges, with their Rules of Court. To ſerve not only for a Directory in like Caſes to themſelves, according to the Rule *ubi eadem ratio, &c.* and to Lawyers who have Occaſion to plead before them; but alſo as a Pattern to Judges who act in a lower Sphere, under the Control and Correction of the ſuperior Courts, to copy after in their Proceedings, and *lead them in the Paths of Judgment* (o). Seeing it is an old and a true Saying, that *Ignorantia judicis, eſt calamitas innocentis.*

Deciſions.

Foreign Courts.

The Deciſions of the *Imperial Chamber*, the *Rotæ* of *Rome* and *Genoa*, and other ſovereign Courts in *Spain*, *Portugal*, *Italy*, *Germany*, *Holland* and *Flanders*, committed to Writing by learned Pens (whereof many were ſet on Work by the ſupreme Powers in the reſpective Countries) are laſting Monuments of the great Abilities of Judges and Lawyers, and ſhew ſufficiently that *nondum Aſtræa Terras reliquit.*

M. *Louet*, M. *le Prêtre*, the Authors of *le Journal du Palais* and *le Journal des Audiences*, and other *Arretiſtes*, have collected the Judgments and Sentences of the Parliaments and ſovereign Judicatures in *France*: Which M. *de la Ville* compiled in the Year 1692 into a *Dictionaire des Arreſts*, lately continued and mightily improv'd by M. *Pierre Jacques Brillon*, whoſe *Dictionaire des Arreſts* doth agreeably exceed what the Title promiſeth.

Engliſh Reports.

'Tis true, that for the Matter of 100 Years after the Courts of Juſtice of *England* were ſettled in *Weſtminſter*-Hall, we find no regular Collection of printed Caſes judicially argued and adjudged there, which the *Engliſh* Term REPORTS. But King *Edward* III. (in whoſe Reign the Law was greatly improv'd) took Care to have a Relation of ſuch Caſes tranſmitted to Poſterity, by appointing Salaries to Four able induſtrious Men, probably choſen out of the reſpective Inns of Court, for an Encourgement to ſet them furth yearly: Whoſe Labours publiſh'd in ſeveral Volumes were therefore called, The *YEAR BOOKS* and *TERMS*, or Annals of the Law. This Method continued from the firſt Year of his Reign till 12th of *Henry* 8. Since which Time, Reports have multiplied and increas'd to that Degree, that One obſerves it would require a Waggon to carry them. And tho' many of theſe written with great Learning and Judgment, publiſh'd by Sages of the Law, be of great Authority and Uſe; yet there are among them flying ſpurious Reports under the borrowed Names of grave and learn'd Men deceas'd, compar'd by Mr. *Bulſtrode* (p) to the Souldiers of *Cadmus*, daily riſing and juſtling each other, which do rather cheriſh than extinguiſh Law-Suits.

(m) *Amos* 5. 24. (n) 9 H. 3. C. 29. (o) *Prov.* 8. 20

Deciſions of the Seſſion.

But to come home. K. *James* V. (who inſtituted the College of Juſtice) ordered one of the Lords to keep a Journal of the Deciſions: Which Province many have performed different Ways. Some have made promiſcuous Collections of Deciſions, Statutes and Cuſtoms: As Sir *James Balfour* of *Pittendriech*, Sir *William Oliphant* of *Newtoun*, Sir *Robert Spotiſwood* of *Pentland*, and Sir *Thomas Hope* of *Kerſe*. Others have obſerved only the Deciſions of their own Time. Of whom ſome have digeſted theſe under alphabetical Heads of Law: As Sir *Thomas Nicolſon* of *Carnock*, who commenc'd Advocate 9 *July* 1594; Sir *George Auchinleck* of *Balmanno*, who was admitted a Lord of Seſſion 14 *February* 1626; and Sir *John Lockhart* of *Caſtlehill*, admitted a Lord of Seſſion 22 *November* 1665, Brother to that Great Lawyer Sir *George Lockhart* of *Carnwath* the Preſident, whoſe Father, Sir *James Lockhart* of *Lee*, ſucceeded in the Seſion to the Lord *Dury* 2 *July* 1646. Others have committed Deciſions to Writing, according to the Order of Time they were pronounced: As the Author of that Collection called *Sinclair's Practicks*, Sir *Richard Maitland* of *Lethingtoun*, *Alexander Colvill* Commendator of *Culroſs*, *Thomas* Earl of *Haddingtoun*, Sir *Alexander Gibſon* of *Durie*, Sir *John Gilmour* of *Craigmiller*, *James* Viſcount of *Stair*, Sir *John Baird* of *Newbyth*, Sir *John Niſbet* of *Dirleton*, Sir *Peter Wedderburn* of *Goſfoord*, Sir *David Falconer* of *Newtoun*, Sir *Rodger Hog* of *Harcurſe*, Sir *Patrick Lyon* of *Carſe*, and Sir *John Lauder* of *Fountainhall*.

Lord Pittendriech.

Mr. *James Balfour* Parſon of *Fliſk*, afterwards Sir *James Balfour* of *Pittendriech*, was 15 *November* 1563, admitted an Ordinary Lord, in place of Mr. *James Scot* Provoſt of *Carſtorphine*. *March*

22

(p) Epiſt. Ded. to his Rep. 2.

22. 1565, Queen *Mary* took the Office of Clerk-Regiſter from Mr. *James M'gill* of Nether-*Rankielor*, becauſe friendly to the Reformers; and beſtowed it upon Sir *James Balfour*, who was a mighty Oppoſer of the Reformation, and 6 *December* 1567 was made Preſident of the Seſſion.

Sir Will. Oliphant.

Sir *William Oliphant* of *Newtoun*, who commenc'd Advocate 21 *October* 1577, was admitted an ordinary Lord 16 *July* 1611, in Place of Sir *David Lindſay* of *Edzel* then deceas'd, and 8 *July* 1612 was made King's Advocate.

Sir Robert Spotiſwood.

Sir *Robert Spotiſwood*, ſecond Son to Dr. *John Spotiſwood* of *Dairſey* Arch-biſhop of *St. Andrew*'s and Chancellor of *Scotland*, was born in the Year 1596. He had his Firſt Education at the College of *Glaſgow*, where he received the Degree of Maſter of Arts. Having ſtudied thereafter in *Exeter* College in the Univerſity of *Oxford*, he travelled from thence into *France*, *Italy*, and *Germany*, for his Improvement in the Knowledge of the Laws, Theology, the Oriental Languages and Church Hiſtory; and brought Home with him after Nine Years Travel, many ancient Eccleſiaſtical Manuſcripts and Records, that had been carried Abroad at the Reformation by the *Scottiſh* Prieſts and Monks, particularly the famous *Black-book of* Paiſly, which he recovered at *Rome*. He was made by King *James* the VI. an extraordinary Lord of Seſſion with the Stile of Lord *Newabbey*, and by King *Charles* I. an ordinary Lord 14. *February* 1626, upon the Earl of *Melros*'s Reſignation; and 1 *November* 1633 preferred to the Preſidency of the Seſſion in the Place of Sir *James Skeen* of *Currihill*. Having agreed with the King about his quitting the Lands of *Newabbey*, to be a Fund for the new erected Biſhoprick of *Edinburgh*, he aſſumed the Title of Lord *Dunipace*, which he afterward chang'd for that of *Pentland*, upon his purchaſing the Barony of that Name. He continued Preſident of the Seſſion till the Beginning of the Troubles in the Year 1637. He retired to *London* to ſhun the Danger he might incur from the then governing Party, who proſecuted him for not complying with the Humour of the Times, as a Perſon they thought to be an evil Counſellor about the King. Notwithſtanding whereof, the King called him to ſucceed the Earl of *Lanerk*, in the Office of Secretary of State in the Year 1645. About which Time he docketted a Commiſſion to the Marquis of *Montroſe*, to be Generaliſſimo of all his Majeſty's Forces in *Scotland*, a Proclamation for calling a Parliament, and a Commiſſion to the Marquis to repreſent his Majeſty therein. With theſe & other publick Papers being diſpatch'd into *Scotland*, he was taken Priſoner in the Battle at *Philiphaugh*, where *Montroſe* was defeated by General *David Leſly*. He was carried to *Glaſgow* and thence to *St. Andrew*'s, where he was tried before the Committee of Eſtates of Parliament, and upon their Report 16 *January* 1646, found by the Parliament to have incurred the Pain and Puniſhment of High Treaſon againſt the Kingdom and Eſtates thereof: For which he was beheaded. He lies buried in the Church of *St. Andrews*. Sir *John Nisbet* of *Dirleton*, Advocate to King *Charles* the II. made an excellent Elegy on his Death. Sir *Robert Spotiſwood* was a Gentleman of Great Knowledge in the Laws, Skill in the Tongues, and well vers'd in Politicks. His Pratticks now publiſhed by *John Spotiſwood* of That-Ilk Advocate, the Author's Grandchild, ſeem to have been but Notes in order to ſome greater Work.

Lord Kerſe.

Sir *Thomas Hope* of *Kerſe* admitted a Lord of Seſſion 19 *July* 1642, and made Juſtice-General 27 of that Month, was ſecond Son to Sir *Thomas Hope* of *Craighall*, Advocate to K. *Charles* I. before whoſe Time the King's Advocates uſed to plead uncovered: But he having two of his own Sons then upon the Bench, *viz.* Sir *John* his Eldeſt and this Sir *Thomas*; the Lords indulged him the Privilege of pleading with his Hat on; which his Succeſſors in Office have ever ſince enjoy'd.

Sinclair's *Praticks.*

The oldeſt Collection of Deciſions of the Seſſion that I have had Occaſion to ſee, carry the Title of *Sinclair*'s Praticks, from *June* 1540 till the 15th *February* 1548: But who the Author was, is not a Thing agreed on all Hands. Some will have *Henry Sinclair* Parſon of *Glaſgow*, who was admitted one of the Spiritual Lords of Seſſion 13 *November* 1537, and afterward Biſhop of *Roſs*, to be the Author: Others attribute that Collection to Mr. *John Sinclair* his Brother a bigot Papiſt, who was Dean of *Reſtalrig*, and afterward Biſhop of *Brechin*, mentioned in the Books of Sederunt as a Lord of the Seſsion 15 *November* 1540, and as Preſident 3 *December* 1565. Theſe Two and Sir *Oliver Sinclair* of *Whitekirk* Favourite to King *James* V. were the Baron of *Roſline*'s younger Brethren. It was this Biſhop of *Roſs*, who induced *John Ferrerius Pedemontanus* to undertake the Continuation of *Hector Boyeſs*'s Hiſtory of *Scotland*, by promiſing to aſsiſt him with Advice and Materials: Of the Benefit whereof he was deprived by the Biſhop's Death at *Paris*, where he was cut of the Stone in the 58 Year of his Age, in the Preſence of Mr. *John* his Brother, who carried his his Books and Furniture back to *Scotland*, and lent a helping Hand to *Ferrerius* in his Work.

Lord Lethingtoun.

Sir *Richard Maitland* of *Lethingtoun* was admitted an ordinary Lord of Seſſion 12 *November* 1561, in Place of Sir *William Hamilton* of *Sanquhar*. He was Keeper of the Privy-Seal in the Year 1563. The Lords, 13 *December* 1583, indulged him, by Reaſon of his great Age, to come or not to come to the Seſſion when he pleaſed, without wanting any thing that belonged to him as one of their Number. But Firſt of *July* 1584 he reſigned his Poſt in the Seſſion in Favours of Sir *Lewis Ballenden* of *Auchnoul*, Juſtice-Clerk, reſerving the Fees and Profits of his Place during his Lifetime: Which is the firſt Reſignation *in favorem* that I have had Occaſion to obſerve. Sir *Richard* collected the Lords Deciſions from 15 *December* 1550, till 30 *July* 1565, and died the Firſt of *April* 1586. Sir *William Maitland* his eldeſt Son was Secretary of State to Queen *Mary*, a Man of deep Wit and great Experience. Sir *John Maitland* of *Thirleſtain* the ſecond Son, was choſen a Lord of Seſſion, 26 *April* 1581, in Place of Mr. *Archbald Douglaſs* Parſon of *Glaſgow*, who had fled into *England* upon Notice that he was charged with and about to be apprehended for the Murder of the Lord *Darnly*. This Sir *John Maitland* (afterward Lord *Thirleſtain*) was made Vicechancellor, 1 *June* 1586, and advanced in *July* 1587 to the Dignity of Lord Chancellor: Whoſe Succeſſor is the preſent Earl of *Lauderdale*.

Lord Culroſs. *Alexander Colvil* Commendator of *Culroſs* is in the Sederunt Books mentioned as a Lord of Seſſion, 26 *October* 1575; upon whoſe Dimiſſion, Mr. *John Colvil* Chanter of *Glaſgow*, 2 *June* 1587 came in his Place. But 26 of that ſame Month, the Commendator was, upon a Letter from the King, reſtored to his Office in the Seſſion, which he injoyed till his Death. He wrote the Deciſions from 24 *March* 1570 till *April* 1584. This Lord *Culroſs*'s Lady was famous for her Dream. Dr. *Alexander Colvil* his eldeſt Son, was firſt Profeſſor of Divinity in the Proteſtant Univerſity of *Sedan* in *France*, and thereafter in the Univerſity of *St. Andrew*'s, where he died a little after the Reſtauration of King *Charles* II. His ſecond Son, Mr. *Samuel Colvil*, ſufficiently known by his exalted Genius for Poeſy, had a Stock of Learning, and extraordinary Parts that might have been improved to better Purpoſes.

Earl Haddingtoun. Mr. *Thomas Hamilton* (afterward Earl of *Haddingtoun*, commonly called, *Tam of the Cowgate*) eldeſt Son to Mr. *Thomas Hamilton* of *Prieſtfield*, deſcended of the ancient *Hamiltons* of *Innerweick*, having ſtudied the Laws in *France*, was 1 *November* 1587 admitted Advocate. And ſoon diſtinguiſhing himſelf by his great Parts, was 2 *November* 1592 advanced to the Place of an ordinary Lord of Seſſion, with the Title of Lord *Drumcairn*, in the Room of Mr. *David Chalmers* of *Ormond*, Chancellor of *Roſs*; & 9 *January* 1695, appointed one of the Eight Commiſſioners of the Treaſury & Exchequer, commonly called the *Octavians*. *February*, 6 1595, he became King's Advocate during Life, in Conjunction with Mr. *David M^cgill* of *Cranſtoun-Riddel*, who taking it much to Heart, a few

Days after died of Grief. Upon *Cranſtoun-Riddel's* Death, he procured a Gift to be ſole Advocate to his Majeſty. And 11 *July* 1604, the Parliament of *Scotland* named him one of the Commiſſioners to treat with thoſe of *England*, about an Union of the Two Kingdoms then projected. 29 *May* 1607, he got his Father to be a Lord of the Seſsion in his old Age, ſtiled Lord *Prieſtfield.* 16 *May* 1612, he was received Clerk-Regiſter, vacant by the Dimiſsion of Sir *James Skeen* of *Curriehill*, under the Deſignation of Sir *Thomas Hamilton* of *Byers*: And in the *October* following, ſucceeded to Sir *Alexander Hay* in the Station of Secretary of State. 15 *June* 1616, he was made Preſident of the Seſsion, with the Title of Lord *Binning*, in the Place of Lord *Preſtoun*, who died the Day before. In an Action of Improbation of a Writ, which the Lords were convinc'd was forged, but puzzled for Want of clear Proof, the Lord *Binning* taking up the Writ in his Hand, and holding it betwixt him and the Light, diſcovered the Forgery by the Stamp of the Paper; the firſt Paper of ſuch a Stamp being poſterior to the Date of the Writ quarrelled. At another Time, a *Highland* Witneſs in a Cauſe, who had been hard put to it by his Lordſhip's Interrogatories, meeting another *Highlander*, who came to depone in Favours of the ſame Party, adviſed him to beware of the Man with the Partridge-Eye. This great Man in the Rolls of Parliament 1621, is deſigned Earl of *Melroſs*, which Title he afterwards chang'd for that of Earl of *Haddingtoun*. He continued Secretary and Preſident till the Year 1626, when he got from King *Charles* the I. the Character of Lord Privy-Seal. He hath obſerved the Deciſions of the Lords of Seſsion from the Year 1592 till the End of *July* 1624. He firſt married a Daughter of *Borthwick* of *Newbyers*, by whom he had the Counteſſes of *Caſſils* and *Airly*, The Lady *Carnegy* afterwards Counteſs of *Hartfield*, and the Lady *Lindſay* afterward Lady *Boid*. His Children by his ſecond Lady Daughter to Sir *Foulis* of *Collingtoun*, were Lord *Binning* and *Byres* (aftewards Earl of *Haddingtoun*) *Alexander Hamilton* General of the Artillery, Sir *James Hamilton* of *Prieſtfield* who fought and diſarmed *Bouteville*, Sir *John Hamilton* of *Riedhouſe*, and Sir *Thomas Hamilton* of *Trabrown*. By his Third Lady, Siſter to *Robert Carr* Earl of *Somerſet*, firſt married to Sir *Patrick Hume* of *Polwarth*, he had *George Hamilton* of *Coldſtream*, who with his eldeſt Brother was unfortunately blown up at *Dunglaſs*.

Alexander Gibſon, (afterwards Sir *Alexander Gibſon*, Lord *Durie*) only Son to *George Gibſon*, One of the Two Clerks of Seſſion at the Inſtitution of the College of Juſtice, and *Elizabeth Airth*, Daughter *Lord Dury.*

to *Airth* of that Ilk (whoſe Son's Great Grandchild, *Alexander Gibſon* of *Durie*, enjoys the Office at this Day,) ſtudied Law at Home. *December* 14. 1594 he was aſſumed a Third Clerk of the Seſſion, and 10 *July* 1621 advanced to the Station of an ordinary Lord thereof, vacant by the Death of *Sir Gideon Murray* of *Elibank*. He married *Margaret Craig* Daughter to the Learn'd Sir *Thomas Craig* of *Riccartoun*, by whom he had 3 Sons and 2 Daughters. *Alexander Gibſon* his eldeſt Son was preferred to the Office of Clerk-Regiſter 1 *November* 1641; and to that of an ordinary Lord of Seſſion 2 *July* 1646: Both which Characters he bore till 1 *June* 1649. Sir *John Gibſon* of *Pentland*, One of the Clerks of Seſſion, was the Lord *Durie*'s Second Son, and Mr. *George Gibſon* of *Balhouſſie* Clerk of the Bills, his Third Son. *Elizabeth Gibſon* his eldeſt Daughter, was beſtowed in Marriage upon *Murray* of *Polmais*, and *Margaret* the Second, given to *Fotheringham* of *Powrie*. Sir *Alexander Gibſon* Lord *Durie*, died at his own Houſe of *Durie*, in *July* 1646. He was a Man of a penetrating Wit and clear Judgment, poliſhed and improved by much Study and Exerciſe: For the Prefacer to his Father in Law's Book *de Feudis*, ſays, That he having for many Years often Occaſion to wait upon the Lord *Durie*, he found him always diligently turning over the Books and Doctors of the Civil Law, and probably running the Parallel betwixt that and the Laws of *Scotland*, which he perfectly underſtood. We may frame a rational Conjecture of his great Learning and Parts, not only from his Collection of the Deciſions of the Seſſion from *July* 1621 till *July* 1642: But alſo from the following Circumſtances. 1. In a Tract of more as Twenty Years, he was frequently choſen Vice-Preſident, and no other Lord in that Time. 2. 'Tis commonly reported, That ſome Party in a conſiderable Action before the Seſſion, finding that the Lord *Durie* could not be perſuaded to think his Plea good, fell upon a Stratagem to prevent the Influence and Weight that his Lordſhip might have to his Prejudice: By cauſing ſome ſtrong masked Men kidnap him in the Links of *Leith* at his Diverſion on a *Saturday* Afternoon, and tranſport him to ſome blind and obſcure Room in the Country, where he was detained Captive without the Benefit of Day-light a Matter of Three Months (tho' otherways civilly and well entertained); during which Time his Lady and Children went in Mourning for him as dead. But after the Cauſe aforeſaid was decided, the Lord *Durie* was carried back by Incognito's, and dropt in the ſame Place where he had been taken up.

Lord Craigmiller.

Sir *John Gilmoir* of *Craigmiller* Advocate, was eldeſt Son to *John Gilmoir* Writer to the Signet, a very ſufficient Man in his Imployment, of whom *George Dallas* in his Book of Stiles (*q*) obſerves, That Letters of Sequeſtration ſubſcribed by him were ſuſtained before the Lords, to exculpate and aſſoilzie *Alexander Leſly* another Writer to the Signet, from a Complaint offered againſt him for writing and putting ſuch Letters in Execution, which were alledged to have gone in Deſuetude. Sir *John Gilmoir*, after he had ſerved long with great Honour at the Bar, was named by King *Charles* II. Conſtant Preſident 13 *February* 166$\frac{0}{1}$: Which great Truſt he faithfully and diligently diſcharged till 22 *December* 1670, when his Infirmity and Weakneſs of Body obliged him freely to reſign. Sir *George Mackenzie* gave him this Character when an Advocate. *Sine ullo juris civilis auxilio doctiſſimus, raro miraculo, dici poterat; ingenioque ſuo praxin Fori* Scoticani *juri etiam Romano æquabat. Illum jura potius ponere, quam de jure reſpondere dixiſſes; eique appropinquabant clientes tanquam judici, potius quam advocato. Quaſi alter etiam* Hercules, *nodoſa & nulla arte perpolita clava adverſarios proſtravit; ſine Rhetorica eloquens, ſine literis doctus. Oppoſuit ei Providentia* Nisbetum, *ut juſtitiæ ſcalæ in æquilibrio eſſent. Quoties conflixerunt, penes* Gilmorium *gloria, penes* Nisbetum *palma fuit: quoniam in hoc plus artis & cultus, in illo plus naturæ & virium.* But the Weight of the Charge of Preſident in the Seſſion, did in a few Years ſink Sir *John Gilmoir*, tho' a Man of great Strength of Body and Spirit when he undertook it. He hath obſerved the Deciſions from *July* 1661 till *July* 1666: Which were publiſh'd in the Year 1701 by *John Spotiſwood* of that Ilk, Advocate.

Viſcount Stair.

William Dalrymple One of the Viſcount of *Stairs*'s Predeceſſors in the Reign of King *James* 2. married a female Heir of *Montgomrie* of *Stair*, which lies in the Shire of *Air*, about 4 or 5 Miles from the Barony of *Dalrymple*, that hath given Name to the *Dalrymples* of *Dalrymple*, of whom the *Dalrymples* of *Stair*, and ſeveral other Families bearing that Name now extinct are deſcended. *James Dalrymple* (afterward Viſcount of *Stair*) was born in *May* 1619 at *Dunmorchie*, a Poſſeſſion belonging to *James Dalrymple* of *Stair* his Father in the Bailliery of *Carrick*. *Dalrymple* of *Stair* was reckoned among the earlieſt of the Lollards of *Kyle* (*r*). *Janet Kennedy*, Mr. *Dalrymple*'s Mother was the Daughter of *Fergus Kennedy* of *Knockdaw*, and *Helen Cathcart* Daughter of *Cathcart* of *Carleton*. Both his Parents were of very good Families, and their Anceſtors remarkably zealous for the Reformation. His Relations on both Sides are Subſcribers to the Firſt Addreſſes & Bonds made for it (*ſ*). Mr. *Dalrymple* being left

---

(*q*) *Pag.* 480. (*r*) *See* Knox's *Hiſtory of the Reformation of the Church of* Scotland. *Where we are told of* Iſobel Chalmers *Lady* Stair, *one of the moſt Zealous of thoſe People perſecuted by* Blackader *Archbiſhop of* Glaſgow *in the Year* 1494: *But the Hiſtorian hath miſtaken the Lady's Name; for by Writings in the Earl of* Stair's *Hand, it appears ſhe was called* Marion Chalmers *Daughter to Sir* John Chalmers *of* Gadgirth, *whoſe good Family was very ſteddy in the Matters of Religion.*

left fatherleſs when he was not full Five Years old, his Mother a Woman of an excellent Spirit, took Care to have him well educated. He was taught his Grammer at *Mauchline* a neighbouring Village, and his *Greek* and Philoſophy at the Univerſity of *Glaſgow*, where he took the Degree of Maſter of Arts. He came to *Edinburgh* in the Year 1638, when capable to make Obſervation on the Affairs of the World: And there never was in *Scotland* a more important Scene, than that which he had occaſion firſt to open his Eyes on. The Firſt Imployment Mr. *Dalrymple* betook himſelf to, was the War; and he ſoon had a Company of Foot in the Regiment commanded by *William* E. of *Glencairn*, afterwards Chancellor. Upon the Solicitation of ſome of the Profeſſors in the Univerſity of *Glaſgow* of his old Acquaintance, *a Martis ad Muſarum caſtra traductus fuit* (to uſe his own Phraſe) he ſtood a Candidate in Buff and Scarlet, at a comparative Trial for a Chair of Philoſophy then vacant there, to which he was preferred with great Applauſe, tho' he kept his company a conſiderable Time after. During his Stay at *Glaſgow* he ſtudied hard the *Greek* and *Latin* Languages, with the Hiſtory and Antiquities of *Greece* and *Rome*, in order to the Study of the Civil Law, which he afterwards ply'd with good Succeſs. 21 *September* 1643 he married *Margaret Roſs*, eldeſt Daughter to *James Roſs* of *Balneel* in the Shire of *Wigtoun*, by whom he had an Eſtate of Five Hundred Pound Sterling of yearly Rent. She was his only Wife, the Mother of his Children: And they lived together in great Happineſs more as 49 Years. Many Perſons of Diſtinction for Birth and Intereſt, and ſome who proved very eminent for Learning heard his Prelections of Philoſophy, who eſteemed and loved him, and proved uſeful to him in his firſt Appearance at the Bar, and in the Courſe of his Life: Beſides, the Univerſity had Occaſion to imploy him to ſolicite Grants for the Increaſe of their Revenues and other Affairs, which led him to ſee the Form of proceeding in the Courts of Juſtice, and brought him to be acquainted with the Great Men then at the Head of Publick Buſineſs, and the Eminent Lawyers both on the Bench and at the Bar. With theſe uſeful Preparations and Advantages Mr. *Dalrymple* entered Advocate 7 *February* 1648, and became ſoon eminent. For the Eſtates of *Scotland* having, upon Notice of the Murder of King *Charles* the I, forthwith proclaimed *Charles* II. his Son King of *Great-Britain* &c. 5 *February* 164$\frac{8}{9}$, and ſent Commiſſioners to wait on his Majeſty in *Holland*, to treat with him in

---

(*ſ*) Knox *hath given us the Tenor of a Bond ſigned by the moſt conſiderable of the Nobility and Gentry of the Shir of* Air, *and the adjacent Country, for maintaining the Preachers of the Evangel, and the Proteſtants all over th Kingdom; of which* Stair *is one of the Subſcribers.* James Dalrymple *of* Stair *is alſo Subſcriber of a Bond or Aſſociation, enter'd into in the Year* 1567 (*when Queen* Mary *reſigned her Royal Dignity to Prince* James *her Son*) *by the moſt eminent of the Nobility and Gentry of* Scotland, *to ſet the Crown on King* James's *Head, and to maintain his Authority. The Original whereof is now in the Univerſity of* Glaſgow. *Which Aſſociation was univerſally judged ſo juſt and neceſſary for the King's Safety, and the Good of the Nation, that many Popiſh Lords and others, who never turned Proteſtant, ſigned it.*

in order to his Return, Mr. *Dalrymple* went Secretary to theſe Commiſſioners. By an Act of the Eſtates in *March* that Year, he was one of thoſe appointed to reviſe the Old Books of Law, the Acts of Parliament, and Practice of the ſeveral Judicatures. In that Expedition to *Holland* he had the Opportunity to be known to the King, and to the Great Men about him, particularly to the Earl (afterward Duke) of *Lauderdale*; and to give great Proofs of his Ability, Sincerity and Moderation: For which Reaſon that King did ever after eſteem him, and was pleaſed to expreſs himſelf very obligingly about him in the Year 1681, when his Miniſters perſwaded him to lay the Lord *Stair* aſide from his Office of Preſident of the Seſſion. When in *Holland* in the Years 1649 and 1650, he viſited the Univerſities of learned Men there, particularly the great *Salmaſius*. Having returned before the King to *Scotland*, he waited upon his Majeſty at his landing in the North, and was well received. When the *Tender* came to be impoſed, he withdrew from theBar, (as many other eminent Lawyers then did) and return'd when the taking of that Oath was either diſpens'd with, or the not taking of it conniv'd at. After which Time in the Year 1656 we find him One of Four deputed by the Faculty of Advocates to declare to the Commiſſioners for Adminiſtration of Juſtice, that their Opinion was, for reſtoring the ancient Form of the Outer-Houſe, which theſe reforming Judges had ſuppreſs'd. 26 *June* 1657, the Day that Sir *James Lermonth* of *Balcomy*, one of the Commiſſioners for Adminiſtration of Juſtice died, a Commiſſion ſigned by General *Monk* in the Name of the Protector's Council in *Scotland* was iſſued, appointing Mr. *Dalrymple* to ſucceed to *Balcomy*'s Chair. Which was not ſought after by him,nor accepted of willingly: For the continuing his Practice at the Bar would have more improved his Fortune, and he had no Mind to bear any Charge under that Adminiſtration. But there being an univerſal Deſire of the People in *Scotland*, that the Poſt ſhould be filled by a Perſon eminent for Integrity, and Knowledge of their Laws; and many not Favourers of the Uſurpation, as well as Miniſters, having preſs'd Mr. *Dalrymple* to accept; alledging a Difference between the ſerving under Uſurpers in their Council of State, and the being imployed as a Judge for diſpenſing of Juſtice to his Fellow Subjects: He Complied at length,and was admitted 1 *July* 1657, whoſe Act of Admiſſion bears only that he took the Oath *de fideli*. His Election was confirmed by a Gift directly from the Protector 25 *July* thereafter. He being imployed by the Gentlemen of the Counties where his Eſtate lay, to ſollicite from the Council or *Engliſh* Army Redreſs of Grievances: The Opportunity of doing freely theſe Offices of Friendſhip increas'd creas'd his Intereſt in the Country, and brought him into the Acquaintance and Eſteem of ſeverals of the *Engliſh* who were conſiderable after the Reſtauration, particularly General *Monk* (ſince Duke of *Albemarle*) who repoſed much Confidence in him. The Day before the General went into *England*, to ſettle the Diſtractions which theſe Sectaries had bred there, he called Judge *Dalrymple* to a private Conference, deſiring his Opinion freely what was beſt to be done for ſettling the Three Nations: To which he readily anſwered, that the wiſeſt and faireſt Way was, to procure a Meeting of a full and free Parliament; and recommended earneſtly to the General, to interpoſe at *London* effectually for ſetting the Courſe of Juſtice a going, which then was ſtopp'd by Reaſon of the Diſorder and Unſettledneſs of the Times. Which Counſel the General followed, as appears from his Letter dated at *Dunſtable* 27 *January* 1659, directed *For the Honourable Judge* Dalrymple: The Original whereof with the Seal intire I ſaw in the Hands of Sir *James Dalrymple* of *Borthwick* Baronet. Judge *Dalrymple* came with the Earl of *Caſſils* (as other Subjects of the Three Kingdoms did from all Places) to pay his Duty to the King after the Reſtauration, who upon his firſt Appearance conferr'd the Honour of Knighthood upon him. His Majeſty, as a farther Teſtimony of the Truſt he repoſed in Sir *James Dalrymple*, appointed him to be one of the Lords of Seſſion, in that firſt Nomination dated at *Whitehall*, 13 *February* 166$\frac{0}{1}$. the Lords, 1 *November* that Year having applied to the Earl of *Middleton* the King's Commiſſioner then at *Edinburgh*, to name a Vice-Preſident in the Abſence of Sir *John Gilmoir* the Preſident, who was called to *London* by the King, to adviſe the Marriage Articles betwixt *James* Duke of *Monmouth* and *Anne* Dutcheſs of *Buccleugh*: His Grace the Lord Commiſſioner made Choice of the Lord *Stair* to be Vice-Preſident, whom the Lords admitted upon taking the Oath *de fideli*; and ever after chus'd him Vice-Preſident, as often as Sir *John Gilmoir*'s Health, or other Occaſions hinder'd him to be preſent, except once that the Lord *Halkerton* was choſen when the Lord *Stair* was at *London*, as One of the Commiſſioners for the Treaty of Union in the Winter-Seſſion 1670. The Declaration contained in the Fifth Act of the Parliament 1662, and 3d Act of the Parliament 1663, whereby thoſe bound to take the Oath of Allegiance were likewiſe tied to affirm and declare againſt defenſive Arms, and the Conduct of the late Troubles, particularly againſt the National Covenant as explain'd in the the Year 1638, and the Solemn-League as contrary to the Fundamental Laws and Liberties of the Kingdom, cauſed no ſmall Uneaſineſs to the Lord *Stair*. Who being abſent in the Country at the Burying of his Mother when the

Reſt of the Lords ſubſcribed this Declaration, and acquainted by them that the King in his Letter to the Privy Council, had ordered the Places of ſuch of the Lords as did not come in and ſign betwixt and a preciſe Day to be declared void; and that no written Explanation or Declaration ſhould be admitted, which would look like the Stating of a Party: He returned Anſwer, excuſing his not Compliance, for that he had ſent his Dimiſſion to the King before the Date of the Letter; whereupon the Lords 19 *January* 1664, declared his Place vacant. The Lord *Stair* being thus at Liberty, took a trip to *France* with *John*, after Earl of *Stair* his eldeſt Son, who, then about ſixteen Years of Age, began to travel for his Improvement: But my Lord in his return by way of *London*, having the Honour to wait upon the King; His Majeſty was pleas'd to tell him that he would not accept of his Dimiſſion, and allowed him to clear or explain his Mind in what Senſe he could ſign the Declaration. His Majeſty, by a Letter to the Lords dated 21 *April* 1664, ſignified, That being well ſatisfied with Sir *James Dalrymple* of *Stair* one of their Number, his clearing himſelf in the Matter of the Declaration *(t)*, and of his Affection to his Majeſty's Service, and great Abilities to ſerve in that Station: He did not think fit to accept of his Dimiſſion, whereof no Uſe had been made. Therefore it was his Majeſty's Pleaſure, that the Lord *Stair*, ſigning the Declaration, continue in his Place, as if the Dimiſſion had never been made. Upon Receipt of which Letter, and Sir *James Dalrymple*'s ſigning the Declaration, the Lords reſcinded their former Act declaring his Place in the Seſſion void. *June* 2, 1664, the King, as a farther Mark of his Favour, was pleas'd to create him a Baronet. This great Man did always decline to be concerned either as a Judge or Lawyer in Criminal Trials He had been much preſs'd to be one of the Judges of the Criminal Court before the Year 1660 with a conſiderable Addition of Salary; and after the Reſtauration was again deſired to be King's Advocate, or one of the Lords of Juſticiary: But he excus'd himſelf, alledging for his Reaſon the Danger of acquitting the Guilty, or wounding the Innocent in ſuch Offices; and no doubt the Gentleneſs of his Nature, as well as the Hazard he foreſaw in deciding concerning State-Crimes, had Influence on that Reſolution. In the many Regulations of the Seſsion that happened after the Reſtauration, the Lord *Stair* had a principal Hand, which were eſtabliſhed by Acts of Sederunt till the Year 1669: And he was one of the extraordinary Commiſsion paſs'd under the great Seal for regulating Judicatures, whoſe excellent Rules and Concluſions were confirmed by

---

(t) Viz. *He was content to declare againſt whatever was oppoſite to his Majeſty's juſt Right and Prerogative, and no more: Which Terms his Majeſty granted to him writing.*

by Acts of Parliament in the Years 1669 and 1672. The Diſtinction then projected betwixt Innerhouſe and Outerhouſe-Lawyers, and the Oaths appointed to be ſworn by the Advocates not to take greater Fees than were tax'd by the Regulation, which gave great Offence to the Bar, were carried on againſt the Lord *Stair*'s Opinion, who oppos'd theſe Things, foreſeeing the Struggle they would meet with, and had Thanks from the Faculty of Advocates for his Tenderneſs to them on that Occaſion. Yet the Envy which his Merit and good Fortune had already drawn upon him, found Means to blame him as the Author of what he ſo withſtood: And the Sourneſs remain'd till the Diviſion which happen'd in the Seſſion *anno* 1674, gave Vent to it. Mean time, it cannot be denied, that, tho' ſomethings entered into theſe Regulations which my Lord *Stair* would have avoided; yet in the Main they were excellent: And every Body did his Lordſhip the Juſtice to aſcribe the chief Praiſe of 'em to him. He began the Calling of Cauſes by the Order of Roll or Table in his Courſe as Ordinary, before the Act was made: Whoſe Example in firmly adhering to that Rule, brought to Perfection a Thing which, (tho' deſigned at the Inſtitution of the College of Juſtice, and ordered by many Acts with the King's ſpecial Approbation) took no Effect till then. In the Year 1670, the Parliaments in both Kingdoms having made Acts impowering Commiſſioners to treat of a more ſolid Union, the Lord *Stair* was named One of the Commiſsioners for *Scotland*; tho' the Treaty that followed broke off without coming to any Effect. *January* 13 1671 he was admitted conſtant Preſident in Place of Sir *John Gilmoir* of *Craigmiller*: And his Place of an Ordinary Lord was ſupplied 27 *July* thereafter by Sir *Thomas Wallace* of *Craigie* his Kinſman, who had been his Hearer in Conſultations (as Sir *James Stuart* late Lord Advocate alſo was) One of the ordinary Methods of Improvement in order to ſerve at the Bar. The Lord *Stair* was quarrelled as the Author of the Privy-Council's baniſhing the greateſt Part of the Advocates from *Edinburgh* in the Harveſt-Vacation *anno* 1674; albeit he was altogether free of that Imputation, being in the Country when the Thing was done. And the Truth is, he never ſeem'd to have Pleaſure in the Affairs then moſt agitated in Council. Upon Repreſentations made by him, and others to the Duke of *Lauderdale* when he came to *Scotland* in the Year 1677, the Duke concurr'd in making ſeveral Acts of Council, correctory of Abuſes of the Time; particularly that of citing Perſons for Church-Irregularities without libelling ſpecial Circumſtances of Time and Place, but only one or other of the Days of all the Moneths of ſeveral Years: Whereupon the then Arch-Biſhop of St. *Andrew*'s charged him at Court with overturning the National

Settlement, and putting the King's Intereſt farther back in one Moneth than could be retrieved in ſeven Years. The Lord *Stair* did with all Freedom and Faithfulneſs labour to diſſwade the Duke from bringing in the Highland Hoſt upon the Weſt of *Scotland*, and from obtaining an Order of Council for a Bond to be taken for diſcovering, apprehending and bringing to Judgment Presbyterian Miniſters that had kept Conventicles: To ſubſcribe which Bond, or to approve that Inrode, the Lord *Stair* could never be induc'd. When his Royal Highneſs the Duke of *York* came to *Edinburgh* in *November* 1679, being attended at the Abbey by the Lords of Seſſion and other Members of the College of Juſtice in their Formalities; the Lord *Stair* Preſident had a Congratulatory Speech in the Name of the Society, wherein he uſed an Expreſſion to this Effect: *'Tis Matter of great Joy to this Nation to ſee one of the Royal Family among them, after being for ſo many Years deprived of that Honour; and the Nation being intirely Proteſtant, it is the fitteſt Place your Royal Highneſs could have made your Receſs to at this Time*: Which Words ſome took Exception at. His Lordſhip did ſeveral Times after, adviſe his Royal Highneſs, that it was much his Intereſt not to attempt any Thing, that might ſeem to have the leaſt Tendency to weaken the Eſtabliſhment of the Reformed Religion. In the Parliament 1681, to which his Royal Highneſs was the King's Commiſſioner, the Earl of *Argyle* and the Lord *Stair* were named upon a Committee of the Articles, to prepare an Act for the farther Security of the Proteſtant Religion. But the Draught brought in by that Committee was laid aſide, in reſpect it was thought to limit too much the Power of a Popiſh Succeſſor to the Crown: In place whereof, a general Statute ratifying all former Laws for ſettling and ſecuring the Liberty and Freedom of the Proteſtant Religion (*u*) did paſs. However, when the Act aſſerting the Right of Succeſſion to the Crown of *Scotland* according to the Proximity of Blood, without reſpect to any Difference of Religion (*x*) had paſt; it was thought expedient even by thoſe who promoted it, to have a more ſpecial Law made for Security of the Proteſtant Religion. Accordingly, a Draught of the Act about Religion and the Teſt (*y*), brought into the Articles by other Hands, was tranſmitted to the Parliament. Which providing only for the Preſervation of the Proteſtant Religion, as contained in the Word of God in general, could not diſcover Papiſts who pretend to walk conform to that: The Lord *Stair* was forward to have a particular Standard of the Proteſtant Religion eſtabliſhed, that might be a *Shibboleth* to *Roman* Catholicks, and effectually prevent their getting into publick Offices in the Event of a Popiſh Prince upon the Throne. The ſtrong Reaſons

urg'd

(*u*) Act 1. Par. 3. *Ch.* II. (*x*) Act 2. *ibid.* (*y*) Act 6. *ibid.*

urg'd by him in Parliament, prevailed to exclude all from Publick Truſt in the Government who did not ſwear, *That they own'd and ſincerely profeſs'd the true Proteſtant Religion contained in the Confeſſion of Faith recorded in the Parliament* 1567; *and that they believed the ſame to be founded on and agreeable to the written Word of God, and ſhould adhere thereto, and maintain the ſame.* This was mightily reſented by his Grace the Lord Commiſsioner, who, the very Night that the Act paſſed, declared to the Earl *Argyle*, That the Lord *Stair* had ruin'd all honeſt Men (meaning Papiſts) by bringing in the Confeſsion of Faith. Tho' the Lord *Stair* was pleaſed with the firſt Part of the Teſt-Act, as the ſafeſt Hedge againſt Popery: Yet he could not ſign the latter Part of it that ſtruck againſt Presbyterian Diſſenters therein called *Phanaticks*. He therefore went up to the King to declare ſo much, and to deſire Liberty with his Favour to retire: But before he arrived at *London*, he found himſelf eas'd of that Trouble, by a new Commiſſion to Lords of Seſsion, iſſued under the Great-Seal, wherein he, Sir *Thomas Murray* of *Glendoick* Lord Regiſter, and Sir *John Baird* of *Newbyth*, were all left out *indicta cauſa*; tho' they held their Places in the Seſsion *ad vitam aut culpam*. The Lord *Stair*'s late Behaviour before the Parliament, and Freedom of Speech to the Duke of *York* at his firſt Coming to *Scotland*, was ſo improved as a heavy Charge againſt him: That, as if it had not been ſufficient to lay him aſide from his Poſt in the Seſſion, he was not ſuffered to live without Diſturbance in his Country-Retirement; contrary to the Aſſurance given him at *London* by the King's ſpecial Order. His Tenants were haraſs'd with grievous Proſecutions and Fines for Nonconformity or Church-Irregularities: And he got a Hint from Sir *George Mackenzie* then King's Advocate, That he could not promiſe him Protection from Impriſonment. Finding himſelf thus circumſtanc'd, he thought fit to withdraw into *Holland* in *October* 1682. During his Abode there, many Witneſſes, among others his Lady's Siſters and his own domeſtick Servants were examined and re-examined in the Way of Inquiſition, to find out Matter for a Criminal Purſuit againſt him. But nothing was diſcovered, ſave that ſome Perſons thought to have been at *Bothwel*-Bridge, liv'd upon his Ground, or lurked about his Houſe in the Country, while he attended in the Seſsion at *Edinburgh*. However he was purſued for Treaſon, Firſt before the Juſticiary, and then before the Parliament, upon the common Ground of *Harbour and Reſet of Rebels*. Sir *John Dalrymple* his eldeſt Son, was about the Beginning of the Year 1683 fined in 500 l. *Sterling*, upon Pretence, That he as Heritable Baillie of the Regality of *Glenluce*, interfering in Juriſdiction with the new named Juſticiars, had fined his own and his Father's Tenants too low for haunting Conventicles. And tho'he had never meddled in any publick Matters; yet he was in *September* 1684 ſeized ſummarily under Night in his own Houſe of *Newliſtoun*, without any Shadow of Ground, and carried to the common Jail of *Edinburgh*, without allowing him the Benefit of Bail: Tho' the Officer who apprehended him, brought him Firſt to the Abbey of *Holy-rood-Houſe*, in Expectation that he might have been bail'd. He was diſmiſſed upon Bond of Confinement, after lying Three Months in Priſon, and ſome Weeks thereof cloſe Priſoner. The Lord *Stair* about the Time he was removed from the Seſſion, publiſh'd his Inſtitutions of the Law of *Scotland*. While he was in *Holland*, his *Philoſophia nova experimentalis* came out there; and the Two Volumes of his Deciſions of the Lords of Seſſion were printed in *Scotland*. When the Prince of *Orange*, (afterwards King *William*) was ſetting out to ſail for *Britain* in the 1688, the Lord *Stair* aſked him ſome few Days before his Imbarkation, what his true Deſign in going to *England* was? The Prince anſwered, That he deſigned the Glory of God, and the Security of the Proteſtant Religion then in imminent Danger. Upon which the Lord *Stair* pull'd off his Wig and ſaid, *Tho' I be now in the Seventieth Year of my Age, I am willing to venture that* (meaning his Head) *my own, and my Children's Fortunes in ſuch an Undertaking.* Which the Prince took in very good Part, and reported to others as that which greatly hearten'd him to purſue his Deſign. The Kindneſs and tender Affection expreſs'd by his Royal Highneſs upon that Occaſion to my Lord *Stair*, expoſed him to the Envy of ſeveral Perſons: Which afterwards broke out in Pamphlets ſtuff'd with perſonal Reflections, and other injurious Writings againſt reſtoring him to his rightful Office of Preſident of the Seſſion, and aſperſing his Adminiſtration thereof. This good old Man, with all imaginable Cheerfulneſs, came over in that glorious Expedition, to preſerve our Conſtitution, when Religion, Liberty, and Property, the deareſt Concerns of Mankind ſeem'd to be at Stake. The Prince, upon his landing at *Torbay*, ſent to inquire concerning my Lord *Stair*'s Health; and perceiving that his Horſes were not come up, ordered a *Neapolitan* Horſe belonging to himſelf to be ſent to the Lord *Stair* for his Accommodation. The Lord *Stair* was reſtored to his Office of Preſident in the Year 1689 conform to the Claim of Right. He was created Viſcount of *Stair* in the Year 1690; and died 25 *November* 1695, aged 76 Years and 6 Months; and was honourably interr'd in the High-Church of *Edinburgh*.

John, Maſter (afterwards Earl) of *Stair*, his eldeſt Son, Father to *John* now Earl of *Stair*, was then Secretary of State: Who had been King's Advocate in the Year 1687, Lord Juſtice-Clerk in the Year 1688, & King's Advocate again in the Year 1690. The Office of Preſident of the Seſſion continued vacant till *March* 1698, when Sir *Hew Dalrymple* of North-*Berwick* Baronet, Advocate, and One of the Commiſſaries of *Edinburgh*, the Viſcount's third Son was named Preſident by the King's Letter, and admitted in *June* thereafter; who, to the general Satisfaction of the Country, doth at preſent juſtly fill his Father's Chair. Sir *James Dalrymple* of *Borthwick* Advocate, his ſecond Son, was firſt one of the Commiſſaries of *Edinburgh* (in which Place his Brother Sir *Hew*, now Lord Preſident, ſucceeded to him) and afterwards one of the Principal Clerks of Seſſion, which Office he lately reſigned in Favours of *John Dalrymple* of *Cranſtoun*, his eldeſt Son. *Thomas Dalrymple*, the Viſcount's fourth Son, is firſt Phyſician in Ordinary to Her Majeſty. Sir *David Dalrymple* of *Hales* Baronet, late Queen's Advocate, is the fifth Son. *Janet Dalrymple*, his eldeſt Daughter, was given in Marriage to *David Dunbar*, eldeſt Son to Sir *David Dunbar* of *Baldoon* Baronet; but died ſoon after the Marriage. *Eliſabeth*, his ſecond Daughter, was married to *Allan* Lord *Cathcart*. *Charles* Lord *Crichtoun*, eldeſt Son to the Earl of *Dumfreis*, married *Sarah Dalrymple* his third Daughter; and Sir *David Cuningham* of *Milncraig* Advocate, Baronet, married *Iſabel Dalrymple* the fourth Daughter. All which Daughters (the eldeſt excepted) have left Children.

Having thus given an Account of the moſt remarkable Things in the Viſcount of *Stair*'s Life, and of the Children he left behind him: I ſhall now offer to the Reader ſuch a ſhort Character of that great Man, as I can give.

During the long Time he was a Judge, none could ever ſtain him with the leaſt Malverſation or Inſolence in his great Truſt, at a Time when it would have been thought obliging and good Service to Men of Power, who wanted nothing more than the leaſt Ground to call him in Queſtion. He could not indure to be ſollicited, or impertinently addreſſed to in Matters of Juſtice. The Memory of the many good Regulations in the Form of Proceſs before the Seſſion owing to his Lordſhip, will never be obliterated. He had a ſtiff Averſion from being concerned in Criminal Matters, either as a Judge or a Lawyer. In the Matter of Civil Government, he was always for ſober Meaſures. He thought it neither the Intereſt nor Duty of Kings to rule arbitrarily: Both King and People having their Titles and Rights by Law; and an equal Ballance of Prerogative and Liberty being neceſſary to the Happineſs of a Common-wealth. His Judgment never led him to uſe or approve Severity againſt thoſe, who being ſound in the Fundamentals of Religion, differ'd only in Circumſtantials. When he ſat in the Privy-Council, he always interpos'd ſo far as he could with Safety, to reſcue the ſuffering Presbyterians from feeling the ſharp

Edge of penal Laws, to which they lay obnoxious in the Reign of King *Charles* the II. and ſuffered often publick Reproach for his ſo doing. Where he gave it as his Opinion, that the Privy-Council, to whom the Government and Policy of the Nation was committed, ought to be equally prudent and juſt in applying the Severity of the Laws: Albeit Judges in other Courts are to walk by the Letter of the Law, however rigorous and hard. He was a devout Chriſtian, a ſincere Proteſtant, and a true Son of the Preſbyterian Church of *Scotland*, tho' Prudence allowed him not at all Times to make a Noiſe. He approv'd himſelf to be of ſteddy Principles, in thrice forſaking his honourable and profitable Station, rather than comply with the Corruption of the Time. 1. He refuſed abſolutely to take the Uſurper's *Tender*, and contentedly ſat down with the Loſs of a beneficial Imployment as an Advocate, till it was diſpens'd with. 2. He risked his Place of an ordinary Lord of Seſſion, in the Year 1664, before he would ſign, without a Commentary, the Declaration then impoſed on all in Publick Truſt. And 3. expoſed himſelf to be ſhuffled out of his Preſidency (as he was) in the Year 1681, by his boldly ſtanding up in Defence of the Proteſtant Intereſt. In the midſt of the Multiplicity of Civil Buſineſs, which his Imployment and Character brought upon him, he always found ſome Time for the Study of Divinity, wherein he arriv'd to a deep Pitch of Knowledge, and directed every Thing elſe to it. In ſhort, he was indefatigable in Buſineſs, even when he might have uſed the Privilege of his Age to ly by and withdraw from it. He knew not what it was to be idle, and took a ſtrict Account of his Time: Dividing himſelf between the Duties of Religion, and the Studies of his Profeſſion, which he minded more than the raiſing a great Fortune. He was ſober, temperate and mighty regular. He duly prayed always and read a Chapter of the Bible to his Family before they ſat down to Dinner, and performed the like divine Service after Supper: Which he would not interrupt upon any Conſideration of Buſineſs, how important ſoever. He had a great Spirit, and equal Temper in the harſheſt Paſſages of his Life: By the conſtant Bent of his Thoughts to what was ſerious or profitable, he knew how to divert them from any uneaſy Impreſſion of Sorrow. He was apt to forget, at leaſt not to reſent Injuries done to him, when it was in his Power to requite them.

His excellent Writings will carry down his Memory to the lateſt Poſterity. His *Inſtitutions of the Law of* Scotland, wherein that is compared with the Canon and Civil Laws, and the Cuſtoms of neighbouring Nations, are ſo uſeful, that few conſiderable Families in *Scotland*, not to mention profeſſed Lawyers, do want them. He hath therein ſo cleared up the Springs and Grounds of our Law, that had been damm'd up from ordinary Obſervation by Ruſt and Rubbiſh, and reduc'd it into a ſound and ſolid Body (for which he deſerves to be reckon'd a Founder and Reſtorer of our Law) that if it were loſt, it might be retrieved, and the Tenor on't made up out of his excellent *Inſtitutions*. He hath judiciouſly obſerved the *Deciſions* of the *Seſſion* from the Reſtauration of the Sovereignty, and Re-eſtabliſhment of the College of Juſtice to it's ancient Conſtitution and Splendor, till *Auguſt* 1681: In which he hath not omitted any Caſe of Difficulty or Importance determined when he was preſent on the Bench; without expreſſing his own Opinion when different from that of the Plurality of the Lords, out of Modeſty and Deference to their Judgment. He wrote them *de die in diem*, commonly before Dinner when freſh in his Memory: And was the more fitted to do it, that he was not a Day abſent during that Period of 20 Years, except the Time of the Summer-Seſſion 1679, when he attended the King by his Majeſty's ſpecial Order. I have ſeen his *Philoſophia nova experimentalis*. He wrote a Treatiſe concerning the Royal Prerogative and the Rights and Privileges of the Subject, and ſome Sheets in Vindication of the Church Government: But I don't remember to have ſeen either of theſe in Print. He wrote alſo *A Vindication of the Divine Perfections*, which was publiſhed at *London* in the Year 1695, with a Preface by Doctors *W. Bates* and *J. Howe*: Wherein theſe learned Divines give this Character of the Book. *The Clearneſs and Vigour of the noble Author's Spirit are illuſtriouſly viſible in managing a Subject ſo deep and difficult. And in his unfolding the glorious and amiable Excellencies of the Bleſſed God, there is joined with the Strength of Argument, that Beauty of Expreſſion, as may engage all Readers to be happy in the entire Choice of God for their everlaſting Portion. Which Performance ſhews it to be a Thing not impracticable, as it is moſt Praiſe-worthy, amidſt the greateſt ſecular Imployments, to find Vacancy and a Diſpoſition of Spirit to look with a very inquiſitive Eye into the deep Things of God: Which (if it were the Author's Pleaſure to be known) would let it be ſeen, the Stateſman and the Divine are not Inconſiſtencies to a great and comprehenſive Mind.*

Lord *Newbyth.* *John Baird* (afterwards Sir *John Baird* of *Newbyth*) Son to Mr. *James Baird* One of the Commiſſaries of *Edinburgh*, being ſent to *France* by his Father to ſtudy the Laws, he came Home without thinking of that, and procured to himſelf a Commiſſion to be a Lieutenant of Horſe before his Father knew on't. Who, when it came to his Ears, obliged his Son to drop that Deſign, and diſpatched him abroad again, under the Conduct of Doctor *Alexander Colvil* afterward Profeſſor of Divinity in St. *Andrew*'s, to ply his

Studies at *Saumur* and *Sedan*. Immediately upon his Return aſter his ſecond Travels, the Father got him adjoined to himſelf in the Office of Commiſſary *Anno* 1647. King *Charles* II. knighted him at St. *Johnſtoun*. Sir *John Baird* was turn'd out of his Office of Commiſſary by the Uſurpers, and reſtored to it aſter the King's Reſtauration. Which Place he continued to exerce till 11 *November* 1664, when he was promoted to be a Lord of Seſſion, in Place of Sir *George Mackenzie* of *Tarbet* (afterward Earl *Cromarty*) who, notwithſtanding his great Loyalty, was laid aſide, for being acceſſory to the Buſineſs of Billeting in Parliament. But my Lord *Tarbet* was 14 *October* 1681 named a Lord of Seſſion again and alſo Clerk-Regiſter, in Place of Sir *Thomas Murray* of *Glendoick*: And the Lord *Newbyth* turn'd off the Seſſion. *Newbyth* was again brought in by King *William* and Queen *Mary*'s Nomination of Lords in the Year 1689: And died in the Exerciſe of the Office, about the End of *May* 1698, in the 78 Year of his Age, the oldeſt Judge then in *Britain*, being of 51 Years Standing. He is One of the Two Subſcribers of the Inſtructions given to Commiſſaries authorized and injoined by King *Charles* II. *January* 21, 1666, recorded in the Books of Sederunt. He was named by the King in the Year 1670 One of the Commiſſioners for *Scotland* to treat about a further Union with *England*. The Lord *Newbyth* hath obſerved and collected the Lords Deciſions from 12 *November* 1664 till the End of *February* 1667: To which there is an Appendix of others obſerved by him, from 14 *November* 1689 till the laſt of *July* 1690. He was a Judge of long Experience, a good Humaniſt, and well ſeen in the *Belles Lettres*. He married *Margaret Hay* Daughter to *William Hay* of *Lenplum* Brother to the Earl of *Tweeddale*; by whom he had One Child Sir *William Baird*, who was made a Baronet 4 *February* 1680, and commenced Advocate 31 *July* thereaſter.

Lord Dirleton.

When Sir *John Niſbet* of *Dirleton*, (Son to Mr. *Patrick Niſbet* of *Eaſtbank*, admitted a Lord of Seſſion, 1 *November* 1636) commenc'd Advocate, I don't certainly know, but his Learning and great Parts were firſt taken Notice of in that famous Criminal Proceſs againſt *John* Lord *Balmerino* in *December* 1634, one of whoſe Advocates in Defence, Sir *John* (then Mr. *John*) *Niſbet* was. He diſcharged the Duty of one of the Commiſſaries of *Edinburgh* for many Years, both before and aſter the Reſtauration of King *Charles* the II. which led him to make uncommon Reſearches into the Conſiſtorial Law: Of the Fruits whereof, perhaps the Burning of his Houſe depriv'd the learned World; where he loſt a curious *Greek* Manuſcript written with his own Hand: For Recovery whereof, he offered 1000 lib. *Sterling* to any Perſon that could reſtore it. He is One of the Two Subſcribers of the King's Inſtructions in the Year 1666. Upon Sir *John Fletcher*'s Diſmiſſion, he became Advocate to King *Charles* the II. 4 *November* 1664: And 11 *ditto*, was alſo admitted an Ordinary Lord of Seſſion, in Place of Mr. *James Robertoun* of *Bedlay*, then deceas'd. He was appointed One of the Commiſſioners authorized by the Parliament of *Scotland*, to treat with the *Engliſh* about an Union of both Kingdoms. He died in *April* 1678, about 78 Years of Age. He travelled much in the learned Languages, was a Man of vaſt Reach and Depth of Judgment, great Penetration and Application to Buſineſs, and a Lawyer of the firſt Magnitude. But to uſe Sir *George Mackenzie*'s Phraſe (becauſe I know none better) *Nimia arte ſemper utens, artem ſuam ſuſpectam reddebat*. He obſerved the Deciſions of the Seſſion, from *December* 1665 till *June* 1677, with great Succinctneſs and Judgment. His *Doubts and Queſtions in Law*, written without any Order, were bruſh'd into Form and Method by Sir *William Hamilton* of *Whitelaw*, a late Senator of the College of Juſtice, and Lord Juſtice-Clerk: And publiſh'd with his Deciſions in the Year 1698, by Mr. *Robert Bennet*, whoſe Daughter and only Child *Jean Bennet*, is married to *William Nisbet* now of *Dirleton* Sir *John*'s Nephew, to whom he diſponed his great Eſtate, having no Heirs male of his own Body, but only a Daughter, who was given in Marriage to Sir *William Scot* of *Harden*. Anſwers to ſuch of theſe Doubts and Queſtions, as Death prevented him from reſolving, writ by Sir *James Stuart* of *Goodtrees*, late Queen's Advocate, One of our greateſt Lawyers in his Time, are juſt now in the Preſs.

Sir *Peter Wedderburn* of *Goſfoord*, Advocate and ſole Clerk of the Privy-Council, was 17 *June* 1668 admitted an ordinary Lord of Seſsion, in Place of Sir *Archbald Stirling* of *Carden* then deceas'd. 3 *June* 1679, he was elected Vice-Preſident, when the Lord *Stair* was at *London*, to preſide in the Seſsion till his Return. He died at his Houſe of *Goſfoord*, 11 *November* 1679: And Sir *Andrew Birnie* of *Saline*, was admitted to his Poſt, 28 *ditto*. He was a Man of great Eloquence & Literature, & other bright Parts. Sir *George Mackenzie* ſpeaks of him as an Advocate thus. Wedderburnus *morum probitate judices clienti conciliabat; dicendique ſuavitate eos corrumpere potuiſſet, ſi voluiſſet: nihil autem ille in facto, niſi quod verum; nec in jure niſi quod juſtum pathetice urgebat.* Ciceronis *lectioni ſemper incumbebat; unde illi dicendi genus uniforme & flexanimum: Ex junioribus tamen nullus illum imitari poterat, ſicut ille* Ciceronem. *Eloquium materiam, actio eloquium decorabat; famaque fugientem proſequebatur.* The Lord *Goſfoord* hath obſerved and written the Deciſions of the Lords of Seſsion, from 1 *June* 1668 till the End of *July* 1677.

Mr. *David Falconer* (afterwards Sir *David Falconer* of *Newtown*) ſecond Son to Mr. *David Falconer* One of the Commiſſaries of *E-*

dinburgh (afterwards Sir *David Falconer* of *Glenfarquhar*) Brother to the Lord *Halkertoun*, ſtudied the Law at Home by the Advice and Direction of his Father. He entered Advocate 25 *June* 1661; and was thereafter made one of the Commiſſaries of *Edinburgh*, and knighted. Sir *David Falconer* was admitted to be One of the Ordinary Lords of Seſſion 24 *June* 1676, in Place of Sir *Archbald Primroſe* of *Caringtoun*, and a Lord of Juſticiary, in Place of Sir *Thomas Murray* of *Glendoick*, then preferred to the Office of Clerk-Regiſter. 5 *July* 1682 the Lord *Newtoun* was made Preſident of the Seſſion upon the Promotion of Sir *George Gordon* of *Haddo* (afterward Earl of *Aberdeen*) to the Station of Lord High Chancellor of *Scotland*. He died in *December* 1685 in the 45 Year of his Age, and was ſucceeded in the Office of Preſident by Sir *George Lockhart* of *Carnwath*: Conform, as it is ſaid, to his earneſt Wiſh and Deſire on Death-bed. He was a Man of Temper and good Parts, loyal to his Prince, and mighty aſſiduous in Buſineſs. He obſerved the Deciſions from *November* 1681 till *January* 1686: which are ſhort, but pointed and clear, and were publiſhed by Mr. *Spotiſwood* in the Year 1701.

Lord Harcurſe.

Mr. *Rodger Hog* (afterward Sir *Rodger Hog* of *Harcurſe*) entered Advocate 25 *June* 1661. He was knighted at *London* by King *Charles* II. admitted to the Place of an Ordinary Lord of Seſſion 16 *November* 1677, and to that of a Lord of Juſticiary 18 *November* 1678. He was removed from his Places in the Seſſion and Juſticiary, for ſome State-Court-Reaſon, about the Beginning of the Year 1688. Sir *Rodger Hog* finding himſelf a diſcarded Judge, reſolved to go again to the Bar, and plead as an Advocate; but was diverted from that Deſign by the Revolution. He was named to be One of the Lords of Seſſion in the Year 1689, but declined to accept, and thereafter died 65 Years of Age. He hath obſerved ſome ſelect Deciſions from the Beginning of *July* 1679 till about the End of *January* 1684.

Lord Carſe.

Mr. *Patrick Lyon* (afterwards Sir *Patrick Lyon* of *Carſe*) was firſt a Profeſſor of Philoſophy in the old College of St. *Andrew*'s; which Poſt, I am inform'd, he loſt for not ſigning the Declaration impoſed upon all in publick Office or Truſt, by Act 5. Seſſ. 2. Act 3. Seſſ. 3. Parl. 1. *Ch.* 2. Then he applied himſelf to ſtudy Law, and entered Advocate 11 *July* 1671. He was afterward Judge-Admiral; and laſt of all a Lord of Seſſion and a Commiſſioner of Juſticiary; which Two laſt Places, he enjoyed till the Revolution. He hath collected the Deciſions of the Seſſion, from *November* 1681 till *July* 1687.

Lord Fountainhall.

Mr. *John Lauder* (now Sir *John Lauder* of *Fountainhall* Baronet) eldeſt Son to Sir *John Lauder* of *Ledingtoun* Baronet, commenc'd Advocate 5 *June* 1668; and was named One of the Lords of Seſſion at the Revolution in the Year 1689, and a Lord of Juſticiary 16 *January* 1690. The publick and private Character of this excellent Judge are now ſo well known, that I need ſay no more of him, than that he ſignalized himſelf as a good Patriot and true Proteſtant in the Parliament 1686, in Defence of the Penal Laws againſt Popery. This ſelf-denyed Man hath taken no leſs Pains to ſhun Places that were in his Offer, than ſome Others have been at, to get into Preferment: Witneſs his refuſing to accept of a Patent in the Year 1692 to be King's Advocate, and the reſigning his Place of a Lord of Juſticiary after the Union, which her Majeſty with Reluctancy took off his Hand. In ſhort, his Lordſhip is (what I know by Experience) as communicative, as he is univerſally learned and knowing. He hath obſerved the Deciſions of the Seſſion from *November* 1689 till *November* 1712: Which I have ſeen in Manuſcript: But his exceſſive Modeſty can't be prevail'd on to make them publick.

Acts of Sederunt.

Acts of Sederunt (the ſame with the *Rules of Court* in *England*) differ from the Deciſions in this, That the former are only fixed Rules of Form to be obſerved in the Diſtribution of Juſtice made by the Lords *in Theſi*: Whereas the latter are their Determinations or Reſolutions *in Hypotheſi*, upon particular Points of Right or Form brought before them *in Foro contentioſo*. The Statutes of the Seſſion, at the firſt Erection of it, were entered promiſcuouſly in the ſame Record with Acts and Decreets: But now it is otherwiſe. Tho' the Seſſion in the Year 1537, made certain Statutes and Rules to be obſerved by themſelves in their judicial Proceedings, which the King ſubſcribed, and got further Authority from the Parliament; I don't ſee any formal Sederunt-Book before 15 *January* 1553. From which Time the Books are continued till 17 *May* 1608. The Book from that Time till 2 *February* 1626 is a miſſing and abſtracted. For Recovery whereof an Act of Sederunt was made 22 *November* 1677, propoſing 100 l. *Scots of* Reward to any who ſhould produce it to the Lords before the Firſt *February* 1678; and declaring, That the Perſon in whoſe Hands it ſhould be found after that Day, was to be proceeded againſt with all Severity: But no Account hath to this Hour been got of it. The Sederunt-Book of the Actings of the Commiſſioners for Adminiſtration of Juſtice to the People of *Scotland* during the Time of the *Engliſh* Uſurpation, begins 1 *November* 1654, and ends 23 *February* 1659. *November* 22 1677 the Lords Preſident, Juſtice-Clerk, *Collingtown*, *Caſtlehill*, *Goſfoord*, *Forret* & *Glendoick*, or any Three of them, were appointed to meet and peruſe the whole Sederunt-Books, and to collect and cauſe print ſuch Acts therein as are of publick Uſe. The Acts of Sederunt from 1 *June* 1661 till the End of *February* 1681 are printed in the firſt Volume of the Viſcount of *Stair's* Deciſions,and thoſe from that Time to the End of *July* 1696 are publiſh'd and ſubjoined to the Collection of Deciſions obſerved by the Lords *Craigmiller* and *Newtoun*.

An Account of this Journal.

It remains after this Account of Deciſions written by others, to ſay ſomething about this Journal. The Deciſions of the Lords of Seſſion having lain unobſerved and neglected from *November* 1681 till *November* 1689, except ſome ſelect Caſes in a Matter of Four Years taken Notice of by the Lord *Newtoun*; and the Collections of Sir *Patrick Hume* of *Rentoun* Advocate, which moſtly contain but a Sum of Debates wanting the Interlocutors of the Lords; and thoſe from *November* 1689 till *June* 1705, having been obſerved by my Lord *Fountainhall* for his own private Uſe only, without Deſign to make them publick: This rouſed my Curioſity to dig in the Records, or otherways, for ſo great a Treaſure of Standard-Law. But foreſeeing that, did I give my ſelf wholly to ſearch after bygones (which would be a Work of Time) the current Deciſions were like to run the ſame Fate with the Former, and prove as hard to be made up: I reſolved, Firſt of *June* 1705 to obſerve the Deciſions of that Seſſion; by taking and preſerving what I thought to be ingenious, pithy or material in the Pleadings of the Lawyers, and what farther was ſtirred by the Lords in their impartial Reaſoning among themſelves; without ſetting forth any more Matter of Fact, than had a neceſſary Connection with the Points of Law determined; and pointing carefully at the Suggeſtions that appeared to weigh with the Lords. In Order to this, I gave cloſe Attendance at the making of Reports, and adviſing Bills and Anſwers, every Seſſion-Day, in that Place in the Inner-Houſe ſet apart by the Lords for my Conveniency: Where I took Notes of what I heard, and was always kindly accommodated by the Clerks, with ſuch Interlocutors as I wanted to ſee; for which I make them jointly and ſeverally a humble and hearty Acknowledgment: Out of theſe Notes, and the Papers at large, *viz.* Informations, Memorials, Repreſentations, Petitions and Anſwers given in by Parties to the Lords Boxes, and carefully kept for me by my honourable and good Friend, Mr. *James Erskin* of *Grange*, One of the Senators of the College of Juſtice, and Lord Juſtice-Clerk, I did in the ſucceeding Vacation pen the Deciſions. where the Lords had varied upon any Point, I took Notice only of their laſt Interlocutor, as the Reſult of the moſt juſt and correct Thought after full Light and Information. I intermixed the Acts of Sederunt with the Deciſions in the Order of Time, as they were made; upon which Account, my Collection was made to bear the Name of *A Journal of the Seſſion*. The Dean and Faculty of Advocates having ſeen this *Journal* of the Summer-Seſſion 1705, were pleaſed by their Act, dated 24 *November* thereafter, to imploy me to continue & go on with the Work in the Manner I had begun: By obſerving every Seſsion the material Deciſions thereof in the Seſsion-Time, and writing them with the Acts of Sederunt in the Vacation following, ſo as to be lodged in their Library for their Uſe before the Commencement of another Seſsion; for doing whereof, they gave ſome Incouragement. In the Diſcharge of this Truſt, I have obſerved and writ a Journal of the Seſsion, from Seſsion to Seſsion, containing the Deciſions of the Lords and their Acts of Sederunt in a continued Courſe from the Summer-Seſsion 1705 down to the Firſt of *November* 1713. Theſe Journals (which lay confin'd in Manuſcript in the Lawyers Library till now) having ſwell'd to the Bigneſs of a competent Volume; I was deſired both by Lords and Advocates to ſend them Abroad into the World in Print, that they might be more eaſily and univerſally known: Which is accordingly done; and they are all caſt into One Book, under the general Title of *A Journal of the Seſſion*, allowed by the Lords to be printed for the Publick Good. The ingenuous Reader will therein not only learn what has been ſuſtained as Law, but will alſo ſee the Grounds and Reaſons whereupon it was adjudged to be ſo, by thoſe Oracles whoſe Province is *de jure reſpondere*, to define what is Law. Which anſwers more effectually the true End of conſulting Deciſions, than the dry conciſe Way of expoſing them to the publick View without a *Becauſe*. I ſee nothing done elſewhere that ſo nearly reſembles this Journal, as *Le Journal du Palais*, undertaken in the Year 1672, by *C. Blondeau* and *G. Gueret* Advocates in the Parliament of *Paris*; and the *Year-Books* in *England*. But as each of theſe Collections containing the Judgments and Sentences of ſeveral different Courts, behov'd to be made up by different Hands: So the Authors of *Le Journal du Palais* ſeem to depend in a great Meaſure upon private Parties, bringing or ſending to them ſuch Sentences obtained in their Favours, as they deſired to have made publick, and were under a Neceſsity to truſt to the Exactneſs and Diligence of their Correſpondents in the different Provinces where the *French* Parliaments ſat. Whereas in this Journal I have followed the Faith only of my own Eyes and Ears, which contains much more relating to Caſes therein determined, than can be learned from any Record, *viz.* Arguments and Reaſoning of the Judges, that had eſcaped the Obſervation of the Lawyers; with their Reſolutions and Judgments in Caſes not a few, upon verbal Reports whereof nothing did enter into Record.

Some complain we have too may Collections of Deciſions, fancying, as *Caligula* did when he intended the Burning of all Law-Books then extant, that Equity would run clearer, and Juſtice be quicker, when the Niceties and Perplexities of the Law were gone: As if forſooth Cerebrine Equity, raw indigeſted Conceits of Men, were to be preferr'd to grave Reſolutions of Great Maſters in Juſtice and Judicature. Law is the Rule of Right and Property: But the Deciſions of Judges, thoſe *Leges loquentes*, are Applications of that Rule in various Caſes, and the beſt Explanations thereof, where it is obſcure or doubtful. They furniſh Notions of Things for determining parallel Caſes, without the Expence of that Time and Thought imployed in hitting upon them at firſt. Judges do thereby ſee, not only with their own Eyes, but alſo with the Eyes of their learn'd and judicious Predeceſſors, whoſe Obſervations they (who being raiſed upon the other's Shoulders, can ſee farther) may improve to the beſt Advantage. It's ridiculous to think that the Subject of Deciſions is exhauſted; when we daily ſee ſo great Variety of Caſes, out of which the rich Invention of Lawyers do always diſcover ſomething new, that falls not directly under former Precedents, but muſt be determined by Analogy.

Another Set of Men are ever crying out againſt ſhewing due Regard to the Deciſions of the Seſſion: For that many of 'em do contradict one another.

Such may pleaſe to conſider, 1. No Judges in any other Nation have Reaſon to boaſt of more Uniformity in their Proceedings, than the Lords of Seſſion: Which I could demonſtrate, had I Room here to run the parallel betwixt the Seſſion and other foreign Courts. 2. Many Deciſions, which at firſt View may ſeem to claſh together, will, upon more narrow Conſideration of Specialities, be found very compatible. 3. Alteration of Deciſions may be accounted for, *diſtinguendo tempora*: Where in Proceſs of Time the Reaſon of an old Deciſion comes to ceaſe; or a contrary more cogent Reaſon takes Place. As Inhibition in the Days of Yore, when trading in *Scotland* was not much thought on, affected Moveables as well as Heretage: But now, when Commerce is increas'd, the Effect of that Diligence is reſtricted to Heretage. For that ſame Reaſon, the Preference anciently in Uſe to be given to Wives for the Proviſions in their Contracts of Marriage, in Competition with perſonal Creditors of their dead Husbands, is now juſtly denied to them by the Lords. Again, the Effects of feudal Delinquencies are generally extended and favoured by our old Deciſions, becauſe Vaſſals (who then had their Feus *gratis*) ought to have been more obſervant of the Terms thereof, whether expreſs'd or imply'd in the Nature of the feudal Contracts. But later Deciſions, now that Feus are purchaſed for adequate onerous Cauſes, generally reſtrict ſuch Irritancies or Delinquencies, as odious and unfavourable. 4. Whatever Latitude the Lords might have taken in deciding contrary to former unprinted Deciſions, which were known only to Lawyers: Yet they have always approved themſelves very tender to alter printed Deciſions; eſpecially in determining Caſes happening after ſuch Precedents were publiſhed, upon the Faith whereof the Lieges might have probably tranſacted their Rights, or contracted, and ſettled their Intereſts. And as it is adviſeable for the Lords to regard their own Deciſions, that others may pay the more Reſpect to them: So it is certainly better to have an ill Rule than no Rule at all; at leaſt to alter an eſtabliſh'd Rule, tho' attended with ſome little Inconveniencies, is a Snare to the Lieges, doth marr Commerce, and confound Humane Society.

In fine, having thus purſued the Hiſtory of the Seſſion ſo far, as I thought might ſerve for an Introduction to my Journal; I ſhall add, That this illuſtrious Court (which hath been confirmed in every Prince's Reign, and never ſuffered in it's Privileges, but in Times intolerably factious, to the great Prejudice of Law and Juſtice) ſtands at preſent ſecured by the Treaty of Union (*a*): And long may it be preſerved againſt the Aims of ill deſigning Men.

I had Information and Lights about the Seſſion, and thoſe Heroes who have given Pains to preſerve and communicate the Deciſions, partly from the Records and Hiſtory; partly from the honourable and worthy Perſons following, Sir *Hugh Dalrymple* of North-*Berwick*, Lord Preſident of the Seſſion, Sir *John Lauder* of *Fountainhall*, Sir *Francis Grant* of *Cullen*, both ordinary Lords, Sir *Alexander Seton* of *Pitmedden* ſometime a Lord, Sir *David Dalrymple* of *Hales* late Queen's Advocate, Sir *James Dalrymple* of *Borthwick* Advocate, Sir *William Baird* of *Newbyth*, who are all Baronets; Dr. *Matthew Sinclar*, Doctor of Medicine; *Alexander Gibſon* of *Durie*, one of the principal Clerks of the Seſſion; *William Wilſon*, one of the Clerks of the Outer-houſe, and other very good Hands.

7 July 1713.

THE Lords of Council and Seſſion conſidering, That Mr. William Forbes *Advocate hath given ſufficient Evidence of great Learning and Judgment, by former Treatiſes publiſhed by him, which have been very acceptable and uſeful to the Publick; and that he, by giving cloſe Attendance every Seſſion-day in the Inner-houſe, for the Space of Eight Years immediately preceeding* June *laſt, hath been enabled to obſerve with Exactneſs and Accuracy, their Lordſhips Deciſions: Therefore the ſaid Lords do, for the Publick Good, allow and approve of the Printing and Publiſhing his* Journal of the Seſſion, *containing their Deciſions in the moſt important Caſes, from* February *One Thouſand Seven Hundred and Five, till* June *One Thouſand Seven Hundred and Thirteen Years; and the Acts of Sederunt made in that Time.*

HEW DALRYMPLE, *J. P. D.*

(*a*) *Art.* 19.

Edinburgh, 8 *December* 1713.

THE Lords of Council and Seſſion conſidering their former Approbation, for Printing and Publiſhing the Journal of their Deciſions in the moſt important Caſes, obſerved by Mr. William Forbes *Advocate, from* February 1705 *till* June 1713 *Years, with the Acts of Sederunt made in that Time; and that he hath now continued and brought down his ſaid Journal of the Seſſion, comprehending the Deciſions and Acts of Sederunt, from the ſaid Month of* June *laſt till* November 1713: *Therefore the ſaid Lords do, for the Publick Good, allow and approve of the Printing and Publiſhing that Continuation of the Journal of the Seſſion aforeſaid.*

HEW DALRYMPLE, *J. P. D.*

A Liſt of the Subſcribers.

A.

JAmes Adam of Vogrie.
Mr. Robert Alexander, one of the Principal Clerks of Seſſion.
Mr. Robert Alexander of Blackhouſe, Advocate.
Robert Alexander of Newton, Writer to the Signet.
Mr. James Anderſon, Writer to the Signet.

B.

THe Right Honourable David Earl of Buchan.
Mr. James Baillie, Writer to the Signet.
Charles Bell, Writer to the Signet.
Mr. Robert Bennet, Advocate.
Mr. David Bethune of Bandon, Advocate.
Mr. Charles Binning, Advocate.
Mr. James Boſwel of Auchinleck, Advocate.
Robert Boid, Writer in Edinburgh.
Thomas Boyes, Writer to the Signet.
Mr. William Brodie, Advocate, one of the Commiſſaries of Edinburgh.
Charles Brown of Colſtoun.
Matthew Brown, Writer in Edinburgh.
William Brown, Writer in Pittenweem.
William Brown of Lindſeylands.
Mr. George Buchan, Clerk to the Commiſſion for Valuation of Tithes.
James Budge, Writer in Edinburgh.
Mr. Gilbert Burnet, Advocate.

C.

MR. Patrick Campbel of Monie, Advocate.
Robert Campbel of Balvie, Writer to the Signet.
Ronald Campbel, Writer to the Signet.
Mr. William Carmichael, Advocate, Brother to the Earl of Hyndford.
Mr. John Carr, Advocate.
Mr. William Carr, Writer in Edinburgh.
Mr. John Carnegy of Boyſack, Advocate.
John Clerk, Writer in Edinburgh.
Mr. James Colvill, Advocate.
Joseph Corry, Writer in Dumfreis.
John Corſe, Writer in Edinburgh.
Mr. Laurence Craigie of Kilgriſtoun, Advocate.
John Chryſtie of Comrie, Writer in Edinburgh.
John Cunningham of Ballindalloch, Writer to the Signet.
William Cunningham younger of Ballindalloch.

D.

Sir Hew Dalrymple of North-Berwick, Baronet, Lord Preſident of the Seſſion.
Sir James Dalrymple of Borthwick, Baronet, Advocate.
Sir David Dalrymple of Hales, Baronet, late Advocate to Her Majeſty.
Mr. George Dalrymple, one of the Barons of Exchequer.
Mr. Hew Dalrymple, Advocate.
Mr. Robert Dalrymple of Killoch, Writer to the Signet.
Mr. George Douglas of Frierſhaw, Advocate.
Mr. David Drummond, Advocate.
George Drummond, General Accomptant.
Mr. Robert Dunbar of Grangehill, Advocate.
Sir Robert Dundaſs of Arniſtoun, one of the Lords of Seſſion.
Mr. Robert Dundaſs, Advocate.
John Dundaſs, Writer to the Signet.

E.

Robert Edgar, Writer in Dumfreis.
Sir Gilbert Elliot of Minto, one of the Lords of Seſſion.
Mr. James Elphinſtoun, Maſter of Balmerino, Advocate, Sheriff-Depute of Edinburgh.
Mr. John Elphinſtoun, Advocate, one of the Commiſſaries of Edinburgh.
Mr. James Erskine of Grange, Lord Juſtice-Clerk, and one of the Lords of the Seſſion.
Mr. David Erskine of Dun, one of the Lords of Seſſion.
Mr. Charles Erskine Senior, Advocate, Brother to the Earl of Buchan.
Mr. Charles Erskine Junior, Advocate.
John Ewing of Craigtoun, Writer to the Signet.

F.

THE Right Honourable James Earl of Findlater and Seafield, Lord Chancellor of Scotland.
Mr. John Fairholm of Baberton, Advocate.
Mr. Alexander Falconer Senior, Advocate.
Mr. Alexander Falconer Junior, Advocate.
Mr. Alexander Farquharſon, Writer to the Signet.
Sir John Ferguſſon of Kilkerran, Advocate.
Mr. Alexander Ferguſſon of Iſle, Advocate.
Mr. James Ferguſſon of Pitfour, Advocate.
Alexander Finlayſon, one of the Clerks of the Seſſion.
Mr. John Fleming, Advocate.
Sir David Forbes of Newhall, Advocate.
Mr. Duncan Forbes, Advocate.
Alexander Forbes of Ballogie.
Mr. Alexander Forreſter of Milnhill, Advocate.
Mr. William Frazer, Advocate.
Mr. John Frazer of Logan.

G.

HIS Grace George Duke of Gordon.
The Right Honourable David Earl of Glaſgow.
Mr. Alexander Garden of Troup, Advocate.
Thomas Gibſon, Writer in Edinburgh.
Mr. James Gillon, Advocate.
Alexander Glaſs, Writer to the Signet.
Mr. Robert Gordon of Clunie, Advocate.
Mr. James Graham, Advocate.
Andrew Graham of Jordanſtoun.
Sir Francis Grant of Cullen, Baronet, one of the Lords of the Seſſion.
Mr. Francis Grant, Eſquire.
Mr. James Moriſon, Advocate.

Mr. Charles Gray, Advocate.
Alexander Guthrie, Writer to the Signet.

H.

MR. William Hall, Advocate.
Andrew Halyburton, Writer to the Signet.
Mr. John Hamilton, Younger of Pancaitland, Advocate.
Mr. James Hamilton of Oliveſtob, Advocate.
Gavin Hamilton of Cleland, One of the Clerks of the Seſſion.
Mr. Alexander Hay, Advocate.
Mr. Robert Hepburn of Stoniflate, Writer to the Signet.
Mr. Thomas Hope of Rankielor, Advocate.
Sir Patrick Home of Rentoun, Advocate.
Sir Andrew Home, Advocate, One of the Commiſſaries of Edinburgh.
Alexander Home, Writer in Edinburgh.
Mr. Thomas Hunter, Advocate.
Mr. George Hutchiſon, Advocate.

I.

MR. Charles Inglis, one of the Under-Clerks of the Bills.
Mr. John Innes, Writer in Edinburgh.
Mr. Alexander Irvine of Saphock, Advocate.
Alexander Irvine, Writer in Dumfries.
Sir James Juſtice of Crichtoun, One of the Principal Clerks of Seſſion.

K.

ALexander Keith, Writer in Edinburgh.
Mr. Thomas Kennedy of Kirkhill, Advocate, One of Her Majeſty's Sollicitors.
Mr. John Kennedy of Kilhanzie, Advocate.

L.

THe Right Honourable, Hew Earl of Loudoun, for Two.
Sir John Lawder of Fountainhall, Baronet, One of the Lords of Seſſion.
Mr. Mungo Law Advocate.
Mr. John Lindſay younger of Wormiſtoun, Advocate.
George Livingſtoun, one of the Clerks of Seſſion.
Mr. John Lowdoun, Profeſſor of Philoſophy in the College of Glaſgow.
Mr. Michael Lumiſden Advocate.

M.

MR. Andrew M'dowal, Advocate.
Mr. John Mackenzie of Delvin, one of the Principal Clerks of Seſſion.
Mr. Colin Mackenzie, Advocate, one of the Clerks of Exchequer.
Mr. Alexander Macleod, Advocate.
Mr. Alexander Maitland of Pittrichie, one of the Barons of Exchequer.
Andrew Marjoribanks of that Ilk, Writer to the Signet.
Mr. Andrew Maſſie, Advocate.
Mr. Hary Maule of Kellie, Brother to the Earl of Panmure.
Sir Alexander Maxwel of Monrieth, Baronet, Advocate.
Sir John Maxwel of Pollock, Baronet, one of the Lords of Seſſion.
Mr. John Menzies of Cammo, Advocate.
Sir William Menzies of Gladſtanes.
Mr. Alexander Menzies of Culterrallers, Advocate.
Thomas Mercer Commiſſary Clerk-deputy of Edinburgh.
Alexander Mitchell of Craig-end, Writer to the Signet.
Mr. John Mitchelſon of Middleton, Advocate.
Archbald Moir, Writer in Edinburgh.
James Montgomerie of Langſhaw, Clerk to the Court of Juſticiary.

Mr. William Muir, Advocate.
Mr. Alexander Murray younger of Stanhope, Advocate.

N.

GAbriel Napier, Writer in Edinburgh.
Sir James Naſmith of Poſſo, Baronet, Advocate.
James Naſmith of Earlſhall, Writer in Edinburgh.

O.

MR. Archbald Ogilvy, Advocate.
Mr. John Ogilvy of Balbegno, Advocate.

P.

THE Right Honourable James Earl of Panmure.
Mr. Alexander Paterſon, Writer to the Signet.
Mr. James Paterſon of Kirktoun, Advocate.
Mr. David Plenderlieth of Blyth, Advocate.
Sir Walter Pringle, Advocate.
Mr. John Pringle of Hayning, Advocate.
Thomas Pringle, Writer to the Signet.

R.

MR. Andrew Ramſay, Advocate.
Mr. Thomas Rigg of Mortoun, one of the Sheriff-Deputes of Edinburgh.
Mr. James Robertoun, one of the Principal Clerks of Seſſion.
William Robertoun, Writer to the Signet.
William Roſs of Aldie.
Mr. George Roſs of Balgrigie, Advocate.
James Ruſſel, Writer in Edinburgh.
John Ruſſel of Braidſhaw, Writer to the Signet.
Sir John Rutherfoord of That-Ilk, Advocate.

S.

MR. David Scot younger of Scotſtarvit, Advocate.
Mr. William Scot Son to Sir Patrick Scot of Ancrum, Advocate.
Mr. Hary Scrimzeour, Writer to the Signet.
Sir Alexander Seton of Pitmedden Baronet, ſometime One of the Senators of the College of Juſtice.
Mr. Robert Sinclair, Advocate.
Mr. Robert Sinclair, Writer to the Signet.
Mr. John Sinclair Advocate, Brother to the Earl of Caithneſs.
Mr. William Skene, Maſter of the High-School of Edinburgh.
Hugh Somervel, Writer to the Signet.
David Spence, Secretary to the Bank.
John Spence, Town-Clerk of Montroſe.
Mr. Robert Stephen, Writer in Edinburgh.
Sir James Stuart of Goodtrees, Baronet, One of her Majeſty's Sollicitors.
Mr. Walter Stuart, Advocate.

T

RObert Thomſon, Sheriff-Clerk-Deputy of Edinburgh.
William Torbit, Writer in Paiſley.
George Turnbull of Balglaſſie, Writer to the Signet.

W

SIr Thomas Wallace of Craigie Baronet, Advocate.
Mr. Adam Wat of Roſehill Advocate, Town-Clerk of Edinburgh.
John Wardlaw, Writer in Edinburgh.
Andrew Waugh of Schaw, Town-Clerk of Selkirk.
Mr. Francis Wauchop of Cakemuir, Advocate.
Mr. Alexander Wedderburn Advocate, One of the Commiſſioners of Exciſe.
Mr. Robert White of Bannochie, Advocate.
William Wilſon, One of the Clerks of Seſſion.
Mr. James Wynram, Sheriff-Clerk of Berwick.

A JOURNAL OF THE SESSION;

CONTAINING THE

DECISIONS

OF THE

LORDS of COUNCIL and SESSION in the moſt important Caſes,

AND THE

ACTS of SEDERUNT,

Commencing *June* 8. 1705.

June 8. 1705. George Blair *Merchant in* Edinburgh, *againſt Mr.* James Oliphant *of* Langtoun *Advocate.*

IN a Cauſe at the Inſtance of *George Blair*, againſt Mr. *James Oliphant*: The Lords found Annualrent due upon Inland Bills as well as others. In reſpect the Act *36th* of the *6th* Seſſion of King *William*'s Parliament, extends the Statute 1681 in all Points, to Inland Bills and Precepts: And *generalia debent generaliter intelligi*. Albeit it was alledged, That the ſaid Act 36 ſhould be extended only to Inland Bills and Precepts, in all Points relating to Execution and Diligence, as to which it is expreſs; and not underſtood to carry the Clauſe concerning Annualrent, whereof it makes not the leaſt mention.

June 12. 1705. Cochran *of* Preiſtgill *and* Dykes *of* Halburn, *againſt* James Urquhart *of* Knockleith.

IN the Action at the Inſtance of *Cochran* of *Preiſtgill* and *Dykes* of *Halburn*, againſt *James Urquhart* of *Knockleith*, as Donatar to the Forfeiture of *Halburn*, for Repetition of a Sum paid to him as a Compoſition for tranſmitting the Gift of Forfeiture to *Preiſtgill*, with Annualrent from the Parliament 1690: The Purſuers contended, That the Diſpoſition of the Gift bearing for onerous Cauſes in general, inſers that the Donatar received near to the Value of the Lands, and *Halburn*'s Oath ſhould be taken on the Compoſition.

Anſwered for the Defender. Heretors buying back their own forfeited Lands, or Friends for their Behoof, always get an eaſie Bargain: And what was given muſt be proven by the Donatar's Oath who received it, ſince the Writs bear not the particular Sum.

The Lords found the Purſuer's behooved to prove by *Knockleith*'s Oath the Quantity of the Sum given for the Compoſition.

Upon this the Purſuer craved, That *Knockleith* might be holden as confeſt, altho' not perſonally apprehended: Since it appeared from the Execution, That he had induſtriouſly abſconded.

The Lords granted a Diligence to cite him edictally at the Market Croſs of the head Burgh of the Shire, and at the Pariſh Church Door.

A Meſſenger finding him accidentally, gave him a Copy by virtue of this Warrant, as perſonally apprehended: Upon which the Purſuers craved he might then be holden as confeſt.

Anſwered. That could not be, ſince there was no Warrant for a Perſonal, but only for an edictal Citation.

Replyed. That a perſonal Citation includes the edictal, as being ſomething more, and a better Certioration: The Warrant for an edictal Citation having proceeded allannerly on a Suppoſition of the Parties lurking and keeping out of the Way, ſo as he could not be apprehended perſonally.

The Lords held him as Confeſt: But declared, That if he came in to depone betwixt and a certain Day, he ſhould be received.

June 13. 1705. Janet *and* Iſobel Robertſons, *Daughters and neareſt of Kin to Baillie* Robertſon *in* Inverneſs, *againſt* William Baillie *Commiſſar there.*

JAnet and *Iſobel Robertſons*, as neareſt of Kin to Baillie *Robertſon* their Father, having purſued Commiſſar *Baillie*, who married their Mother, as Executor confirmed to the ſaid Baillie *Robertſon*, for their Share of the Inventary: The Proceſs reſolved in a Compt and Reckoning, wherein one of the Articles of the Commiſſar's Diſcharge was three Years and an half's Annuity of 400 Merks, extending to 1400 paid to the Defunct's Mother, conform to his Obligement.

It was *Objected* againſt this Article, That it could not be allowed, becauſe the Payment was made without Diſtreſs, for Terms ſubſequent to the Defunct's Deceaſe, which were Heretable *quoad* the Debtor.

Anſwered. By Law it is optional to the Creditor to affect the Executrie *primo loco*: And Payment in ſuch a Caſe, even without Diſtreſs or Decreet, furniſheth Action of Relief to the Executor and neareſt of Kin againſt the Heir; *February* 5th, 1663, *Hill* againſt *Maxwell*; *March* 7th, 1629, *Falconer* againſt *Blair*: And therefore the Article ought to be allowed.

Replyed, 1. It may be denied, That an Executor, ſo long as there is an Heir and Heretage, can at all be decerned for Terms after the Defunct's Deceaſe, of a ſimple Annuity not acceſſory to a Stock. For albeit where there is an Obligement for a Stock or principal Sum, that as pre-exiſting to the Debtor's Deceaſe, may oblige the Executor for Annualrents thereafter in Conſequence: Yet *in annuo legato dies nec cedit, nec venit*, till the Perſon to whom it is due Survive the Term: And *quot anni tot ſunt debita, L.* 4. *ff. De Annuis Legatis.* So that ſuch a ſimple Annuity may be ſaid not to have been properly a Debt upon the Defunct at his Deceaſe; and conſequently ſhould not burden his Executry. And my Lord *Stair* obſerves, *Inſtit. Lib.* 3. *Tit.* 8. §. 64. That the Heir only, and not the Executor, is liable for Annualrent, not acceſſory to a Stock, for Years after the Debtor's Deceaſe, unleſs there be no Heretage. 2. The Executor's paying officiouſly without Diſtreſs, argued ſome fraudulent Deſign, and was a *Negotium geſtum* for the Heir bound in Relief, and not for the neareſt of Kin whoſe Intereſt it was, not to quit their Mony without Neceſſity, upon Expectation of Relief; Nor yet was the *Negotium* perfected by actually working out the Relief againſt the Heir: And *Negotiorum Geſtio* doth not oblige where the Affair is neither Neceſſary, Profitable, nor Perfected, but meerly Spontaneous, and *novum Negotium*. 3. The Executor being *Curator Bonis*, or a Truſtee, could not by an ultroneous Payment burden the neareſt of Kin with the Expences of a Proceſs of Relief, more than a Curator to a Minor ingaged in Cautionry, could warrantably pay the Debt without Diſtreſs. 4. The Deciſions cited by the Defender touch not the preſent Caſe, which is not, Whether an Executor paying an heretable Debt may recur againſt the Heir? But, Whether an Executor doing this without Diſtreſs, and thereby underſtood to act rather for the Heir than the neareſt of Kin, without completing the Matter by recovering Relief, ſhould be left to ſeek his Relief off the Heir? 5. There is no Ground for the Executor to ſay, That the forehand Payment was a Piece of frugal or provident Adminiſtration, whereby any needleſs Expence to the neareſt of Kin was ſaved. For *non conſtat*, that ever the Executor would have been purſued; and if he had been purſued, he would have been aſſoilzied in the Caſe of a ſimple Annuity for Terms after the Debtor's Deceaſe. Nor do Creditors get Expences from Executors.

Duplyed. *Utcunque dies non cedit* in the Legacy of an Annuity, till after the Term of Payment: Yet in the Caſe of Annuities due by Stipulation or Contract, (ſuch as is the Subject of the preſent Controverſie) the Obligement takes Effect, and is binding from the Date, §. 3. *Inſtit. de Verborum Obligat.* And even a Liferent Annuity not acceſſory to a Stock, may burden and exhauſt the Executry, if the Creditor pleaſes, *quoad* Terms ſubſequent to the Debtor's Deceaſe, tho' with the Benefit of Recourſe for Relief againſt the Heir, if there was any Heretage, and that is all which my Lord *Stair* ſaith in the Place cited by the Purſuers. 2. An Executor's paying without a Decreet for his Warrant, can only be quarrelled by a Creditor of the Defunct, who is diſappointed by the Executor's partial Payment, and not by his neareſt of Kin, who have only Relief of heretable Debts againſt the Heir. Neither can the Payment made by the Executor be underſtood as a voluntary, but as a neceſſary and profitable Deed. For *quorſum* ſhould he have been at the Expence of warding off the Annuity till he was decreeted, when no Defence was competent to him. Seing *decernendus habetur pro decreto*; according to the Rule, *Cingendus habetur pro cincto*: And the Executor's Want of a Decreet cannot hinder the neareſt of Kin's Recourſe againſt the Heir, nor could his having ſuch a Decreet forward it. Neither doth any Law oblige the Executor after the Inventary is exhauſted, to commence any Proceſs of Relief for the neareſt of Kin againſt the Heir, in order to repeat what was paid to Creditors: Becauſe, the Office ends with exhauſting of the Inventary. 3. The Inference doth not hold from that of a Minor's Curator ultroneouſly paying a Cautionry for the Minor, *Intuitu* of the Minor's Recourſe for Relief. Becauſe the Executor after he is once lawfully exhauſted of the Defunct's Means, is no further concerned: But the Curator is concerned in the Minor's Eſtate. And yet the Minor being obnoxious to Payment as Cautioner bound conjunctly and ſeverally, the Curator ſhould not oppoſe it by ineffectual Reſiſtance. The Executor is not here demanding Repetition as a *Negotiorum Geſtor*, but Allowance of what he acted warrantably in the Terms of his Mandate, by the Nomination and Confirmation for negotiating the Inventary, as ſhould accord of the Law, which expreſly ſubjects the Inventary to heretable Debts, if the Creditor pleaſe.

The Lords refuſed to allow, as an Article of Exoneration, the Payment of the Annuity for Years ſubſequent to the Debtor's Deceaſe: As being an heretable Debt.

June 15. 1705. *Competition betwixt the Creditors of* William Walwood.

HEnry *Walwood* Merchant in *Edinburgh* having diſponed his whole Eſtate to *William* his eldeſt Son, with the Burden of Proviſions to *Henry* his ſecond Son, and *Helen* his Daughter; and *Henry* having aſſigned his Portion to *Robert Walwood* the Father's Brother: He transferred it under Truſt to *John Liberton* Merchant in *Edinburgh*, who Adjudged *William*'s Eſtate.

In the Ranking of *William Walwood*'s Creditors, it was alledged for *George Home* one of the Town Clerks of *Edinburgh*, That the Adjudication at the Inſtance of *John Liberton* is null; at leaſt ought to be reſtricted, as being led for more than was due. In ſo far as *Henry Walwood* was Debtor to his Brother in 250 Pound *Sterling* ſubſcribed for him in the *African* Company, which ſhould have been deduced off the Adjudication, at leaſt muſt be allowed to reſtrict the ſame For clearing of which Ground of Debt three Letters from *Henry* to his Brother *William* are produced. In one whereof he deſires *William* to ſubſcribe for him *Two or Three hundred Pound* Sterling *in the* African *Company*. In another he writes, *That* William *had informed him he had ſubſcribed for* 500 ℔. Sterling, *and deſires him to place* 250 ℔. *thereof to his Accompt*. And in a third Letter after the Company broke, *he deſired* William *to do for his Share of the Stock, as he was to do for his own*. From which Commiſſion to ſign, Acquieſcence in what was done, and Mandate to negotiate his Proportion of the Stock, *Henry* appears to be Debtor to *William* in the Half of the Subſcription Money.

Anſwered. The not allowing Compenſation, tho' *Henry Walwood* had been Debtor to his Brother for the 250 ℔. is no Nullity in the Adjudication: Since a Ground of Compenſation needs not to be noticed unleſs it be proponed; and is not receiveable after Decreet. 2. The Deſire of *Henry*'s Letters was never performed, nor complied with by *William*: Since he ſubſcribed the 500 ℔. for himſelf before receiving his Brother's Letter; and did not State the 250 ℔. to his Accompt; nor yet made or obliged himſelf to make any Transfer of the Share to *Henry*, while the Company's Circumſtances were intire. And now when *Res non eſt integra* with the Company, neither *William*, if he were alive, nor his Creditors can transfer.

The Lords repelled the Alledgeance of Extinction and Compenſation founded on *William Walwood*'s Subſcription in the Books of the *African* Company; and found the ſaid Alledgeance not inſtructed by the Writs produced.

June 16. 1705. Robert Hamilton *Merchant in* London, *againſt Mr.* William Livingſton *of Kilſyth*.

ROBERT *Obert Hamilton*, being Creditor to the Viſcount of *Kilſyth*, arreſted twice in the Hands of Mr. *William Livingſton* of *Kilſyth* his Brother, and raiſed a Forthcoming: In which Mr. *William* deponed, *That he was obliged to pay yearly to the Viſcount* 2000 *Merks of Aliment, and that Quarterly* per *Advance, conform to a Diſpoſition made by the Viſcount of his Eſtate to the Deponent, reſerving to himſelf the ſaid Annuity. And that the Time of the Arreſtment he was reſting none of theſe quarter Payments, they having been paid* per *Advance, and that he was Debtor no other manner of way to the Viſcount.*

The Defender craved to be aſſoilzied, in Reſpect Arreſtment cannot affect ſubſequent Terms, but only bygone Reſts, and the current Term, 28. *July* 1669, *Leſlie* contra *Cuninghame*. And he was reſting nothing of Bygones, and had paid *bona fide* the current Terms arreſted *per* Advance. For an Arreſter can be in no better Condition than the Perſon whoſe Debt is arreſted, where he can have no Action for direct Payment, neither can the Arreſter have for making forthcoming. Now the Time of the Arreſtment no Action was competent to the Viſcount for the current Term paid according to Paction *per* Advance, nor yet for a ſubſequent Term.

Alledged for the Arreſter. That the Viſcount's Aliment or Liferent being paid *per* Advance could never be arreſted, if the Arreſtment did not affect ſubſequent Terms.

Anſwered. The Aliment was fairly and juſtly Conſtituted without the leaſt Deſign to defraud any Creditor; and the punctual Payment *per* Advance according to Paction can be no Ground to alter the Caſe in Law. For no Man is bound to keep his Creditors Mony from him one Moment after it falls due to wait for Arreſters.

The Lords upon adviſing the Oath, with the Viſcount's Diſpoſition to the Deponent, found the Debt acknowledged to be of the Nature of a reſerved Liferent, affectable by Arreſtment; and therefore decerned.

June 19. 1705. *Mr.* William Stirling *Writer to the Signet, againſt* John M'reach, Thomas *and* Mary Alexanders.

A Gift of the Baſtardy and *ultimus Hæres* of *John M'reach* of *M'ilſtoun* having been taken in the Name of Mr. *William Stirling*, for the Behoof of Sir *Robert Grierſon* of *Lag* to whom he granted Backbond declaring the Truſt; and a Declarator being raiſed againſt *John M'reach* in *Glen*, and *Thomas* and *Mary Alexanders*, on whom *M'ilſtoun* had ſettled his Fortune by Proviſion, from which the Defenders were aſſoilzied: Mr. *William*, who but lent his Name to the Gift and Proceſs, was decerned in 300 ℔. of Expences of Plea; reſerving Relief to him as accords againſt the Perſons principally concerned.

Eodem die. *The Magiſtrates and Town of* Dumfreis, *againſt the Heretors upon the Water of* Nith.

THE Town of *Dumfreis* having formerly a Mill upon the Water of *Nith* a little above their Bridge, ſerved by a Damdike or Watercall croſs the Water, which by Torrents ſo pool'd and ſanded that the Water took another Courſe, and the Mill ſtood dry and uſeleſs: To obviate this Inconveniency, they fell to the building of a Mill and Watercall below the Bridge. Of which Work a Suſpenſion was procured at the Inſtance of the Heretors upon the Water of *Nith*, upon this Reaſon, That ſuch a Damdike would hinder Fiſhes to come up to the Bounds whereof they are Heretors, at leaſt to come over but with a dry Back, and ſo prejudge them of their Properties of Fiſhing more than Cruives and Yairs and other Engines for catching or preventing the ſwimming of Fiſh: Which are diſcharged in all freſh Waters where the Sea ebbs and flows; and where the Sea flows not, are allowed only to ſtand at certain Times of the Year under the Limitation of obſerving the *Saturday*'s Slop, Mid-ſtream, Wideneſs of the Hecks, and other legal Cautions for ſecuring the Liberty of Fiſhing. Therefore the building of the Damdike ought to be ſtopp'd as having a Tendency to elude the Laws in Favours of Fiſhing.

Alledged for the Town. They being Heretors upon both Sides of the Water, the *Alveus* is their Property, and they may build through their own Water as they pleaſe, tho' ſome accidental Prejudice may thence ariſe to the Heretors of the upper Fiſhing: As the building of a Houſe cannot be ſtopped upon the bare Pretence that it may damnify ſome Neighbours Lights. 2. Mill Dam-dikes being low, and not a Foot and a half above the ebbeſt Water, are no Hindrance to Fiſhes going over. 3. Cruives, Yairs, Nets and other Engines ſet on Purpoſe to catch Fiſhes have no Relation to Mill Dams, which are not deſigned for that End, but only for furniſhing of Water to Mills, that are very much privileged by our Law and Cuſtom. Beſides, this is not a *novum Opus:* For the Burgh had a Dike for their Mill near to the ſame Place, as high as the new One is to be, and as the former Dike had a Mid ſtream open nightly for a free Paſſage to the Fiſh, ſo ſhall this, which therefore can no more prejudge the Heretors than the former did.

Anſwered for the Heretors. The building of ſuch Dam-dikes being deſtructive to the Neighbours Property of Fiſhing that is ſo advantageous to the Nation, ſhould not be tolerated, altho there were no poſitive Law againſt it. Nor doth the Pretence of keeping open the Mid ſtream ſatisfie in Cruives where Perſons are legally inveſted with that Privilege; But the *Saturday's* Slop muſt be obſerved, and they cannot ſtand in the forbidden Time of Year: Which Cautions for the Safety of Fiſhing cannot take Place here, where the Dam-dike is to be fixed and conſtant. 2. *Eſto* the Town were founded *in Jure* as to a Dam-dike above the Bridge, they cannot alter the Situation: Privileges which incroach upon the Rights of Third Parties being *ſtrictiſſimi Juris*, and not to be extended.

The Lords granted Commiſſion to the Sheriff-depute of *Dumfries*, to examine Witneſſes upon the Place concerning the old Dam dike, as to its Height, and as to the Wideneſs of the Slop or Gullet for the Mid-ſtream, whether the ſaid Mid-ſtream was conſtantly keeped open, and if the new Dam-dike be conform to the old; or upon any other pertinent Interrogatory. And allowed the Work to proceed in the mean time, with this Quality, That the ſame ſhould be conſidered, and regulated at adviſing of the Probation, as if no ſuch Allowance had been granted.

June 20. 1705, *Captain* John Grant *of Eaſter* Elchies *as Aſſigny by* Archibald Innes *of* Auchluncart *againſt Major* Alexander Anderſon.

IN the Action at the Inſtance of Captain *Grant* againſt Major *Alexander Anderſon*, for Payment of 79 ℔. *Scots* contained in his Ticket, whereby he ſtood obliged to hold Compt for that Sum to *Innes* of *Auchluncart* the Purſuer's Cedent; the Ticket being quarrelled as Null for want of Writer's Name and Witneſſes: The Purſuer offer'd to prove by the Defender's Oath, That he both wrote and ſubſcribed the Ticket. And he having in his Depoſition acknowledged the ſame to be Holograph, but that he had in the Terms thereof, compted with *Auchluncart* for the Mony: The Lords found the Oath ſupplied the Nullity of the Ticket, and the Quality to be extrinſick, and therefore Decerned. Albeit it was alledged for the Defender, That the Defects of the Ticket being only ſupplied by his Oath, the Oath could not be divided. 2. The Ticket is not of the Nature of a clear and liquid Obligation, where one obliges himſelf to pay a Sum, but is allennerly to hold Compt, which of it ſelf implies, That the Perſon to whom it is granted is Debtor on the other Hand, and that there are mutual Claims; upon which the Defender having deponed, That ſeems to make a complete Probation.

Then the *Defender* offer'd to prove by the Cedent's Oath, That he did

Compt with him in the Preciſe Terms of the Note for the Sum, and allowed the ſame in the firſt End of what he was reſting at the Time of the Compting: which muſt prove againſt the Purſuer, tho an Aſſigny for an onerous Cauſe; ſeing the Obligement is only to compt for the Sum.

Anſwered for the Purſuer. If the Defender had compted with *Auchluncart*, he would either have got a Writ under his Hand acknowledging ſo much, or retired his own Note: Neither of which is done. 2. The Cedent's Oath ought not to be taken to the Prejudice of his Aſſigny; Nor even the Aſſigny's Oath after a Cauſe is thus concluded, where the Oaths may claſh, and prove contradictory. But if the Lords incline to Ordain the Cedent to Depone, the Purſuer acquieſceth ſo be, it is with the Burden of all Expences deburſed in the Proceſs.

The Lords allowed the Cedent's Oath to be taken *cum Onere Expenſarum*.

June 21. 1705. *The Lady* Innerleith *and Mr.* James Cathcart *her Aſſigny, againſt Sir* William Cockburn *and* John Renton *of* Lamertoun *and his Tenants.*

IN an Action for Mails and Duties againſt *John Renton* of *Lamertoun* and his Tenants, at the Inſtance of the Lady *Innerleith*, as deriving Right from the deceaſt Sir *James Rochead* her Husband, to an Adjudication led upon Bonds granted to him by the Lairds of *Langtoun* and *Cockburn* as Principals, and *Lamertoun* and the Lord *Sinclair* as Cautioners.

Alledged for the Defenders. The Adjudication is null, being led for more than was due: In ſo far as the Sum adjudged for is accumulated at a Term prior to the Date of the Adjudication; and the Annualrents thereof till that Time are a clear Overcharge, and the ſame thing upon the Matter, as if the Lands were decerned to belong to the Adjudger at a Term preceeding the Adjudication.

Anſwered for the Purſuer. If accumulating the Sums at a Term preceeding the Date of an Adjudication were ſuſtained as a Nullity, few Adjudications in *Scotland* would be unquarrellable, and ſafe from overturning: For nothing is more ordinary. But here Annualrents are only decerned from the Date of the Adjudication; So that the Debtor hath no Prejudice, and the *Pœna plus Petitionis*, which is the legal Foundation of the objected Nullity, cannot take Place. Again, tho the Sum be accumulated at a preceeding Term, the Lands are only adjudg'd from the Date of the Decreet: and the Adjudication contains no legal Aſſignation to Mails and Duties with a Retroſpect.

The Lords found no Nullity or Ground of Reſtriction in the Adjudication. For they made a Diſtinction betwixt Adjudications accumulating at a preceeding Term without decerning for Annualrents from that Term, and ſuch as decern for Annualrents from the Date of the Accumulation: holding that the firſt Sort ought to be ſuſtained, and the Latter annulled or reſtricted.

June 22. 1705. William Fead *againſt* John Ewart *Merchant in* Edinburgh.

W*illiam Fead*, Executor of *Robert Fead* Merchant in *London*, having charged *John Ewart* upon a Bond granted by him to *Robert Fead*: He ſuſpended upon this Reaſon, That the Creditor in the Bond had by Commiſſion uplifted from the Lord *Glaſsford* at *London*, the equivalent Sum belonging to the Suſpender, for which he ſtood liable to hold Compt to him conform to a Back-bond.

Anſwered for the Charger. That the Mony uplifted from *Glaſsford* was otherways ſatisfied, in ſo far as the Charger did formerly remit the ſame by a Bill drawn by *Walter Ewing* Merchant in *London*, upon his Brother *John Ewing* Writer in *Edinburgh* payable to the Suſpender.

Replyed for the Suſpender. *Ewing*'s Bill was proteſted for not Acceptance, and a proteſted Bill is no Payment. Nay further, The Drawer was utterly broken and gone off before the Term of Payment. *2do, Non conſtat* that *Ewing*'s Bill was granted for *Ewart*'s Mony, but more probably it was for a deſperate Debt due by *Ewing* to *Fead* himſelf. 3. The Suſpender having given no previous Order to *Fead* for the remitting *Glaſsford*'s Mony by Bill, the Risk of *Ewing*'s Draught could not lie upon him, more than a Debtor ſending Mony by Poſt to his Creditor could pretend, That the miſcarrying thereof is a Loſs to the Creditor. 4. *Fead* not only had no Mandat to remit the Mony, but was expreſly obliged by his Back-bond to compt for it to *Ewart*, and therefore could not at his own Hand remit the ſame. But ſhould have kept it till either *Ewart* had Occaſion for it at *London*, or gave Orders to diſpoſe on't otherways.

Duplyed for the Charger. 1. That he having remitted the Mony by way of Bill from *Walter Ewing*, a Perſon held and reputed Reſponſible the Time of the Draught, the not Payment was upon *Ewart*'s Peril. 2. The Bill muſt be preſumed drawn for the Suſpender's Mony, being payable to him or Order, and ſent down to *Scotland* within Twenty four Hours, or thereby after Mr. *Fead* received it from my Lord *Glaſsford*; and was indorſed by *Ewart* when it came to his Hands in Favours of Mr. *Fead*. 3. Mr. *Ewart* did not return the proteſted Bill in due Time, that Mr. *Fead* might have done Diligence againſt *Ewing*, before he abſconded. 4. Mr. *Fead* who was Factor for *Ewart*, and doing him the Favour to recover *Glaſsford*'s Mony, acted *bona fide* as other prudent Men in taking Bills for it upon *Edinburgh*, from a Perſon of entire Credit at the Time, whoſe Breaking and Inſolvency could not be foreſeen. And as this was a due and faithful Negotiation: ſo it was acquieſced to, and ordered by *Ewart* himſelf, as moſt ſuitable to his Conveniency, and the Exigence of his Affairs. For in a Letter to Mr. *Fead* before Notice of any Payment made by *Glaſsford*, he ſays, *A hundred and fifty Pound* Sterling *would do him great Kindneſs, in order to the paying a Sum to Sir* William Maxwell who lives in *Scotland*. By two other Letters importing his Knowledge that *Glaſsford*'s 150 ℔. was payed, and ſignifying to *Fead*, That he had received and proteſted *Walter Ewing*'s Bill for not Acceptance: He writes, *That he believes the Mony is ſafe, but fears Sir* William Maxwell, *whom he had poſitively aſſured of his Sum againſt a preciſe Day, might be diſappointed through the not Payment of* Ewing'*s Bill. And therefore intreats* Mr. Fead *for ſaving his Credit, to order* 160 ℔. *payable to him at* Edinburgh, *coſt what it will, and he ſhould be at no Loſs.* Accordingly Mr. *Fead* ſent him a Bill upon his Correſpondent for the 160 ℔. who took Mr. *Ewart*'s Bond for it payable to *Fead*. After this Mr. *Ewart* by his Letter to Mr. *Fead*, *acknowledges the Receipt* of the 160 ℔. and ſays, *That he needs not fear his Mony, having been ſo kind as to help him then, which, if there come no Effects of* Ewart'*s into his Hands before the Term of Payment, ſhall be in readineſs on a ſhort Warning at the preciſe Day.* The haill Strain of which Letters imply a Warrant for ſo remitting the Mony, at leaſt an Homologation thereof. For he inſinuates a Deſire to have *Glaſsford*'s Mony remitted to *Scotland* for ſupporting his Credit with Sir *William Maxwell*, whom he had aſſured of Payment. And for ſupplying the Want thereof, moſt earneſtly writes for the 160 ℔. promiſing Payment faithfully, both by Letters and the Bond Charged on: which he would not have done, had *Glaſsford*'s Mony been remitted without his Conſent; But would certainly have challenged *Fead* for ſo doing, and deſired him to pay it himſelf. And as the Remiſe of *Glaſsford*'s Mony by Bill to *Edinburgh*, cannot be pretended an unwarrantable Step of Procedure in Mr. *Fead*, upon the Account of *Ewart*'s Acquieſcence, and the Drawer's Solvency at the Time: Neither is there any Ground for Mr. *Ewart* to obtrude Compenſation on the other's Back-bond concerning *Glaſsford*'s Mony, againſt his own 160 ℔. *Sterling* Bond Charg'd on; Albeit *Fead*'s Way of remitting *Glaſsford*'s Mony to *Scotland* had been quarrellable. Becauſe, Compenſation that is but tacitely paſt from, can never be afterwards recurred to, *27th February* 1668, *Henderſon* contra *Birnie*: Where the granting a Bond blank in the Crditor's Name was ſuſtained as a paſſing from Compenſation upon a Debt due by the Receiver againſt a ſingular Succeſſor, whoſe Name was filled up in the Blank. And ſo it is that *Ewart*'s Letters abovementioned, are ſtrong Evidences of his having renounced the Benefit of Compenſation, upon Mr. *Fead*'s Back-bond; Particularly the laſt, whereby he ſtates himſelf in the Caſe of one who abſolutely promiſed Payment at his Day, except in the Event of his Effects coming afterward to be lodged with Mr. *Fead*; And not being able to ſay, That any ſuch Effects fell into his Hands after the ſaid Promiſe and Bond charged on: he *Ewart* muſt be underſtood to have renounced all Exceptions, and Objections that might be founded on the ſaid Obligement and Bill for the 150 ℔.

Triplyed for the Suſpender. 1. Until the Delivery of the individual Mony received from the Lord *Glaſsford* be proved, it muſt be preſumed, That Mr. *Fead* a *Scots* Man and Factor would keep it himſelf, and draw Bills for it upon *Scotland*, rather than put it in *Ewing*'s Hand, who could not but be in a tottering Condition, having turn'd Bankrupt ſo ſuddenly thereafter. As for *Ewart*'s indorſing the Bill in Favours of *Fead*; That argues, If any thing, that he did not accept it in Satisfaction of *Glaſsford*'s Debt: For it is not ſuppoſeable he would then have aſſigned it to *Fead*. But it was juſt and honeſt for *Ewart* to indorſe it to *Fead*: Becauſe he having taken the Bill in Mr. *Ewart*'s Name without his Knowledge, could make no Uſe on't, had not ſuch an Indorſement been granted. 2. As to the Pretence that the Bill was not timeouſly return'd for doing Diligence againſt the Drawer; for Suſpender cannot prove, now after *Fead*'s Death, What Time the Bill and Proteſt were returned to him: he having the Inſtructions thereof himſelf. But the Bill being produced by the Charger who is *Fead*'s Executor, 'tis very probable he got it in due Time; elſe he had not accepted it. But then again, ſuch an Alledgeance is frivolous, ſince it is known, that by the *Engliſh* Law a Perſon may be arreſted without Inſtruction of Debt againſt him. 3. Mr. *Fead* being obliged in his Back-bond to hold Compt for *Glaſsford*'s Mony, he was *in mala fide* to remit it by Bill without ſpecial Warrant. Nor doth it better his Caſe, That we conſider him as a Factor: ſeing it is a receiv'd Maxim, even among Merchants, that *delegatus non poteſt delegare*, one Truſtee cannot ſafely truſt another. As to the Pretext of Homologation of the Remit by writing the Letters, and granting the Bond, Approbation or Homologation is never inferr'd from a Deed that is capable of another Conſtruction: For *Reſpiciendum quod Actum eſt, et agentium actus non Operantur ultra eorum Intentionem*. But here the Suſpender's Deſign was not to Diſcharge the Back-bond, but only to borrow Mony for ſupplying his preſent Neceſſity, and to Repay, if Mr. *Fedd*'s Occaſions ſhould peremptorily call for it, before recovering Payment of *Ewing*'s Bill. Whereas at the ſame Time Mr. *Ewart* knew that *Fead*'s Obligement to hold Compt was ſtill Effectual to him, either for purſuing Payment of the Sum therein-contained, or to compenſe the Bond charged upon. Nor is it of any Moment, That *Ewart* granted the Bond for borrowed Mony after the Date of *Fead*'s Back-bond: For in every Compenſation almoſt, the one Debt is contracted before the other. And a Charge upon a Bond granted to one who was Debtor to the

Granter by a former Bond, hinders not the Debtor in the laſt Bond, either to Compenſe, or Charge for Payment, upon the firſt, as he thinks fit.

The Lords having conſidered *Ewart*'s Letters, find that Mr. *Fead* acted warrantably in remitting the Mony; *Ewing* being held and reputed in good Condition, and Solvent the Time of the Draught; and therefore repelled the Compenſation.

Eodem Die. *Mr.* William Irving *Miniſter of the Goſpel, Againſt* Patrick Crawford *Merchant in* Edinburgh.

T*Homas Gordon* being Debtor to the Earl of *Caſſils*, Mr. *William Irving*, to whom the Earl was Debtor, arreſted firſt in the Hands of *Gordon*, and obtained a Decreet of Forthcoming; then he arreſted in *Patrick Crawford*'s Hands as Debtor to *Thomas Gordon*, and purſued a Forthcoming, wherein the Defender deponed, *That he was no ways Debtor to* Thomas Gordon, *but only in ſo far as by a Decreet-Arbitral, he is decerned to pay to him and his Wife in Liferent for their Aliment the Annualrent of* 3000 *Merks, and the Fee to their Children, which Sums are declared not affectable by* Thomas Gordon's *Creditors.*

Alledged for Crawford. That he could not be decerned againſt in the Forthcoming, the Annualrent of the 3000 Merks due to *Gordon* being alimentary, and not affectable by his Debts.

Replyed for the Purſuer. The 3000 Merks being the proper Effects of *Thomas Gordon*, neither he nor the Arbiters could alter or invert the Nature thereof by making it Alimentary, or declaring it not to be ſubject to the Diligence of his Creditors. For no Man needed to trouble himſelf about the Payment of his Debts, if he could declare his own Eſtate free from Diligence.

The Lords found, That after *Gordon* was Debtor to the Earl of *Caſſils*, The Decret-Arbitral could not prejudge the Earl; and conſequently that the Annualrent of the 3000 Merks was arreſtable.

June 23 1705. John Matthie *Skipper in* Preſtonpans, *againſt the Commiſſar-Clerk of* Edinburgh.

THe ſaid *John Matthie* having caus'd regiſtrate a Bond due to him in the Commiſſar-Books of *Edinburgh*, and having afterwards Occaſion to raiſe an Adjudication for the Debt, which could no be done effectually upon an Extract out of theſe Books; and the Commiſſar-Clerk having refuſed to reſtore the Principal upon getting back Extract; Becauſe the Bond was booked: Application was made to the Lords of Seſſion by a Bill for a Warrant to the ſaid Commiſſar-Clerk, or his Deputes, to give up the principal Bond to be regiſtrated in the Seſſion-Books, in Order to found a legal Diligence for making the Debt effectual.

The Lords granted the Deſire of the Petition.

Eodem Die. Helen *and* Margaret Murrays *Children to the deceaſt* Patrick Murray *Merchant in* Edinburgh, *againſt* James Murray *of* Deuchar.

J*Ames Murray* of *Deuchar*, and Mr. *William Monipenny* Advocate, having been the only accepting Tutors nominate to *Helen* and *Margaret Murrays*: The Lords ſuſtained Action of Compt and Reckoning at their Inſtance, againſt the ſaid *James Murray*, and the Repreſentatives of Mr. *William Monipenny*, without Neceſſity to call the reſt of the Tutors named, who never accepted nor acted.

June 26, 1705. Janet *and* Iſobel Robertſons *againſt Commiſſar* Baillie.

IN the Action of Compt and Reckoning betwixt theſe Parties, called upon the 13th Day of *June* inſtant, the Lords having repelled the 1400 Merk Article of Exoneration, and found Commiſſar *Baillie* liable to the Purſuers, as neareſt of Kin to Baillie *Robertſon*, in a certain Superplus of the Inventary not exhauſted; They craved Annualrent for the ſaid free Superplus, upon the following Grounds, 1. *Nummi pupillares non debent eſſe inutiles vel otioſi*: Therefore Annualrent ought to be decerned *Nomine Damni*; And as ſome Sums in the Inventary are mentioned to bear Annualrent, all are preſumed to be of that Nature. 2. The neareſt of Kin are Legatars *quoad* the Superplus of the Executry: And by *L.* 3. *§. ult. l.* 34. *ff. de Uſuris*, Annualrent is due for Legacies. Yea, a Father intrometting with a Legacy left to his Child, or the Mother's Third of Moveables falling to that Child, was found liable for Annualrent thereof, *February* 4 1665, *Begg* contra *Begg*; *December* 15. 1688, *Wynram* contra *Ellies*. And what holds in the Caſe of a Father cannot fail to be ſuſtained againſt a Step-Father. 3. The Defender acted, and muſt be liable to the Purſuers, as their Protutor, by the Act of *Sederunt*, *June* 10. 1665, at leaſt for Annualrent of their Means intrometted with by him, while they were Minors.

Anſwered. The Inventary was not given up by the Defender, but by the Defunct himſelf in his Teſtament, who may be ſuppoſed to have known the Nature of his Debts and Gear beſt: And the Lords are not in Uſe to allow Annualrents in Name of Damages to any but Trading Merchants for Commerce Sake. 2. *Eſto*, the Parity did hold betwixt the Intereſt of the neareſt of Kin as ſuch, and that of Legatars: Yet the *Roman* Law and Ours differ as to Annualrents in this, That regularly our Law never allows Annualrent but *ex Pacto vel Lege*, unleſs to Merchants *Nomine Damni*, whereas the *Roman* Law allows of it *in bonæ Fidei Judiciis ex mora*. 3. The Act of *Sederunt* 1665 can neither make the Defender Protutor, nor ſubject him to Annualrents, becauſe, 1. It has no Retroſpect; And the Defender was confirmed Executor before the Date on't. 2. It relates only to ſuch as intromet without any Title, whereas the Defender's Title of Intromiſſion was a confirmed Teſtament.

The Lords found Annualrent due for the Sums in the Inventary bearing Annualrent, and that from the Date of the Confirmation; but not for other Sums which were not mentioned in the Teſtament, as bearing Annualrent.

Eodem Die. *Mr.* Alexander Heggins *Advocate, and Procurator-Fiſcal in the High Court of Admirality, againſt Sir* Alexander Brand *of* Brandfield.

THE *Catharine* of *Rotterdam* and it's Cargo being Adjudged as Prize by Sentence of the Admiral, and the Wines aboard that Ship expoſed by his Order to a publick Roup, whereof it was a Condition and Article, That the greateſt Offerer ſhould be preferred, upon giving Bond and ſufficient Caution to pay the Price offered to the Clerk of Admirality within 10 Days, under the Penalty of 2000 *Lib. Scots*; Sir *Alexander Brand* was preferred as the higheſt Offerer, and ſigned the Articles and Conditions of Roup; who having failed to perform, was purſued before the Admiral Court at the Inſtance of Mr. *Alexander Heggins* Procurator-Fiſcal there, for Payment of the 2000 *Lib.* of Penalty.

Sir *Alexander* raiſed Advocation of the Proceſs upon the Head of Incompetency, alledging 1. That albeit the Admiral was the only proper Judge in the firſt Inſtance to the Roup of the Wines declared Prize; Yet after the Roup was over, he was not competent to determine how far the Defender had incurred the Penalty, which is a liquid Sum of Mony, and no Maritime Subject. 2. The Purſuit being at the Procurator-Fiſcal's Inſtance, for the Behoof of himſelf and the Admiral Court, if the Judge Admiral ſhould determine therein, he would be both Judge and Party.

Anſwered. If the Admiral had not Power to judge of Penalties incurred thro not fulfilling of the Articles of Roup, his Juriſdiction would be altogether Eluſory, and Inſignificant: *Et conceſſa Juriſdictione, omnia conceſſa videntur, ſine quibus explicari non poteſt.* 'Tis ridiculous to alledge that the Judge Admiral cannot determine in Penalties conſiſting of liquid Sums: For then he could not judge of Penalties in Charter Parties. 2. He is moſt competent to judge as to the Penalty, tho' ſome Part of it be to come to his own Uſe: For what is more ordinary, than for Sheriffs and Baillies of Regality to decern for Payment of Fines in Proceſſes at their Procurator-Fiſcal's Inſtance, albeit theſe Fines belong to themſelves? And this holds in the Contravention of all Penal Statutes. And here there is a *Jus quæſitum* to the Court of Admirality, by the Defender's obliging himſelf to give Bond and Caution to the Clerk, for Payment of the Price of the Wines bought by him under the foreſaid Penalty: And he having failed to perform, the Admiral is only Judge competent to cognoſce how far the Penalty is incurred.

The Lords repelled the Reaſon of Advocation, and remitted the Cauſe.

Eodem Die. *Competition betwixt* Alexander Stuart *of* Torrence *and* Walter Stuart *of* Pardovan, *as Creditors of* Bonhard *and* George Dundaſs.

W*Alter Cornwall* of *Bonhard* having upon the 27th of *February* 1700 granted an heritable Bond to *George Dundaſs* Merchant in *Leith*, for the Sum of 10600 *Lib.* payable at *Lammas* thereafter, with Annualrent commencing from the preceeding *Candlemaſs*, and in Time coming after the Term of Payment, upon which no Infeſtment followed. *Walter Stuart* of *Pardovan*, a Creditor to *George Dundaſs*, did raiſe Summons of Adjudication of that Mony, which was Executed 6 *July* 1700, and obtained Decreet 20 *Feb.* 1701. *Alexander Stuart* of *Torrence* another Creditor arreſted it 9 *July* 1700, and obtained a Decreet of Furthcoming upon the 9 *July* 1701. There aroſe a Competition betwixt theſe Creditors, each of them claiming to be preferred upon his Diligence.

The firſt Ground of Preference urged for *Torrence* was, That his Arreſtment had been laid on before the Term of Payment of either Principal or Annualrents, at which Time the Bond was purely moveable, and not affectable by Adjudication. Becauſe if *George Dundaſs* had died when Arreſtment was uſed, or at any Time before *Lammas* that Year, the Sum had not gone to Heirs, but to Executors and neareſt of Kin, as being moveable in the Conſtruction of Law, 29 *June* 1624, *Smith* contra *Anderſon*'s Relict. Or if he had been denounced to the Horn before *Lammas*, and his Eſcheat duly gifted and declared, the Donatar would have had Right to it: Bonds heretable by a Clauſe of Annualrent being moveable to all Intents and Purpoſes before the firſt Term of Payment of the Annualrent. And the Reaſon is, Becauſe till then they are not conſidered as *Jura fixa*, but rather as ſo much Mony in the Creditor's Hands unſettled. Now if the Creditor had intended to have the Bond in Queſtion debord from the common Nature of Bonds bearing Annualrent, he would either have ſecluded Executors expreſly, or taken Infeſtment before the Term. And ſeing he did not what he might have done, Law preſumes his Deſign was the Bond ſhould continue purely moveable, until the firſt Term of paying Annualrent.

Anſwered for **Pardovan**. That by the 32 Act, 1. Parl. *Ch.* II. declaring all Bonds moveable, except where they contain an Obligement to infeſt, or ſeclude Ex-

Executors, the Nature of Bonds bearing Annualrent was not changed, but they are only made moveable, by Way of Privilege, as to neareſt of Kin Executors and Legatars. And therefore where the Queſtion is not betwixt Heirs and Executors, Bonds bearing Annualrent retain ſtill their Nature of heretable, and adjudgeable as before the Act of Parliament 1641. 2. The Bond in Queſtion was heretable in the Terms of the 32 Act, Parliament 1661, in ſo far as it contained an Obligement to Infeſt which imported the Creditor's Deſign to have the Sum heretably ſecured; and albeit the 51 Act of that ſame Parliament *Declares Bonds bearing Annualrent whereon Infeftment never followed to be arreſtable*; it provides at the ſame Time, *That this ſhall no ways change the Nature of the ſaid Sums, nor prejudge any Perſons as to their heretable Rights to the ſame.* It matters nothing that neither the Term of Payment of the Sum, nor of the Annualrent was come: For the Bond of its own Nature by the Conception on't was as much heretable in the Senſe of Law the very Minute it was ſubſcribed, as if actual Infeſtment had then been taken. In which Caſe it could not have been controverted but that the ſame was adjudgeable even tho' the Creditor had died the very next Day. But whatever might be pretended in the Caſe of a Creditor's dying before the Term of Payment, that doth not meet the preſent Queſtion: For the Reaſon why Sums in that Caſe are found moveable is, becauſe the Clauſe adjected for Payment of Annualrent at the Term doth not take Effect in the Defunct's own Time, ſo as to make it profitable to his Heir. Whereas here the Creditor is ſtill alive, and the Bond carried Annualrent from the Date; and ſo being eſſentially heretable, it matters not tho' the Term was not come, the Time of the Citation upon the Adjudication. This is confirmed by Deciſions, *Jan.* 8 1624, *Bairns of Colonel* Henderſon *contra* Murray; *July* 31 1666, Gray *contra* Gordon, obſerved by *Dirletoun.* And albeit the Citation upon the Adjudication was before the Term, the Day of Compearance was after. Therefore the Bond was certainly heretable at the obtaining of the Decreet of Adjudication.

Replied for Torrence. There is no Ground in Law or Cuſtom for a Diſtinction betwixt heretable and moveable Bonds as to the Effect of Succeſſion, and as to the Effect of Creditors Diligence: For its certain that all Bonds whereupon Infeſtment hath not followed are moveable before the Term of Payment, or firſt Terms Payment of Annualrent, *quoad Creditorem.* 2. As to the Caſe of *Colonel* Henderſon's *Bairns contra* Murray, *January* 8 1624, the ſame reſpects only the Terms Annualrent of the Sum falling due after the Creditor's Death, where there had been Infeſtment on the Bond before: For elſe there had been no Controverſie, ſeing the current Term's Annualrent is certainly moveable. And in the Deciſion *Gray* contra *Gordon*, the Bond did only bear Annualrent after the Term, which was caſt at the Diſtance of ſome Years from the Date, and the Creditor's Deceaſe, and was found to be heretable in Favours of an Aſſigny, againſt the Fisk and Donatar of Eſcheat who is odious. 2. The Act of Parliament 1661, whereby Debts not ſecured by Infeſtment may be either arreſted or appriſed, is not to the Purpoſe, for it doth expreſly preſuppoſe an heretable Subject which in former Times was not arreſtable, and allows the ſame to be arreſted now. Without prejudice to theſe that have a Mind to compriſe the ſame in a habile Way; *viz.* After they are become heretable by elapſing of Terms. 3. The whole Proceſs and Decreet of Adjudication muſt derive its Force and Virtue from the Summons and Citation, which is *primus Actus Judicii:* In ſo much that if the Subject was not heretable or adjudgeable then, the Summons and Citation were null, and the Decreet following thereon inhabile and incompetent; according to the Rule of Law, *Quod ab initio vitioſum eſt tractu temporis non convaleſcit.* Therefore Arreſtment uſed by *Torrence* while the Subject was affectable by no other Diligence, followed with a legal and formal Decreet of Forthcoming, muſt undoubtedly be preferred to

Pardovan's Adjudication, upon a Citation when the Subject was incapable to be affected by ſuch a Diligence.

The Lords conſidering that by the 51 Act Parliament 1661, heretable Sums before Infeſtment actually taken, were capable either of Arreſtment or Adjudication; and that it was the Intereſt of Creditors to have as many ways as Law can allow to affect their Debtors Eſtates: Therefore they found the heretable Bond adjudgeable before the Term of Payment, as well as arreſtable.

Alledged for Torrence. That he ought to be preferred on his Arreſtment, tho' poſterior to the Citation in the Adjudication. Becauſe, Citations proceeding upon blank Summons's clear nothing of the Purſuer's Deſign, and put no Reſtraint upon the Receiver; all their Effect being only to render the Subject litigious: Whereas Diligence of Arreſtment, how ſoon laid on, is a *Nexus realis*, the Copy bears expreſly the Uſer's Intention, and puts the Receiver in *mala fide* to diſpoſe of the Subject affected. So that the Act of Parliament 1672, declaring Citations of Adjudication equivalent to a Compriſing clothed with Infeſtment, is only underſtood to take Effect in a Competition with voluntary Rights, and not to prejudge legal Diligence, ſuch as Arreſtment; *Newtoun Deciſ.* 1. February 1684, *Competition betwixt* Anderſon *and* Crichtoun. For if a Summons of Adjudication were a Diligence of that Nature and Efficacy to draw back the ſubſequent Decreet to it's Date, an Adjudger would have Right to all the Fruits, Acceſſions and Profits from the Citation, whereas the Decreet carries only Right to theſe from the Date on't; and is but effectual from that Time as to the Benefit of Year and Day, and coming in *pari paſſu* with the firſt effectual Adjudication. Arreſtment on the other Hand doth ſo fix the Subject on't, as the Decreet of Forthcoming is always effectual, and carries the Profits and Conſequences from the Time of the Arreſtment, whereby the Property ſeems to be tranſmitted. For the Deſign of a Forthcoming is not ſo much to complete the Right acquired by Arreſtment, as for declaring that the Arreſter hath not paſt from his Diligence, and for certiorating the Debtor in whoſe Hands the Arreſtment was uſed, and to lay the Foundation of Diligence againſt him. Yea, an Arreſtment uſed before the Term of Payment hath been preferred to an Appriſing obtained before, and completed by Infeſtment after the Term before the Decreet of Forthcoming; *July* 2. 1667, *Litſter* contra *Aiton and Sleich.* Where it might have been pleaded that the Appriſer had the firſt complete Diligence, and the Arreſter had no Benefit of the Priority; both Arreſtment and Appriſing being before the Term of Payment: But yet the Decreet of Forthcoming was drawn back to the Date of the Arreſtment, and preferred to the interveening complete Diligence by Appriſing and Infeſtment. So that the common Brocard of *prior tempore potior jure*, and of the firſt inchoat and firſt complete Diligences are not to be mentioned here: For theſe take only Place in Competition of Diligences of the ſame Kind that are effectually completed after the ſame Manner. 2. As *Torrence*'s Decreet muſt for the Reaſons foreſaid be conſidered in Law as of the ſame Date with the Arreſtment, and therefore prior to the Decreet of Adjudication: So he was *in curſu diligentiæ* from the laying on of his Arreſtment, and *per eum non ſtetit* that his Decreet of Forthcoming was not obtained before the other's Adjudication; and if the Courſe his Forthcoming required, took up more Time than *Pardovan*'s Adjudication; that that ought not to prejudge him a lawful Creditor who was never *in Mora*.

Anſwered for Pardovan. The Citation upon the Adjudication is a Diligence affecting the Subject as really, as Arreſtment doth that which is arreſted. And an Execution of Arreſtment is as general *arreſting all Sums of Mony or Goods in ſuch a Perſon's Hands due or belonging to the Arreſter's Debtor, for ſatisfying the Debt which was the Ground of the Arreſtment.* The Notion that Arreſtment lays on a *nexus realis*, has no Foundation in our Law, and the contrary is clear from many Inſtances: As a Creditor may poind, notwithſtanding of a prior Arreſtment; a ſecond Arreſter inſiſting with Diligence in his Forthcoming is preferable to the firſt who has been *in Mora*; and Arreſtment upon a depending Action may be looſ'd upon Caution. But an Arreſtment is only a legal Prohibition to alter the Condition of the Thing arreſted, or to pay the Arreſter's Debtor: And if the Perſon in whoſe Hands Arreſtment is laid on happen to die before complete Diligence by Forthcoming, the Arreſtment falls to the Ground, and the Defunct's Succeſſor may ſafely pay and diſpoſe of the Subject arreſted; which ſeems inconſiſtent with the Nature of a *Nexus realis*. 2. The Act of Parliament 1672, makes a Citation upon a Summons of Adjudication equivalent to an Appriſing with Infeſtment thereon: So that the Citation in the Adjudication was a complete Diligence without the Decreet, at leaſt preferable to the inchoat prohibiting Diligence of Arreſtment. Which is clear from the 51 Act, Parliament 1661, that introduces the Privilege of arreſting heretable Debts not ſecured by Infeſtment: For there it is expreſly declared that the Act is without Prejudice to the Compriſing of heretable Sums by ſuch as think not fit to arreſt. whence it follows, that every Step of Diligence in the Compriſing or Adjudication prior to the other Diligence of Arreſtment, is alſo preferable. The ſingle Deciſion 1684 doth not meet the preſent Caſe. For there Arreſtment was laid upon the bygone Rents of Lands in the Hands of Tenants, and was certainly prior to the Citation upon the Summons of Adjudication: Seing the Lords found the Citation ought not to prejudice the Arreſtment. But our Queſtion is about the Stock or Subject it ſelf, and not concerning Rents or Profits; and the Decreet of Adjudication is prior to the Sentence of Forthcoming. It avails not, that the Arreſter was *in Curſu Diligentiæ*, and could not by the Courſe of the Rolls bring in his Action ſooner: For *ſibi imputet*, that his Forthcoming was not decerned aſſoon as the Adjudication; ſeing the former might have been ſummarly diſcuſſed as the latter was, upon Application to the Lords repreſenting that the common Debtor, had not *perſonam ſtandi* by Reaſon of Hornings and Captions. Now Adjudication being a proper Diligence for affecting the Subject, and the legal Steps of Form being obſerved; if it fell to be decerned before the Forthcoming could be brought to a Period, 'tis a Privilege allowed by Law to the Uſer of that Way of Diligence; and the Arreſter who chus'd rather to proſecute his Claim by a more tedious Method, has himſelf to blame if he find not his Account in the Procedure.

Replied for Torrence. Arreſtment is certainly a more fix'd and ſpecial Diligence than a Summons of Adjudication, which mentions no Subject, tells neither where nor by whom due, and differs ſomething from a Denunciation of Appriſing. The *Nexus realis* of an Arreſtment is not carried ſo high, as to be like a real Infeſtment upon Lands, but is only pleaded as a Piece of Diligence effectual to draw back the Decreet of Forthcoming to the Date on't, *tanquam ad ſuam Cauſam*; which Effect a Summons of Adjudication hath not. Tho' a Creditor might poind without regard to a prior Arreſtment, that doth not weaken the *Nexus*, as to the other Effect in a Competition with an Adjudication: But only argues that Poinding is a Diligence of a diſtinct Nature from both; being a Decreet and preſent Execution at the ſame Time, whereby the Subject arreſted is taken away that it cannot be made Forthcoming. But where the Subject continues extant in the Debtor's Hand, it muſt be made Forthcoming *cum omni Cauſa* from the Date of the Arreſtment: And if a ſecond Arreſter be preferred to the firſt, it is becauſe the firſt hath been negligent; which cannot be charg'd upon *Torrence*. Nor is his Arreſtment looſable upon Caution: And if it were, then Caution comes in Place of the Subject as an Equivalent. Arreſtment muſt be renewed upon the Death of the Perſon in whoſe Hands it was uſed, that the Arreſter may not want a Party; and as there is no Repreſentation in Succeſſion to Moveables; ſo they are not ſo Permanent as to continue affected by Diligence, commenced againſt a Predeceſſor. 2. There is no imaginable Diſparity betwixt the preſent Caſe, and that of the cited Deciſion 1684. 'Tis true the Maills and Duties were arreſted, and here a Sum of Money: But that Difference was not the *Ratio decidendi*, nor had any Influence upon the Deciſion, which plainly expreſſeth that Citations can only hurt voluntary Rights; And there is no Speciality as to one Subject of Arreſtment, more than another.

The Lords finding *Pardovan*'s inchoate Diligence by citing on his Adjudication to be prior to *Torrence*'s Arreſtment, and the conſummated Diligence by Decreet of Adjudication alſo prior to the Decreet of Furthcoming: They preferred the Adjudication.

A third Ground of Preference inſiſted on by *Torrence* was, That beſides his Arreſtment he had alſo the firſt Decreet of Adjudication, which was a complete Diligence finally denuding the Debtor, and excluding all ſubſequent Adjudgers; the Subject adjudged being a liquid Bond never clothed with Infeſtment: And therefore *Pardovan*'s Adjudication, tho' within Year and Day, could not come in *pari paſſu*. Becauſe, The Act of Parliament 1661 doth only relate to Compriſings or Adjudications of Subjects whereupon Infeſtment hath followed; that is, Adjudications which want to be completed by Infeſtment. For an effectual Compriſing being there ſtated, as the Rule and Meaſure of Preference, that determines who ſhould come *in pari paſſu*: Where that Standart is not found, the Law cannot take Place. 2. As *Torrence* is founded in the preciſe Words of the Statute, which reſpects only Compriſings whereupon Infeſtment followed, or the Superior was charged: He is alſo founded in the Analogy of Law, which conſiders Adjudications as legal Diſpoſitions. For as a voluntary Diſpoſition would have carried the Subject in Controverſie, and made a complete Right, without Neceſſity of Infeſtment: A legal Diſpoſition will more certainly do it.

Anſwered for Pardovan. To ſingle out one Inſtance in a Law to exemplify and illuſtrate the ſame, and make that Inſtance to influence the whole againſt the main Deſign and expreſs Terms, doth contradict common Reaſon, and the known Rules of Interpretation. Now that all Adjudications led within Year and Day ſhould come in *pari paſſu*, is clear both from the expreſs Words of the Statute 1661, while it ſpeaks of Compriſings effectual by Infeſtment or other ways, and from the Reaſon and Narrative on't. And if it were not ſo, the Deſign of the Act, which is calculated to introduce Equality as much as poſſible among Creditors, would moſtly be eluded: For a Perſon better acquainted with his Debtor's Circumſtances, or nearer the Place where he reſides, ſhould prevent and hinder the other Creditors of the Benefit of affecting the common Debtors Means by an Accident, that cannot be attributed to them. And to allow this becauſe forſooth their Debtor has not taken Infeſtment on his Right, is not only againſt the common Principle of Law, but would give Occaſion to Debtors to prefer what Creditors they pleaſe. 2. That the Act is to be underſtood of all Rights adjudgeable, as well as thoſe whereupon Infeſtment follow, is not only clear from the plain and general Words of, *It is Statute and Ordained*, *That all Compriſings*, &c. But alſo from the particular Word *Eſtate* made uſe of to ſignifie the Subject affectable, which comprehends Diſpoſitions, heretable Bonds, and other Rights adjudgeable, whereupon no Infeſtment has followed. 3. The Exception in the Act of Ground-Annuals, and other *Debita Fundi*, confirms the Rule as to all other Caſes not excepted. 4. The effectual Compriſing by Infeſtment is expreſſed *Exempli Cauſa*, and there was alſo this Reaſon for naming it rather than any other, That ſince poſterior Appriſings within Year and Day of him who wared out his Mony in ſecuring his Right by Infeſtment were brought in equally with him, it was juſtly ordered, That they ſhould pay him his Expences as a ſort of Recompence.

Replyed for Torrence. Where the ſtatutory Part of an Act, eſpecially a new and correctory one, is clear, *Caſus omiſſus habetur pro omiſſo*, and the Act is not to be extended to Caſes not expreſſed, by virtue of Arguments drawn from the Narrative, and imaginary View or Reaſon of it. For is it not rational to ſuppoſe, That the Legiſlators were not ſo liable as we to miſtake the Reaſon and View of the Law? 'Twas juſt upon this Ground, that the Lords of Seſſion refuſed to extend againſt Adjudgers the Act of Parliament ordaining a Year's Rent to be paid to the Superior by Compriſers, till a new Law was made for it, albeit the Thing was equally Reaſonable in both Caſes: In regard the *Act 6, Parl. 23, Ja. 6, Anent Compriſings*, allowed the Compoſition of a Year's Duty to the Superior, and the ſubſequent Act concerning Adjudications made no Mention of it. 2. As to the Exception of Ground Annuals, Infeftments of Annualrent, and other *Debita Fundi*, The Brocard, *Exceptio firmat Regulam in caſibus non Exceptis*, holds good, but *Pardovan* miſapplies it. For here the Rule is only concerning Appriſings whereupon Infeftment needed to follow for denuding the Debtor; and the Exception of *Debita Fundi* doth indeed confirm that Rule as to all other Appriſings that behoove to be compleated by Infeftment. But *Torrence*'s Adjudication is a compleat Diligence without Neceſſity of either Infeftment or Charge againſt the Superior; and ſo is not to be conſidered as the firſt effectual Adjudger in the Senſe of the Act of Parliament, to the Effect of others coming *in pari paſſu* with him, but muſt carry the whole Subject adjudged, and the other Adjudgers have only Right to the Reverſion of his Adjudication, and to redeem upon Payment.

The Lords found, That the Clauſe of the Act 62. Parliament 1661, being general, comprehending all Appriſers and Adjudgers within Year and Day, *Pardovan* and *Torrence* ſhould come in *pari paſſu*.

June 27, 1705. James Steuart *Merchant in* Dunkeld, *againſt* Mary Baillie *Lady* Strowan, *and* Duncan Robertſon *her Son*.

J*Ames Steuart* charged *Mary Baillie* and *Duncan Robertſon* her Son, for 280 Pound contained in a Decreet obtained before the Commiſſar of *Dunkeld*. They ſuſpended and afterwards raiſed Reduction, and the Suſpenſion coming in before one Lord, and the Reduction before another: The Lords ordained the Suſpenſion to be diſcuſſed before the Ordinary in the Reduction. Becauſe two Ordinaries might differ, and the one find the Letters orderly Proceeded, and the other reduce the Ground of the Charge, which inconſiſtent Sentences would hinder the Effect of each other. The Reduction being inſiſted in, and the Decreet reduced upon Nullities; It was alledged for *James Steuart*, That he might yet inſiſt in it as a Libel in the ſame Proceſs, and craved a Day to prove the ſame as a Libel.

Anſwered. Had the Charger inſiſted to diſcuſs the Suſpenſion, and the Suſpenders repeated their Reduction at the diſcuſſing, and the Decreet been reduced or turned into a Libel, the Charger might crave *tanquam in Libello* a Day to prove his Libel: But the Lady and her Son having inſiſted in their Reduction and prevailed, it were contrary to Law and Form to allow him who was called as a Defender in the Reduction, to turn Purſuer in the ſame Proceſs. But if he have a Mind to purſue, he ought to raiſe a new Summons, and inſiſt therein in common Form; Eſpecially conſidering, That he was not Purſuer in the Libel upon which the Decreet of Reduction proceeded.

Replyed. There is a great Difference betwixt a ſimple Reduction of a Decreet wherein the Obtainer of the Decreet is only Defender; and a Decreet

under

under Suſpenſion and Reduction, which is *James Steuart*'s Caſe, where he the Obtainer of the Decreet being Charger, has Intereſt to diſcuſs the Suſpenſion, wherein the Reduction is but repeated by way of Defence. And 'tis of no Moment whether the Suſpenſion be remitted to the Ordinary of the Reduction, or the Reduction to the Ordinary in the Suſpenſion; ſince all is alike intire to the Parties in both Caſes.

The Lords found the Decreet ſhould be turned into a Libel, and remitted the Cauſe to an Ordinary.

June 28, 1705. *Sir* Andrew Kennedy *Conſervator*, *againſt* William Gordon *Merchant*.

SIR *Andrew Kennedy* having purſued *William Gordon* before the Judge of Admirality for Sums of Money which he alledged was ſpent by him, his Son and Servants, at the *Hague*, and other Places in *Holland*, in defending *William Gordon* in a Plea betwixt him and his Wife a *Dutch* Woman: A Bill of Advocation was expede, and coming in to be diſcuſſed before the Lords, this Reaſon was proponed, That the Cauſe was not Maritim, and therefore not competent to be judged by the Admiral.

Anſwered for the Purſuer. He being a foreign Miniſter, and the Defender a Factor Abroad, where the Mony purſued was expended at his Deſire and Order, and ſo a foreign Debt; the Admiral was moſt competent to decide therein. For it was found in the Caſe of *Van Rixel* and his Factor againſt *Black*, That a foreign Bill of Exchange fell properly within the Admiral's Cogniſance.

Replyed for the Defender. No Cauſe can be called Maritim, except what relates to Vendition or Fraighting of Ships, Differences betwixt Maſters and Seamen, Maſters and Owners, Maſters and Fraighters, Bills of Bottomry, and the like, in the Terms of the Act of Parliament *1681*. Therefore to pretend that a foreign Debt is a Maritim Cauſe, is a Jeſt. As for the cited Deciſion, it has certainly concerned a Bill of Bottomry, and not a Bill of Exchange.

Duplyed for the Purſuer, That he (who is in Effect general Factor for the Royal Burrows, and the Preſervation of Trade) had in Diſcharge of his Commiſſion from *Gordon*, been put to ſeveral neceſſary Voyages at Sea, in order to exeem him from the *Dutch* Juriſdiction, when he was at the Point of being run down by the Eviction and Seizure of all his Effects, Bills, Compt-books, *&c.* And therefore an Action for refounding Expences and repairing Damages by ſuch an Imployment relating to Trade, is preciſely in the Terms of the Act of Parliament.

The Lords found the Caſe not Maritim, and therefore advocated the Cauſe *in jure*.

Eodem die. George Sutie *againſt* Barbara Roſs.

GEorge *Sutie* and *Barbara Roſs* having arreſted in one Day, and the latter having purſued her Furthcoming before the Commiſſars, and the former before the Lords: *Sutie* craved Preference in reſpect he offered to prove his Copy of Arreſtment was given ſome Hours before the others, and he tabled his Arreſtment before an unqueſtionable Juriſdiction, whereas Miſtreſs *Roſs* had purſued before the Commiſſars, who were not Judges competent in Actions of Furthcoming.

Anſwered for Barbara Roſs. Where there is a Concourſe of Diligences in one Day, and the Executions mention not the particular Hours when they were made, they are uſually brought in *pari paſſu*: For Witneſſes may be apt to miſtake or forget the Hour, and therefore my Lord *Stair* requires the Difference of three Hours at leaſt. As to the Competency of the Commiſſars, the ſame is *ſub judice* not yet decided.

The Lords brought in the two Arreſters *pari paſſu*.

June 29, 1705. *Mr.* James Chappel *Merchant in* London, *and* John Chriſtie *Writer in* Edinburgh *his Factor*, *againſt Major* Guydet.

IN the Action at the Inſtance of Mr. *James Chappel* and his Factor, againſt Major *Belchazar Guydet*, for Payment of 400 Pound *Sterling*, contained in is Ticket; It was alledged for the Defender, That the Ticket was extinguiſhd and taken away by a ſubſequent Diſcharge and Receipt of 50 Pound *Sterling* granted to him by the Creditor, *in full of all Demands betwixt them*.

Anſwered for the Purſuer. The general Clauſe of all Demands is not to be extended to greater Sums than the 50 Pound ſpecially mentioned in the Diſcharge, which the Parties are not ſuppoſed to have had under their Conſideration: But can only take Effect as to Sums of equal or inferior Value.

Replyed. The general Clauſe in the Diſcharge *of all Demands*, muſt comprehend the 400 Pound; Becauſe, *Qui omne dicit, nihil excipit*, and there is nothing more ordinary in a Diſcharge, than to ſubjoin to certain particular Debts a general Clauſe, *of all that the Granter can ask of the other Party any manner of Way*: And by ſuch a Clauſe all Debts whatſoever are underſtood to be diſcharged, tho' greater than theſe ſpecially expreſt: *February* 24, 1636, *Lawſon contra* the Laird of *Ardkinglaſs*.

The Lords found the Diſcharge being in *full of all Demands*, extended to the 400 Pound Ticket. The Reaſon was, Becauſe both Debts were of the ſame Nature.

Eodem die. Patrick Archibald *Merchant in* Leith, *againſt* George Lawſon *late Treaſurer of* Edinburgh.

IN the Action at the Inſtance of *Patrick Archibald* againſt *George Lawſon*, the Lords found the tranſporting of a Perſon's Cheſts or Trunks after his Death, from the Place where he died, to the Defender's Houſe, relevant to infer vitious Intromiſſion againſt him; and that the inventaring and rouping of the Goods by virtue of a poſterior Warrant from a Magiſtrate (tho' before commencing of the Purſuer's Proceſs) did not purge the Vitioſity. Albeit a ſubſequent Confirmation prior to the Citation at the Purſuer's Inſtance would have purged the former Intromiſſion.

June 30, 1705. Charles Jackſon *and his Children*, *againſt* George Lockhart *of* Carnwath, *and the other Creditors of* Cockburn.

R*Achel Wilkie* Spouſe to *Charles Jackſon*, having a Bond of Proviſion for 4000 Merks from *David Wilkie* her Father, obtained her ſelf decerned Executrix *qua* Creditrix to him *ad omiſſa*, and took out a Licence to purſue a Debt due to him by Sir *James Cockburn*, omitted in the Confirmation of the Father's Teſtament by her Brother *Archibald* the principal Executor. The Purſuit was raiſed, and Inhibition uſed upon the Dependence: But *Rachel* happening to die before Sentence, her Children were decerned Executors Dative as neareſt of Kin to her, and alſo Executors *qua* Creditors *ad omiſſa* to *David Wilkie* their Grand-father; and having got Licence to purſue, inſiſted in the Proceſs commenced at their Mother's Inſtance againſt Sir *James Cockburn*, and at length obtained a Decreet, and confirmed the Sum decerned before Extract. Upon which Decreet an Adjudication being led againſt Sir *James Cockburn*'s Eſtate, and founded on in the Ranking of his Creditors: The Lords found, That *Rachel Wilkie*, who, as Executrix decerned to her Father, commenced the Proceſs againſt the common Debtor by virtue of a Licence, and uſed Diligence by Inhibition upon the Dependence, dying before Decreet or Confirmation, the Inhibition fell, and the Decreet and Confirmation at the Childrens Inſtance as neareſt of Kin to her, and Executors Creditors to their Grand-father with the Adjudication thereon, could not ſupply the Defect to make the Inhibition ſubſiſt in their Favours, in a Competition with Sir *James Cockburn*'s other Creditors.

Albeit it was alledged for Charles Jackſon and his Children. 1. The Diligence at *Rachel Wilkie*'s Inſtance, was not done meerly *proprio Nomine*, but by Authority of the Commiſſars, whoſe Licence was not a ſimple Permiſſion, but a poſitive Title, ſufficient to force the Defender to Contradict: And permiſſive Laws have the Effect of poſitive Statutes, where any thing is once done by Authority of the Permiſſion. Again, Action being intented, and ſuſtained at the Inſtance of a Creditor, upon an Eſtate by virtue of a Commiſſion from the Lords of Seſſion, impowering him for himſelf, and for the common Behoof of other Creditors, to purſue for recovering their Debtor's Effects; Would any Man doubt but his Diligence would ſtand, and be effectual after his Death? Which Parallel anſwers exactly the preſent Queſtion: For a Perſon that purſues by Authority of a Decreet and Licence from the Commiſſars, is not underſtood to act *ſua tantum gratia*, but for the common Benefit of all concerned: And is obliged upon that Account to Confirm before Sentence; 21 *June* 1624, Lady *Carnouſtie* contra   *June* 30, 1665, *Stevenſon* contra *Crawford*. So that a Licence to an Executor Creditor being a ſufficient Title flowing from the Authority of the proper Judge, to do every thing, except to Extract or obtain Payment for the Behoof of Creditors, as well as for himſelf; And ſince neither the Intereſt or Power of the Commiſſars, nor Intereſt of the Creditors ceaſeth by his Deceaſe: No Reaſon or Law can be aſſigned why the Diligence ſhould fail. 2. It cannot be controverted, but that, if the Diligence had been done by one ſurrogated to the Procurator-fiſcal; It would have ſubſiſted: And all Decreets Dative not in Favours of the neareſt of Kin, are truly Surrogations to the Fiſcal. For originally here, and in other Places where the common Law prevail'd, the Eccleſiaſtick Court was bound to Confirm the Executor nominate or neareſt of Kin, or theſe failing, to Execute the Teſtament, which Power of Execution was exerced by the Fiſcal. But Time and Cuſtom introduced Decreets *Dative* in Favours of Creditors, whereby they are truly ſurrogated and come in Place of the Fiſcal. 3. Licences may be taken out to a certain Time, and ſuch are daily renewed when the Time is out, without falling of the Proceſs. Nor doth it alter the Caſe, that the Licence is not renewed to the ſame Perſon: For if the Expiring of the Licence made the Proceſs fall, the renewing on't, whether to the ſame or ſome other Perſon, cannot revive it. But then again, the Licence in Queſtion is upon the Matter renewed to the ſame Party: *Rachel Wilkie*'s Children being not only *Hæredes ab inteſtato* to her *in mobilibus*, but actually confirmed Executors, and ſo in the Senſe of Law, *una et eadem Perſona* with their Mother. 'Tis true they are not confirmed Executors to her till after the Decreet: But this Defect is ſuppliable by the Regulation Act; the Decreet being obtained *in foro*. 4. It's clear from the common Principles of Juſtice, Cuſtom of other Nations and the Analogy of our Law in parallel Caſes; That a Party's acting in his own Name, and for his own proper Uſe, is profitable to theſe having Intereſt in the Subject. And if *Titulus mere putativus* will have ſuch Effects in Law, much more ought a Title granted and ſuſtained by Authority: For *Titulus putativus* never goes further in Law than to excuſe, or afford *bonam fidem*, and cannot make any Deed or Right to ſubſiſt. The true Reaſon why the Deeds of Parties acting *Titulo putativo*, are ſuſtained, is, Becauſe of the Rights and Intereſts of others therein. So Actions and Decreets at the Inſtance of the Laird of *Swintoun* as Donator to the Eſtate of *Lauderdale* were found to ſtand, becauſe the Earl of *Lauderdale*'s Right was the immediate productive Cauſe of theſe Deeds. And the *Jus perſequendi* in this Caſe was *David Wilkie*'s Right, which ſubſiſts albeit *Rachel* be dead. Nay further, Seing an Interruption at the Inſtance of an Executor would ſubſiſt; No ſolid Difference can be aſſigned why *Rachel Wilkie*'s Proceſs and Inhibition ſhould not.

In reſpect it was Anſwer'd, 1. A Licence is a mere perſonal and limited Permiſſion founded upon a Decreet Dative, and proſecuted *Periculo Impetrantis*: Therefore the Perſon licenſed dying *ante Sententiam*, the Decreet Dative, Licence, and perſonal Inhibition, all evaniſh and die with her. Becauſe, they could never take Effect but by a Sentence. 'Tis vain to ſay that *Rachel*'s Children, her neareſt of Kin have both the Right of Blood and Title of Credit, and ſo being *eadem Perſona* with her, might have got her Licence renewed, as ſhe her ſelf might have got a Licence limited to a certain Time renewed again in her own Perſon, after elapſing thereof. For here the Children had not their Mother's Right of Credit ſettled by Confirmation in their Perſon when they firſt took a Licence, but were ineptly decerned Executors *qua* Creditors to their Grand-father, and thereupon took out a Licence; which was a new Decerniture, and a Licence in Place of their Mother's Decreet and Licence which evaniſhed with all that followed upon it. Whereas a Licence to a limited Time after expiring thereof, is renewed to the Obtainer upon the Foot of the ſame Decreet Dative. And if *Rachel*'s Decreet Dative died with her ſelf, as no doubt it did, her Licence died alſo: For how can a Licence tranſmit, if the Decreet Dative be not tranſmittable. A Licence is indeed a Title to purſue, but gives no Right to the Executry, nor ſo much as to obtain a Decreet for it, without Confirmation. The Caſe of a Factor appointed by the Lords to do Diligence for himſelf and others, for recovering their common Debtor's Effects, is not parallel with the Point under Debate, unleſs ſuch a Factor's Power to purſue, bear the Reſtriction and Quality of *Excludendo Sententiam*; and then, if he happen'd to die, any Purſuit commenced by him, or Inhibition thereon would certainly evaniſh. For when a Factor purſues upon his Commiſſion *qua* Factor, that Commiſſion not being limited, another Factor may be appointed in his Place: Whereas an Executor's Licence doth laſt only *uſque ad Sententiam*, and if he die before Sentence, it falls with all that followed upon it. 2. Where a Licence is given to a Procurator-fiſcal, if he die, the next Procurator-fiſcal may inſiſt on the ſame Licence: Becauſe the Licence in that Caſe is given to an Office, which dies not. But if one who is ſurrogated in Place of the Procurator-fiſcal take out a Licence and die, both his Surrogation and Licence die with him, and there muſt be a new Surrogate. Beſides, *Rachel Wilkie* was decerned Executor Dative at the Procurator-fiſcal's Inſtance, and was not his Surrogate. So the Decreet *in foro* in the Perſon of the Children, before they were confirmed Executors to their Mother, was fundamentally null, and not ſuppliable by the Regulations. 3. He who acts upon a *Titulus putativus* acquires the Subject, and his Right ſtands for a Time, tho it be afterward reduced or declared void: as in the Caſe of Rights reduced upon old Inhibitions, or in the Caſe of a Co-heir ſtruck out by the Appearance of the more righteous Heir. And the *Ratio Rationis* is, Becauſe in all Caſes where he that hath *Titulum* *putativum* meliorates the Subject, all muſt ſtand when it returns to the true Proprietar: tho nothing that is done to his Prejudice will be effectual againſt him. But what is all this to an Executor dative having a Licence expreſly limited to a Time, or *ad Sententiam*, whoſe Title is not tranſmiſſable, and whoſe Proceedings thereon are *Periculo Impetrantis.* It's not to the Purpoſe to alledge, That the Diligence of a Perſon licenſed will make an Interruption without confirming: For every inchoated Diligence tho never perfected, nor taking Effect, ſerves as an Interruption; Becauſe in that Caſe Law requires only ſome Document that the Action pretended to be purſued was not neglected.

Eodem Die. *Sir* William Keith *of* Ludquhairn, *againſt* John Sinclair *of* Diren.

SIr *William Keith* as deriving Right from *Hugh Keith*, who in the Year 1620, was Infeſt upon a Precept of *Clare conſtat*, as Heir to *John Keith* his Father in the Lands of *Half-Scotland* and *Harland*, having raiſed an Action of Mails and Duties againſt *John Sinclair* of *Diren*: The Defender founded upon a Right to theſe Lands flowing from *Elizabeth Keith* Siſter to *Hugh* the Purſuer's Author, who was likeways Infeſt upon a Precept of *Clare conſtat* as Heir to *John* the Father paſſing by the Brother, which was alledged to be preferable to the Right granted by the Brother; In regard his Seaſin was never regiſtrated, and the Defender had been near 30 Years in Poſſeſſion.

Anſwered for the Purſuer. Elizabeth could not be entred Heir to her Father as dying laſt veſt and ſeaſed, when *Hugh* her Brother ſtood truly laſt Infeſt, tho his Seaſin was not regiſtrated: Since an unregiſtrated Seaſin is declared by Act of Parliament to be good againſt the Granter's Repreſentatives.

The Lords preferr'd *Ludquhairn*'s Right; and found the Defender liable for the Rents ſince Citation, with Allowance of publick Burdens paid for the Lands, during that Time.

July 3, 1705. John Dickſon *of* Hartrie *contra* Alexander Miln *of* Caridden.

IN the Action at the Inſtance of *Dickſon* of *Hartrie*, againſt *Alexander Miln* of *Carridden*, an Alledgeance of *Res Judicata* being proponed by the Defender, who could not produce the extracted Decreet, but only the whole Warrants thereof: It was alledged for the Purſuer, That albeit ſuch a Decreet could now be extracted from theſe Warrants, no Extract being produced, it ſtands in the Terms of a naked Interloquitor, and the Matter may be reconſidered; which is never denied to any Party applying upon new Grounds before extracting; For nothing but a Decreet already Extracted makes a *Res Judicata.*

Anſwered. For proving the Decreet to have been extracted, The Defender adduceth an Atteſtation under the Hand of the Keeper of the Minute-Book, that the Dues were payed, which is never done till after Extracting, and the *Reſponde-Book* in the Clerks Chamber, where the Decreet is again ſet down as Extracted, and ſo marked by the Extracter. Now no Decreet is Inſert in the *Reſponde-Book*, until it be ſigned by the Clerk; That Book being the Rule of Compting for the Clerks Dues.

Replyed. The Evidences and Inſtructions produced, do not prove that the Decreet founded on was Extracted. For no ſuch Decreet is found booked. 'Tis true the *Reſponde-Book* mentions a Decreet betwixt Parties of the like Surnames, but *non conſtat* that the Parties were the ſame. And albeit that were cleared, yet the Preſumption from thence is but weak: For Decreets in the *Reſponde-Book*, whereof the Dues are paid, are many times ſtopped and recalled, and ſometimes never taken out. Nay further, It appears from the Records of Decreets pronounced about that Time, that the Decreet founded on was never booked. And tho' ſuch a Decreet had been given out and extracted, it might have intrinſick Nullities, it might have been recalled, it might have been paid for, lying in the Clerk's Hands, and never ſigned, nor taken out. And to allow the marking of a Decreet by a Servant without any publick Authority for the Clerk's private Uſe and Conveniency to ſupply or make up the Tenor of a formal Writ is a Stretch and Abſurdity to be exploded.

Duplyed. It cannot be inferred that the Decreet was never extracted from its not being booked, ſeing many Decreets at that Time were never booked, nor the Warrants carried to the laigh Parliament Houſe, which was not ſo ordinary 27 Years ago, as now; and yet Extracts have been taken out conform to ſuch old Warrants as are yet in the Clerks Hands. Now will any Man ſay that the not booking, or not tranſmitting theſe Warrants to the low Parliament Houſe, ſhould ſo prejudge one that hath loſt his firſt Extract, that he cannot take out a ſecond at any Time.

The Lords found no ſufficient Probation that there was a Decreet extracted, and allowed Parties to be heard *in Cauſa*.

July 4, 1705. *The Lord and Lady* Pitmedden, *againſt* George Monro of *Lymlair*.

THE Lady *Pitmedden* as Executrix to Mr. *William Lauder* her Father, and her Husband for his Intereſt, having purſued *George Monro* of *Lymlair* for his Father's Debt by Bond upon the paſſive Titles: It was alledged for the Defender that the Bond was preſcribed, no Diligence being done thereon for the Space of more than 40 Years.

Replyed for the Purſuers. That they had interrupted Preſcription by intimating their Claim upon the Bond by a Miſſive to the Defender, as the Defender's Letter of Anſwer bears, wherein he craved ſome Time to ſearch out Matters, and adviſe with his Friends; and that being indulged him, he ought not to obtrude Preſcription upon the 40 Years expiring *medio tempore*. Eſpecially ſeing he promiſed by that Letter to do juſt Things; and by another Letter written to the Purſuer after elapſing of the 40 Years deſired a Communing upon the Matter, without mentioning the Defence of Preſcription. Now communing by Letters is more than if they had ſtated Accompts about the Debt: And compting was ſuſtained to interrupt Preſcription, *July* 2 1630, *Herris* contra *Scott*.

Duplyed for the Defender. According to the 29 Act, 5 Parliament *Ja.* 3 The negative Preſcription of Exoneration from perſonal Obligement ſhould be interrupted by legal Diligence; or a Bond of Corroboration; 27 *November* 1630, L. *Lauder* contra L. *Colinſlie*. As to the Deciſion betwixt *Herris* and *Scott*, it hath no Contingency with the Interruption of Preſcription of 40 Years; but relates only to the Triennial Preſcription of the *modus probandi* of Merchant Accompts by Witneſſes. 2. Interruption of Preſcription by a Letter is a Novelty except in the Sovereign's Caſe which is allowed by an Act of *Sederunt*. *Stair Inſtit. Lib.* 2. *Tit.* 12. §. 27. and even then the Letter requires Publication at the Market Croſs of the proper Juriſdiction where the intereſſed Party lives, 30 *March* 1630, *The King and Earl of Monteith* contra
3. *Non relevat* that the Defender upon the Alarm given him by my Lord's Letter crav'd Time unleſs he had acknowledged this Debt, and crav'd Time

to take Courſe with it, which would have been an Interruption by way of Corroboration or renewed Obligement. But on the contrary the Anſwer bears that the Purſuers Claim was altogether a Myſtery to him, and conſequently his demanding Time to be cleared therein was rather a perſiſting in the Denial of it, than any Thing like to Homologation. And the Defender's uſing a Point of legal Defence cannot paſs under the Conſtruction of a Step of unjuſt Dealing. So that if the Purſuer through his own Remiſſneſs hath ſuffered Preſcription to run out, *ſibi imputet*, he hath himſelf only to blame for it. 4. *Eſto* the Defender had known of the Defence of Preſcription competent to him at the Time of his writing the laſt Letter, as he did not, his craving a new Opportunity to Commune can never be eſteem'd a Renunciation of that Defence: Seing the firſt Word of the Communing upon Sight of the Purſuers Claim might have juſtly been, That the ſame was preſcribed.

The Lords found the Bond preſcribed, and repelled the Ground of Interruption as not legal.

July 5, 1705. Anthony *and* Zerobabel Haigues *elder and younger of* Bemmerſide, *againſt Mr.* Thomas Halyburton *of* Newmains, *and* Margaret Rutherfoord *his Mother.*

Robert Haigue of *Bemmerſide* having in his Daughter's Contract of Marriage with *James Halyburton* Heretor of the Abbey Mill of *Dryburgh*, aſtricted his Lands of *Bemmerſide* to the ſaid Mill till ſuch Time as there ſhould be a Mill built upon theſe Lands; which was not to be done till after the Death of the Parties Contracters; and all of them being now dead of a long Time; *Anthony Haigue* preſent Heretor of *Bemmerſide* and *Zerobabel* his Son proceeded lately to the building of a Mill upon their Ground; but were ſtopp'd by a Suſpenſion at the Inſtance of *Thomas Halyburton* of *Newmains* preſent Heretor of the Mill of *Dryburgh*.

At the calling whereof Compearance was made for *Margaret Rutherfoord* the old Lady *Newmains* and a Liferent Seaſine produced, whereby ſhe ſtood Infeſt in the Mill of *Dryburgh* and aſtricted Multures and Sequels thereof. Upon which it was contended that ſhe being by Virtue of that Infeſtment upwards of 7 Years in Poſſeſſion had the Benefit of a poſſeſſory Judgment; and her Poſſeſſion could not be overturn'd ſummarly by building of a Mill within the Lands of *Bemmerſide*, but the Right of building ſhould be declared *Via ordinaria*.

Anſwered. A poſſeſſory Judgment is a Privilege competent only to Proprietars of Lands, that they may not be put ſummarly to produce their Rights, and debate their Intereſts in poſſeſſory Actions, and not competent to Pretenders to Servitudes. 2. The Aſtriction in the foreſaid Contract of Marriage being conſtitute with that expreſs Quality, that the ſame ſhould ceaſe upon *Bemmerſide*'s building a Mill within his own Bounds: The Liferenter could not enjoy the Servitude but qualified as her Authors had it; and therefore could not ſtop the building.

Replyed. The Lady *Newmains* being ſeven Years in Poſſeſſion upon an Infeſtment in the Mill and Thirlemultures, has *eo ipſo* a poſſeſſory Privilege. And the Exception in the original Conſtitution of the Thirlage being never to this Hour declared, it cannot be ſummarly applied *via facti* in Prejudice of her Right and poſſeſſory Judgment.

The Lords found no poſſeſſory Judgment in the Perſon of the Lady; in Reſpect of the clear Quality of the Right.

July 11, 1705. *My Lord* Inverury, *againſt* James Gordon *Merchant in* Edinburgh.

IN the Action at the Inſtance of the Lord *Inverury* againſt *James Gordon* for the Price of a Parcel of *Florence* Wine ſold by him to the Purſuer, and 80 Pound *Scots* of Damage, upon this Head, that the Wine had run out through the Inſufficiency of the Cask furniſhed by *Gordon*: *John Linn* Couper who furniſhed the Cask was called for his Intereſt. And a conjunct Probation being allowed to both Parties as to the Inſufficiency of the Cask, and if thereby the Wine was loſt, and by whom the Cask was furniſhed, or agreed to be furniſhed: *James Gordon*'s Servant was received as a Witneſs for him *cum Nota* to prove the Terms of the Bargain, and *John Linn*'s Servants were allowed alſo to depone *cum Nota* for proving the Condition of the Cask.

Albeit it was alledged for the Purſuer, that *Linn*'s Servants could not be received, partly, becauſe their Maſter who furniſhed the Cask would be liable for Damages upon the Event of its being proved inſufficient; Partly, becauſe they themſelves might happen to be liable as intruſted by their Maſter in furniſhing and dreſſing up the Cask.

In Reſpect it was anſwered for *Gordon*, That there is no Way to prove the Sufficiency of any Cask but by the Perſon through whoſe Hands it comes. And if ſuch an Objection were ſuſtained, no Merchant, Apothecary or Tradeſmen could ever prove their Accompts, and Delivery of Goods to their Cuſtomers or Imployers. Therefore Servants are frequently received as Witneſſes in Cauſes concerning their Maſters.

July 13, 1705. David Oliphant, *againſt* James Oliphant *of* Gask.

IN the Action of Aliment at the Inſtance of *David Oliphant* againſt *James Oliphant* of *Gask*.

The Lords refuſed to ſuſtain Proceſs, becauſe the Summons required a Term to prove, and contained but one Diet. For Summons of Aliment not inſtantly verified, but requiring a Courſe of Probation ought to have two Diets: And the late Act of Parliament allows only alimentary Actions to be ſummarly diſcuſs'd without diſpenſing in the leaſt with the Days of Citation, or the Number of them.

Eodem Die. *The Lady* Semple, *againſt the Lady* Comiſtoun.

THE Laird of *Comiſtoun* having granted to the Lady *Semple* an heretable Bond upon his Eſtate for 24000 Pound, the Granter's Lady after his Deceaſe did by her Bond of Corroboration as Tutrix for her Son oblige her ſelf perſonally for 3691 Pound of bygone Annualrents of the foreſaid principal Sum reſting by him as Heir to his Father. But at the ſame Time got a Backbond from the Lady *Semple* ſuſpending perſonal Execution againſt her ſelf for ſeven Years, and reſerving all manner of Execution againſt *Comiſtoun* and his Eſtate; ſo be, that the current Annualrents of the corroborate Sum, and the whole 24000 Pound were duly paid.

The Lady *Comiſtoun* being charged upon her Bond of Corroboration after ſhe had made ſeveral partial Payments indefinitely, and having ſuſpended; The Lords found theſe partial Payments applicable to the Sums charged for, and not to be imputed in Satisfaction of the Annualrents of the 24000 Pound which the Payer was liable for *Tutorio Nomine*.

Albeit it was alledged for the Charger, That the Payments ſhould be aſcribed in Satiſfaction of the Sum and Annualrents which by the Backbond were to be punctually paid, and the Suſpender was liable for as Tutrix to her Son; and could not be imputed to extinguiſh any Part of the Bond charged for: In regard the ſame ſtood ſuſpended as to Execution for ſeven Years upon the Condition of punctual Payment of the Annualrents of all Sums due by her or her Son to the Charger. For albeit a Debtor hath the Election to impute indefinite Payments to what Debt he will; yet that Election is reſtricted by *l. 3. §. 1. ff. de Solut.* So that he cannot apply his Payment by Emulation in Prejudice of the Creditor to extinguiſh a principal Sum, while any Annualrents are due. All Payments being firſt aſcribed to Annualrents.

In Reſpect it was anſwered for the Suſpender, That ſhe a Debtor having paid indefinitely, hath *jus applicandi*, and doth apply the Payment to extinguiſh the Bond charged on bearing Annualrent as the *durior Sors*, which ſhe may do more eſpecially in this Caſe, where the Bond bears to have been granted for Annualrents due by her Son. The upliſting of whoſe Rents, and applying them to ſatisfie the ſaid Bond, was an Application in Payment of the Charger's Annualrents. 2. Some of the Payments expreſly relate to Sums due by the Suſpender her ſelf: And ſo it is, that ſhe owes not a Sixpence to the Charger beſide the Sums charged for; nor yet is the 24000 Pound Debt ſo much as conſtitute againſt her Pupil.

July 14, 1705. Patrick M^{c}dowall *Merchant in* Edinburgh, *againſt Mr.* John Marſhall.

IN a Purſuit before the Baillies of *Edinburgh*, at the Inſtance of *Patrick M^{c}dowall* againſt Mr. *John Marſhall*, for Payment of an Accompt of Mournings furniſhed by his Order to himſelf and his Brother and Siſters at their Father's Death, extending to 96 Pounds *Scots*; The Baillies having found it Relevant to make the Defender liable, that the Accompt was furniſhed by his Order, or that his Father delivered to him a Sum of Mony for defraying the Expence of the Mournings; Albeit the Defender was Minor when the Goods were furniſhed, and leſed by ingaging for them, and had raiſed Reduction *intra annos utiles*: The Defender brought the Cauſe before the Lords by Advocation upon this Ground, That the Baillies had committed Iniquity. In ſo far as a Minor's interpoſing himſelf for others to take off Mournings for them is Leſion. And it doth not alter the Caſe, that he received Mony for that End from his Father: Seing Mony given to a Minor is underſtood to be given *perdituro*, unleſs it appear to have been *in rem verſum*, profitably imployed, or that he hath it ſtill in his Hand.

Anſwered. There was no Iniquity committed, Becauſe, 1. Mr. *Marſhall* being at the full Stature of a Man, and Graduate, it was not poſſible to know by his Aſpect that he was Minor: And his inducing a Merchant by concealing his Age to truſt him Goods could not profit him. Beſides, he was *in Confinio Majorennitatis*, wanting only ſome Months of being Major at the Time. 2. He having taken off the Mournings, the Merchant was not bound to know whether he was to imploy them for the younger Children *in Familia* with him, or for himſelf: No more than if he had taken off a Sute of Clothes to himſelf, and another to his Servant, which could never have been interpreted Leſion, tho' there were no Obligation upon him to clothe his Servant in Blacks. And, 3. Albeit the Pretence that Mony given to a Minor is given *perdituro*, may hold in the general; yet there ſeems to be a Speciality in this Caſe, where the

Mony was given by a dying Father to his eldeſt Son, to furniſh Mournings to himſelf and the younger Children, partly taken off before the Burial, and partly within a Day or two after, while the Mony could not poſſibly be miſapplyed.

Replyed. The Alledgeance, that the Minor by his Aſpect looked to be Major, deſerves no Anſwer. Nor was it ever ſuſtained that a Minor was *in dolo* for concealing his Age, and not telling that he was Minor; The legal Exception being *ſi Majorem ſe dixerit*, and not *ſi Minorem non dixerit*. And it cannot be term'd Dole in a Minor not to tell that he was under Age, when ſuch a Queſtion was never put to him. 2. 'Tis contended that one who deals with a Minor, and furniſhes him Goods, is in Law obliged to know for what and whoſe Uſe they are, otherways he truſts upon his Peril.

The Lords repelled the Reaſon of Advocation in reſpect of the Anſwers. And found the Minor liable, tho' the Furniſhing was not made to himſelf, but to his Brothers and Siſters: And therefore remitted the Cauſe.

Eodem die. Nicol Somervell *Writer in* Edinburgh, *againſt Mr.* John Dundas *Advocate, and* Ninian Anderſon *Merchant in* Edinburgh.

Margaret Abercrombie having diſponed her whole Eſtate to *Nicol Somervell* her Husband, and delivered on her Death-bed 100 Pound *Scots* to a Truſtee to be given to Mr. *John Dundas*, and *Ninian Anderſon*, which they received the Day after her Deceaſe: *Nicol* the Husband purſued the Legatars for Repetition of the Mony, upon this Ground, That what was lying by his Wife, belonged to him *Jure Mariti*, and could not be diſpoſed of without his Conſent.

Anſwered. Margaret Abercrombie the Teſtatrix leaving a conſiderable Eſtate to the Purſuer in Bonds bearing Annualrent, which fell not under the *Jus Mariti*, ſhe might have burdened the ſame with Legacies at her Pleaſure, which he would have found himſelf obliged to make effectual; And therefore he cannot repeat ſo ſmall a Complement actually delivered to the Defenders by the Defunct's Order.

The Lords aſſoilzied the Defenders, and found them not liable to refound the 100 Pound.

July 17, 1705. John *Duke of* Athol, James *Earl of* Seafield, *and* John Ritchardſon *Writer in* Edinburgh, *againſt the Earl* of Eglintoun.

John Ritchardſon having in *Anno* 1696 obtained a Gift of the Office of Sheriff-Clerk of *Renfrew* from the Duke of *Athol* and Earl of *Seafield* then Secretaries of State, and having proteſted for Damages againſt *Robert Semple* of *Fulwood* Sheriff-Depute, for refuſing to admit him, and to deliver up the Records; He purſued the Earl of *Eglintoun* Sheriff-Principal, the ſaid Sheriff-Depute, and *Robert Alexander*, who exerced the Clerkſhip, to receive him to the Office, to deliver up the Records, and to make Payment of the Emoluments of the Office ſince the Year 1696.

Alledged for the Earl of Eglintoun. The Secretaries Gift cannot be regarded, becauſe, he the Earl of *Eglintoun* as heretable Sheriff of the Shire of *Renfrew*, hath Power to name the Sheriff-Clerk as a Pertinent of his Office, and hath granted a Commiſſion to *Robert Alexander*, who officiates as Clerk.

Anſwered for the Purſuers. Sheriff-Clerkſhips, as all other Offices belonging to the Crown, are at the Secretaries Diſpoſal, unleſs the heretable Sheriff's

Charter doth bear a ſpecial Power to diſpoſe of the Clerk's Office, which the Earl of *Eglintoun* cannot pretend to be in his. Nor is there any Difference as to the Queſtion and Power of naming Clerks, betwixt heretable and temporary Sheriffs: And as the latter cannot nominate without a ſpecial Grant from the Crown; neither can the former.

The Lords found the Secretaries of State have Power to nominate Sheriff-Clerks, when the Sheriffs, as in this Caſe, have no ſuch Power expreſt in their Charters, or heretable Rights. And decerned *Ritchardſon* to be received in the Office; reſerving to him Action for the bygone Profits as accords.

July 19, 1705. Alexander Black *Merchant in* Edinburgh, *againſt* Andrew Sutherland *Writer to the Signet, and* Barbara Guthrie *his Spouſe, and other Creditors of* Patrick Steill *Vintner in* Edinburgh.

Patrick Steill and *Alexander Black* being bound to Sir *Robert Chieſly* late Provoſt of *Edinburgh*, in 300 Pound *Sterling*; and *Steill* having received from *Black* for Relief of his Proportion, a Precept for 462 Pound *Scots*, upon Mr. *Tock* Periwig-maker in the *Wrightſhouſes*, and obliged himſelf by Backbond to *Black*, that he ſhould apply the ſame for the Satisfaction of Sir *Robert Chieſly*'s Debt *pro tanto*: *Andrew Sutherland* and others of *Patrick Steill*'s Creditors arreſted the Mony in *Tock*'s Hand, as belonging to their Debtor, and raiſed a Furthcoming; Wherein *Alexander Black* compeared and craved Preference to the Arreſters, altho' the Intimation of his Backbond was poſterior to their Arreſtments: In regard *Steill* had only a perſonal Right to a moveable Subject, qualified with a Backbond for a ſpecifick Uſe, and ſo upon the Matter a Truſt not affectable for his Debts.

Anſwered. The Sum arreſted cannot be called *Black*'s Mony, but *Steill*'s, whoſe Faith *Black* followed; And therefore *Steill*'s Creditors are preferable, unleſs there had been a Retroceſſion or Intimation of the Backbond, prior to their Diligences of Arreſtment: Seing they were not bound to know of a latent Backbond.

Replyed. By our Law Backbonds are real and ſubſiſt againſt third Parties, *February* 5, 1678, *Mackenzie* contra *Watſon* and *Steuart*. The like holds in Appriſings or Adjudications, where many aſſign their Debts to one, that he may adjudge in his Name for their Behoof, and they get Backbonds from him as a Truſtee, which militate againſt his Succeſſors, and qualifie the Adjudication led by him within the Legal, till it be made real by Infeſtment.

The Lords found that *Steill*'s Backbond ſo affected the Mony, as it could not be arreſted for his Debt. For they thought a Backbond of this Nature was *Pactum ex incontinenti adjectum*, and *Pars Contractus*, being of the ſame Date with the Precept; And that *Steill*'s Creditors could have no more Right to this Sum, than he had himſelf.

July 20, 1705. Margaret Pots *and Mr.* William Hunter *Miniſter at* Lilliesleaf, *againſt* John Mitchelſon *in* Livelaw *in* England, *and* John Robſon *Glover in* Kelſo.

John Mitchelſon having got Ten Pound Six Shillings *Sterling* from *Robert Pots*, to buy ſome *Engliſh* Wool for him, and having neither bought it, nor reſtored the Mony, was arreſted in the Town of *Kelſo* at the Inſtance of *Robert Pots* according to the Border-Law, till *John Robſon* enacted himſelf in the Baillie Court Books as Cautioner for him, *Judicio ſiſti, & Judicatum ſolvi*:

Upon which *Mitchelſon* and *Robſon* being purſued before the Baillies of *Kelſo*, and the Receipt of the Mony proven by *Mitchelſon*'s Oath, a Decreet was given againſt them conjunctly and ſeverally. And being charg'd to make Payment at the Inſtance of *Margaret Pots* as Executrix to *Robert* the Father, they ſuſpended upon theſe Reaſons, 1. The Decreet is null as pronounced *a non ſuo Judice* upon an Arreſtment by the Baron Baillie of *Kelſo*, of an *Engliſhman* not Subject to his Juriſdiction. For theſe perſonal Attachments, tho' ordinary betwixt the two Nations, are only competent to Sheriffs and Baillies of Regality and the like, as being *magis Imperii, quam Juriſdictionis*, and not to a Baron Baillie who can only judge betwixt Tenants and Inhabitants of the Town in ſmall Matters, ſuch as the Rents of Tenements, Bloodwits, and the like, and therefore the Attachment being unwarrantable, the Obligement of Cautionry became null. 2. The Decreet is null, for that the Principal and Cautioner are therein decerned againſt conjunctly and ſeverally. 3. It was colluſive betwixt the Purſuer and principal Party in ſo far as the latter compeared and judicially acknowledged the Libel, albeit he could not have been compelled thereto, as living without the Juriſdiction.

Anſwered. 'Tis notour that through all *England*, particularly on the other Side of the Border, thoſe that are cloth'd with any Sort of Power or Juriſdiction, attack and arreſt *Scotſmen* till they find Caution: And here we are not to meaſure the Power of a Baron Baillie from the ordinary Acts of Juriſdiction he may exerciſe among *Scotſmen*, but only from the known Practice of our Neighbour Nation, and the Town of *Kelſo* where there is great Traffick and Reſort of *Engliſhmen*. Yea any Judge in *Scotland*, having civil Juriſdiction, as to Debts betwixt Inhabitants within his Bounds, may arreſt the Perſon of any *Engliſhman* till he find Caution; nor is there any Reaſon to diſtinguiſh betwixt a Sheriff and a Baron Baillie as to this Point. 2. *Et ſeparatim.* This cannot avail *Robſon* the Cautioner, becauſe he freely enacted himſelf, and cannot pretend Compulſion. It was alſo juſt to decern againſt Principal and Cautioner conjunctly and ſeverally: Becauſe, all ſuch Cautioners are not only liable to ſiſt the Perſon but alſo to pay what ſhall be decerned. 3. There is no Colluſion in the Caſe, for the judicial Confeſſion is upon Oath; and the Cautioner by enacting himſelf *Judicio ſiſti*, does ſubject himſelf to a Probation by the Principal's Oath, and the Principal's compearing and owning the Debt is an Homologation of the Juriſdiction.

Replyed. The Charger muſt not only prove for ſupporting her Decreet that by the conſtant Cuſtom of the Border upon both the *Scots* and *Engliſh* Side, any Judge, by whatever Authority, tho' limited to a certain Effect, has Power to arreſt thoſe of the other Side when found within his Diſtrict, as being an Alledgeance upon Matter of Fact; but alſo that the Cuſtom hath been ſuſtained and approved by a Sovereign Court in *Scotland*. 2. The finding of Caution *Judicio ſiſti, & Judicatum ſolvi*, did not found the Juriſdiction of the Baron Baillie, but only obliged *Mitchelſon* and his Cautioner to anſwer before a competent Judge, as if *Mitchelſon* were a Native: And if he were a Native without a fix'd Domicile, he could not be conveened but before the Lords of Seſſion. 3. It was unjuſt to decern againſt Principal and Cautioner, becauſe naturally the Principal ſhould be firſt diſcuſs'd. 4. *Cautio Judicio ſiſti, & Judicatum ſolvi*, is only given where there is a depending Proceſs: But where a Perſon is ſummarly arreſted as a Stranger, or ſuſpected to be *in Meditatione Fugæ*, all that can be required is *Cautio Judicio ſiſti*, which is of the Nature of a Bond of Preſentation; and therefore the Baillie of *Kelſo* exceeded his Juriſdiction in extorting Caution *Judicatum ſolvi*, which was certainly Concuſſion. 5. Compearing before the Baron Baillie was no Prorogation of the Juriſdiction, but only a Sign of Colluſion: For the Juriſdiction of a Baron Court cannot be prorogated in ſuch a Caſe, more than it could be prorogated by Parties mutually compearing and debating a Divorce before it.

The Lords found the Baillie's Warrant and Decreet ſufficient, and the Letters orderly proceeded.

Eodem Die. Alexander Aliſon, *Supplicant*.

ALexander *Aliſon* Writer to the Signet as Tackſman of the Eſtate of *Halkertoun*, ſet to him by the Lords of Seſſion, being put to for the Proportion impoſed upon that Eſtate for repairing the Pariſh Church that was ruinous; applyed by a Bill to the Lords for a Warrant to pay: Craving they would declare either that the Payment ſhould be allowed in his Tack-duty; or that the falling of the Church through Want of Reparation, ſhould not be imputed to his Neglect. But the Lords refuſed to interpoſe their Authority.

July 24, 1705. *Mr.* James Gray *of* Balgouny, *againſt* Henry Panton *of Hiltoun*.

A Bond of 8000 Merks payable to *John Vrquhart*, he being on Life, and failing of him by Deceaſe, to *Thomas Menzies* of *Balgouny* his Heirs and Aſſignies, with a Clauſe, *That the Sums ſhould be imployed upon heretable Security in Favours of* Thomas *his Heirs and Aſſignies* (without mentioning Executors) *and declaring the ſame to be heretable and no ways moveable thereafter*, was aſſigned by *John Vrquhart* and *Thomas Menzies* to his Brother *Alexander Menzies* his Heirs and Aſſignies; who, after he had raiſed Horning upon the Bond, and charg'd for Payment, transferr'd the ſame upon Death-bed in Favours of *Margaret Gordon* Relict of *Thomas Menzies* for the Behoof of their younger Children, excluding the Heir. Of which Diſpoſition and Tranſlation Mr. *James Gray* of *Balgouny* as Heir to *Alexander Menzies* having raiſed Reduction *ex Capite Lecti*, againſt *Henry Panton* of *Hiltoun* and his Creditors, It was alledged for the Defenders, They ought to be aſſoilzied from the Reaſon of Reduction, becauſe, the Bond had been rendred moveable by a Charge before the Tranſlation.

Anſwered for the Purſuer. The Bond aſſigned is of the Nature of a Bond ſecluding Executors; which is not rendered moveable by a Charge.

Replyed. The heretable Deſtination in the Bond in Favours of the Heirs of *Thomas Menzies*, can put them in no better Caſe than if the Money had been actually imployed upon heretable Security and the Deſtination executed. But ſo it is, in that Caſe a Charge even at the Inſtance of *Thomas* would have made it ſimply moveable, and much rather ſhould a Charge at the Inſtance of *Alexander* the Aſſigny have that Effect: Seing the Aſſignation is not affected with the ſpecial Deſtination in the Bond aſſigned. 2. A Charge upon a Bond corroborating a Bond heretable by Inſeftment, which bore expreſly to be granted without Derogation to the Bond corroborated made the Sum moveable, *June* 25, 1672, Executors *contra* the Heirs of *Robert Seton*. And a Charge (as my Lord *Newtoun* obſerves, *March* 1, 1683) was found to have the like Effect upon a Bond excluding executors.

Duplyed. The Purſuer acknowledges, That Sums heretably ſecured may be rendered moveable by a Charge of Horning. But here the Sum is declared to be heretable and that it ſhall be no ways moveable in all Time thereafter, which is more than either a ſimple heretable Deſtination, or an actual Implement of it; and upon the Matter a Secluſion of Executors, againſt which no Charge of Horning or Requiſition doth operate. As to the Deciſion obſerved by the Lord *Newtoun* finding a Charge upon a Bond ſecluding Executors to make it moveable: That was the firſt and the laſt Time the Lords ever ſo decided, *Et una Hirundo non facit Ver.* For Deciſions ſince have run in a contrary Strain: Particularly in the Year 1692, it was found that a Charge upon a Bond ſecluding Executors, did not render it moveable. And Sir *George Mackenzie* in his *Inſtitutions* holds it as a Principle, That a Charge upon ſuch a Bond makes not the Sum moveable; for that the Creditor is preſumed to continue his Deſign in Favours of the Heir. 2. It is altogether frivolous to ſay, That *Thomas* did alter the Deſtination by aſſigning the Bond to *Alexander Menzies*. Becauſe, an heretable Right aſſigned remains as heretable in the Perſon of the Aſſigny, as it was with the Cedent; Even tho' the Aſſignation bear to Heirs, Executors, or Aſſignies. For the Mention of Heirs and Executors imports only, That the Right is conveyed to the Aſſigny, and failzieing of him, to any of his Repreſentatives that may have Right according to the Nature of the Subject conveyed. It doth not alter the Caſe, that the Charge of Horning was at the Inſtance of *Alexander*, whoſe Aſſignation doth not expreſs the Speciality in the Bond aſſigned: Since the Aſſignation gives the Aſſigny no more Power than juſt what the Cedent had.

The Lords found the Charge of Horning did not render the Bond moveable, in reſpect by the Conception of it the Sums were deſtined to be heretable and not moveable thereafter.

July 25, 1705. George Dundas *of that Ilk, againſt* William Dundas *Merchant in* Edinburgh.

A Contract of Marriage in the Year 1639 being entred into betwixt *Walter Dundas* Son to *George Dundas* of that Ilk, and Miſtreſs *Chriſtian Leſly* Daughter to Sir *Alexander Leſly* afterward Earl of *Leven*; The ſaid *George* and *Walter Dundaſſes* provide to the ſaid Miſtreſs *Chriſtian Leſly* a yearly Liferent of Twenty four Chalders of Victual, partly localled, and partly by way of Annuity out of the Eſtate of *Dundas*, of which ſhe was to come to the full Poſſeſſion after the Deceaſe of Dam *Anna Monteith* Mother to the ſaid *George*, and *Elizabeth Hamilton* his Lady; But was reſtricted during their Lifetimes to a leſſer Proviſion. After all the Contract bears, " It is agreed and declared,
' That albeit the ſaid *Walter Dundas* and his Heirs Male to be got in the ſaid
' Marriage are not infeſt, nor appointed to be infeſt in Fie in the ſaid Liferent
' Lands, and others above written, nor provided to the Teinds thereof,
' yet after the Deceaſe of the ſaid Miſtreſs *Chriſtian Leſly*, the ſaid *Walter* in his
' Lifetime, and after his Deceaſe the Heirs Male to be gotten in the ſaid Marriage,
' ſhall have Right by virtue of thir Preſents, to bruik the ſaids Lands and
' Teinds, with the foreſaid Annuity provided in Liferent during the Lifetimes
' of the ſaid *George Dundas* and Dam *Anna Monteith conjunctim*, and after
' their Deceaſe, and of the longeſt Liver of them two, they ſhall have Right to
' the haill Liferent Lands, Teinds, and others above written, wherein the ſaid
' Miſtreſs *Chriſtian* is appointed to be provided in Liferent, reſerving always to
' the ſaid *Elizabeth Hamilton* her Liferent of the Eaſter Place of *Dundas*, Office-houſes,
' and half of the Eaſter and Weſter Yards, and to Set, Raiſe, Remove,
' Output and Input Tenants thereintil, as well not infeſt as infeſt therein.
' Likeas, if need beis, the ſaid *George Dundas* binds and obliges him to make
' ſufficient Infeſtments, Tacks, or other Rights to the ſaid *Walter* his Son, and
' his Heirs Male foreſaid, to the Effect above ſpecified. But Prejudice to the ſaid
' Miſtreſs *Chriſtian* her Lifetime of the ſame, in manner above declared. *There is alſo a Clauſe ſubjoined in thir Terms*, " And becauſe the Lands and Living of
' *Dundas*, and Teinds belonging thereto, are tailzied to the Heirs Male, ſo that
' in caſe there be only Daughters procreated of the ſaid Marriage, they will be

‘ deſtitute of Proviſions, therefore the ſaids *George* and *Walter Dundaſſes* binds ‘ and obliges them and their Heirs Male, to pay the ſaids Daughters, certain ‘ Sums in Name of Tocher, in manner mentioned in the ſaid Contract.

There were two Sons of this Marriage, viz. *Ralph* and *Walter*; *Ralph* the eldeſt proving looſe and diſſolute, there was a Tailzie of the Eſtate of *Dundas* made in the Year 1669, by *George Dundas* and his Son *Walter*, whereby they reſign in Favours of the ſaid *George*, *Walter* and *Ralph*, *Walter*'s eldeſt Son in Liferent *Succeſſive*, and to *Walter Dundas* his ſecond Son, and the Heirs Male of his Body in Fie: Which failzieing, in Favours of *George* Brother to the ſaid *Walter* elder, and the Heirs Male of his Body. Then follows a Subſtitution in Favours of ſeveral other Perſons, with a Right of Reverſion to *Ralph Dundaſs* and the Heirs Male of his Body; And a Faculty to *George* and *Walter Dundas*, or either of them, to diſpone and contract Debts. In the 1671, *George* after his Son *Walter*'s Death, renewed the foreſaid Tailzie, with this Alteration, He ſuſpends the Right of Reverſion competent to *Ralph*, until he ſhould procure the Conſent of ſome Friends therein named, who were impowered to diſcharge the Reverſion if they thought fit. Theſe Truſtees did afterward diſcharge the Reverſion, whereby *Ralph* being wholly excluded, and *Walter* his younger Brother dying without Heirs, *George Dundas* the preſent Heretor ſucceeded; And for clearing and eſtabliſhing his Right, commenced an Action of Declarator againſt *William Dundas* Merchant in *Edinburgh*, who laid Claim to the Eſtate as Son and Heir Male to *Ralph*.

Alledged for the Defender. That the Fie of the Twenty four Chalders of Victual at leaſt, provided by his Grandmother's Contract of Marriage, was ſo ſettled upon *Walter Dundas* her Husband and the Heirs of the Marriage, that he as Heir to *Ralph*, who was Heir of the Marriage, could not be debarred from the ſame by any gratuitous or voluntary Deed of his Predeceſſors.

Replyed for the Purſuer. There was no Fie provided by the foreſaid Contract, but only a ſort of Liferent, Aliment, or Appanage to *Walter* and his Heirs Male of the Marriage, till the Succeſſion fell to them upon the Death of old *George*, conform to the antient Infeftments. *For* Walter Dundas *and his Heirs Male*, as the Clauſe of the Contract runs, *were neither infeft nor appointed to be infeft in Fie of the ſaid Liferent Lands*; Which imports that the Proviſion was only a temporary Right, and that the General and his Daughter relied upon the old Infeftments of the Eſtate, whereby it was tailzied to Heirs Male, as the Contract bears. In the which Contract alſo certain Portions to Daughters are provided, in Caſe of the not Exiſtence of Heirs Male. Beſides, it is not to be ſuppoſed, that the Parties had any View of providing ſo ſmall a Part of the Eſtate in Fie: Eſpecially where there is no Obligement to make Reſignation, but allennerly to grant Infeftments or Tacks; And where *Walter* and the Heirs of the Marriage were to uplift eleven Chalders twelve Bolls by way of Annuity: Now, a Right of Tack or Annuity is incompatible with a Proviſion of Fie.

Duplyed for the Defender. If the General reſted ſatisfied with the old Tailzies in Favours of Heirs Male, and followed the Faith of the Parties contracting with him, that his Male Children would ſucceed by Virtue of theſe Deſtinations; He hath been either impoſed upon, or the Faith then given hath not been obſerved; ſince his Grandchild was excluded. And whatever Prejudice might have been taken up againſt *Ralph*, it was hard to extend it to his innocent Children, who at this Day ſeem no ways undeſerving the Succeſſion of the Eſtate. Yet the General has indeed in Part relied upon the Faith of the old Infeftments, tho' not wholly; in ſo far as, he has ſecured ſomething by the Contract in Favours of Heirs Male of the Marriage, which muſt be a Proviſion of Fie. For 1. In ſtead of the Words *Liferent*, *Aliment*, and *Appanage*, which are not to be found in the controverted Clauſe, we find, *To Bruik*, *Enjoy*, and *have Right*, Terms that expreſs'd indefinitely, and without Limitation, do always imply the Conveyance of, or Obligement to convey a Right of Property. For when the granting of a temporary Right is only deſigned, the Quality and Reſtriction of *during Lifetime*, for *Aliment* and *Maintenance to ſuch an Event*, &c. are adjected. 2. As the Words ſo indefinitely expreſs'd imply Alienation; It was rational to think this was the Deſign of Parties: A conſiderable Portion being given, which deſerved the Conveyance of the whole Eſtate. But becauſe the old Infeſtments were ſo conceived, and the Excluſion of the lineal deſcendent Heirs-male could hardly be imagined; It was thought ſufficient to ſecure them expreſly in the Lands provided to the Mother in Liferent. Which, as it anſwers the Objection touching the Smallneſs of the Proviſion, is an Argument of the greater Ingratitude, that ſuch a ſmall Part ſhould have been alſo carried away. 3. The Initial Words of the Clauſe do not at all derogate from the Proviſion of Fie: For they imply only that the foregoing Proviſions being altogether relative to the Lady's Liferent, without Mention of Heirs of the Marriage, (which are uſually firſt ſpoken of in ſuch Contracts, at leaſt by Way of Subſtitution to the conjunct Fiars.) The controverted Clauſe was adjected to ſupply that Defect. 4. The Proviſion being chiefly to take Effect after the Deceaſe of old *George*, it could be no other Thing than a Right of Fie: For *Walter* and his Heirs-male were then to ſucceed to the whole Eſtate by the old Infeſtments. 5. The Fore-part of the Contract ſecuring an Annuity to *Walter* and his Heirs-male of the Marriage is not inconſiſtent with the Proviſion of Fie; for the Fie of the whole Liferent Lands was not to take Effect till the Death of old *George* and *Anna Monteith*. But as Miſtreſs *Chriſtian Leſly*'s Proviſion of Twenty four Chalders of Victual was reſtricted to Twenty, during the Lives of theſe Perſons, to be made up partly by Locality, and partly by Annuity: So the Proviſion in Favours of *Walter* and his Heirs-male, during the foreſaid Interval, was to be bruiked according to the ſame Extent; not to alter the Nature on't, but only to Qualify the Method of Poſſeſſion for that Time. And 'tis no new Thing to ſee Proviſions of Fie in Favours of Heirs of a Marriage qualified as to the Poſſeſſion, and Method of Uplifting during the Courſe of Liferents. 6. *George*'s Obligement to grant ſufficient Infeſtments, *&c.* can only be underſtood of Infeſtments in Fie. 7. If the Proviſions and Obligements in the Contract, concerning the liferented Lands, had only been intended for an Aliment to the Heirs-male, what ſhould have been the Effect, if *Walter*'s Lady ſurviv'd her Husband? She being ſimply provided to the Liferent of the Whole, and the Proviſion to the Heirs-male expreſly declared not to prejudge her Right. Therefore it cannot be underſtood to import any Right inferior to an Infeſtment of Fie or Property, as contradiſtinct to the Lady's Liferent reſerved in the ſame Clauſe. It is a meer Quibble that is taken from the Word *Tacks*: For firſt, a general and indefinite Obligement to grant ſufficient Infeſtments, Tacks or other Rights, muſt always be underſtood of ſuch Rights in the Option of the Receiver, whereby the Perſon obliged may be fully denuded. The Adjection of *Tacks* may again be very well underſtood with Relation to the Teinds, which are here likeways conveyed, and that by way of Tacks, that *George* might not be liable to warrand the abſolute Right to the Teinds, when perhaps he himſelf had only temporary Rights. As to the Argument drawn from the Clauſe mentioning Proviſions to Daughters, becauſe the Eſtate is tailzed to Heirs-male by the old Infeſtments, it is of no Import in the preſent Debate. For there being only a Proviſion of Lands to the Value of Twenty four Chalders of Victual in Favours of the Heirs-male by the Contract, and the Bulk of the Eſtate remaining upon the Foot of the old Infeſtments, it was not improper ſo to introduce the Daughters Proviſions, without taking Notice of that ſmall Part provided to Heirs-male by the Contract.

Triplyed for the Purſuer. 1. The Words of the Contract are not, That *Walter* and the Heirs-male of the Marriage ſhould have Right to the whole Jointure-Lands, after the Deceaſe of old *George*; But *after his and Dam* Anna Monteith's *Deceaſe, the longeſt Liver of them Two*; Which Proviſion may evidently point to give them the Right after Dam *Anna Monteith*'s Deceaſe, if ſhe ſhould chance to ſurvive old *George*, and not after his Death, he proving the longeſt Liver; 'cauſe there the Fie of the whole Eſtate devolving on them by the old Infeſtments rendred the Proviſion uſeleſs. But the true Cauſe of mentioning Heirs-male of the Marriage, was to ſecure them of a Competency for Subſiſtence, notwithſtanding of the Liferents and Burden of Debts then on the Eſtate; To the Effect, that even *Walter* himſelf entring in a ſecond Marriage, might not be in a Capacity to wrong them by providing theſe Lands as a Jointure to the ſecond Wife. The Contract bears indeed, That after *George*'s Deceaſe, *Walter* and the Heirs of the Marriage *ſhould have Right to bruik*: But this the Parties foreſaw would fall out by devolving of the Fie, and not by the Contract. 2. It is evident by the very Air of the Clauſe, That the Obligement to grant Infeſtments, Tacks, or other Rights, and that only if need be, was meerly intended to ſecure *Walter*, and the Heirs-male of the Marriage in a Settlement of Subſiſtence during their own Time, which might be done even by Infeſtment without giving them any Fie. And the adding of *Tacks* or *other Rights* to Infeſtments ſhew that they were all promiſcuouſly named only, for the more Security of the foreſaid Liferent Proviſion. Tho the Defender would have Tacks relate to Teinds, and Infeſtments to Lands; the Clauſe makes no ſuch Diſtinction, but mentions them promiſcuouſly. Nor indeed were there any Teinds given in Jointure that could be ſecured by Tack, ſince all theſe Teinds were drawn by the Maſter from the Tenant, and ſo were carried with the Proviſion of the Lands. 3. That it was the very Intention of Parties from the Beginning to have the Fie deſcend by virtue of the old Infeſtments, without any Limitation of a Contract, is further cleared from the uſhering in the Security to be given to *Walter*, and the Heirs of the Marriage, for bruiking of the Liferent Lands, with a *Likeas if need be*: Which argue ſtrongly that the Security of the Proviſion by Infeſtment, Tack or other Right if need were, was the only Thing intended without the leaſt Deſign of granting a Fie, which could not be ſettled without Infeſtment.

The Lords found, That the Clauſe in the Contract 1639, to the Heirmale of that Marriage, doth not import a Fie, but allennerly a Liferent, or Maintenance till he ſhould ſucceed conform to the Tailzies of the Eſtate by Service and Retour. *Vid.* 2 *January* 1706, *inter eoſdem.*

Eodem Die. William Hamilton *of* Grange-Brech, *and* Margaret Boſwal *his Spouſe, againſt Cornet* George Boſwal.

M*Argaret Boſwal* Daughter to Cornet *George Boſwal*, having a proper Eſtate which came by the Mother and Friends on the Mother's Side: As 4000 Merks upon *Vicars-Grange*, 2000 Merks due by *Kininmonth*, and Thirteen Acres of Land, with a Lodging, Orchard and other Houſes in, and about *Kinghorn*; her Father and his two Brethren had a long Intromiſſion with her whole Eſtate. *William Hamilton* of *Grange* married her with the Father's Conſent; and neither he nor ſhe knowing any thing of her Fortune, they both yielded to the Father's Terms; giving to him and accepting from him, whatever he was pleaſed to propoſe. The Cornet contracted with his Daughter 6000 Merks of Tocher, reſerving his own Liferent of 2000 thereof. And for this Portion he made his Daughter with

Conſent of her future Spouſe, and him as taking Burden for her, diſcharge himſelf and his Brother *Balmuto* of their Curator Accompts; And at the ſame Time took a ſeparate Obligement from them, to diſpone to him upon the Day after their Marriage, the Thirteen Acres of Land, with the Lodging, Orchard and other Tenements above-mentioned, under the Pain of 12000 Merks by and attour Performance: And accordingly ſuch a Diſpoſition was granted by *Grange* and his Spouſe the very next Morning after their Marriage. They coming afterward to underſtand, what a groſs Abuſe had been put upon them, raiſed Reduction of the Contract, Bond and Diſpoſition, upon the Grounds of Minority, Leſion and Circumvention, wherein the Lords, 19 *December* 1701, *Suſtained the Reaſon of Leſion in Behalf of* Grange's *Lady who was Minor, but found that the Husband being Major, and not having proven Concuſſion or Circumvention, could not be reponed againſt the Deeds ſubſcribed by him, before and after the Marriage.* For proving the Leſion, a Compt and Reckoning was appointed: Wherein it was alledged by the Defender, That his Daughter the Purſuer could not charge him with the Rents of her Lands, and Annualrent of her Mony preceeding the Marriage, becauſe they fell under the Husband's *Jus Mariti*, and by the Contract of Marriage, and Diſpoſition after the Marriage, he had diſpon'd the ſame to the Defender.

The Lords found all muſt come *in Computo* to make up the Leſion: But decerned the Cornet to pay only the principal Sums; and aſſoilzied him from compting for Annualrents of Sums, or Rents of Lands due before the Marriage, as falling under the *Jus Mariti* of *William Hamilton* who diſcharged the ſame, and is not reſtored againſt the Diſcharge.

Eodem Die. *Mr.* William Ayton *of that Ilk, Advocate, againſt Dam* Margaret Colvill *his Step-mother.*

MR. *William Ayton* of that Ilk, as Heir to his Father, having purſued Dam *Margaret Colvill* his Step-mother for an Aliment, in reſpect his Father's Eſtate was ſo overburdened with her Liferent, the Proviſion of her Children, and extraneous Debts, that there was not a Competency left to ſuſtain him the Heir.

Anſwered for the Defender. Aliment can only be claimed by the Purſuer, either by virtue of King *James* the fifth's Statute, Ordaining Superiors to aliment their Ward Vaſſals; or *ſuper Jure Naturæ*; none of which holds here, the Defender being a Stranger to the Purſuer, and not his own Mother, and ſecured in a Jointure by her Contract of Marriage, which cannot be diminiſhed *contra Fidem Tabularum nuptialium.* 2. Such Aliments are only given to Minors who are deſtitute of any other Mean of Subſiſtence, and not to thoſe come to Age who have a Calling; That Idleneſs may not be incouraged; *February* 11, 1636, *Sibbald* contra *Wallace*; *July* 21, 1636, L. *Ramorny* contra *Law*: Now the Purſuer is Major, and an Advocate. 3. The Defender is burdened by her Contract with the Aliment of her own Children till they be ſeven Years old; And therefore cannot be further burdened with the Heir of the firſt Marriage. 4. The Purſuer can have no Benefit by this Aliment: For he being ſerved Heir *cum Beneficio*, it muſt be added to the Inventary, and accreſce to his Father's Creditors. 5. Perſonal Debts exhauſting an Eſtate, were not thought ſufficient to found an Aliment; *December* 18, 1667, *Dobie* contra Lady *Stoniehill*: And there is no real Diligence by Adjudication or Infeſtment upon the Eſtate of *Aytoun*, to debar the Heir from poſſeſſing.

Anſwered, 1. The Alimenting of Heirs is introduced by immemorial Cuſtom, that is much ſtronger than poſitive Statute; And it is always ſuſtain'd againſt Step-mothers having extravagant Jointures. 2. The Name of an Imployment will not afford a Man Bread, and *Officium Nemini debet eſſe damnoſum.* Neither is the Race always to the ſwift, nor the Battel to the ſtrong: For many Advocates have riſen to great Eminency, who at the Beginning have had little or no Buſineſs. The Caſes cited do not meet: For in the firſt, *non conſtat*, but the Heir was a plac'd Miniſter who had a ſure Fond to live on; And the Mother had but an Aliment her ſelf, and it was thought hard to burden one Aliment with another. As to the ſecond Deciſion, the Father was then alive who had a reſerved Liferent, and it was as reaſonable he ſhould bear the Aliment, as the elder Brother's Relict. 3. The Defender's Children of the ſecond Marriage have *aliunde* an adventitious Eſtate whereupon they may be maintained; and therefore cannot prejudge the Heir's Aliment. 4. Aliment not being arreſtable or affectable, by Creditors, is not to be added to the Inventary: And Law doth not diſtinguiſh whether the Heir be ſerved or not. 5. *Eſto* at the Father's Death the Debts were meerly perſonal; How ſoon are they made real by charging the Purſuer to enter Heir, and adjudging.

The Lords repell'd all theſe Defences in reſpect of the Anſwers. And modified the fourth Part of the Lady's Liferent for the Purſuer's Aliment; and decern'd her to make Payment to him accordingly. Albeit he was quarrelling her Liferent in a Reduction; Seing if he prevail'd therein, the Aliment would ceaſe.

July 26, 1705. *Competition betwixt the Creditors of* Halbert *and* William Gladſtains.

MR. *William Dundas* of *Kinkavil*, *Halbert Gladſtains* Merchant in *Edinburgh*, and *James Crawford* of *Mountquhany*, being all bound as Cautioners for *Bonhard*, to *Robert Halyburton* in a Bond of Five thouſand Merks, *Mountquhany* paid the Debt upon a Diſcharge and Aſſignation: And for two Thirds thereof adjudged the Lands belonging to the deceaſt *Halbert Gladſtains* upon a Decreet *Cognitionis Cauſa* recovered againſt his Repreſentatives. *William Gladſtains Halbert*'s Son having diſponed his Father's Lands to his Siſters, with the Burden of his Father's Debt, and his own then contracted; Upon which Diſpoſition an Adjudication in Implement was led in the Name of one *Douglaſs* (to whom the Siſters had aſſigned their Right in Truſt) and Infeſtment followed: The Lords by ſeveral Interloquitors found the Father's Creditors preferable to the Creditors of the Son, whoſe Debts were contracted after the Diſpoſition. *John Lillie* a Merchant Taylor at the *Hague*, Creditor to *William* the Son, alledged, That *Mountquhany*'s Adjudication tho for the Father's Debt was led for more than was due. In ſo far as the Eſtate of *Halbert Gladſtains*, who was but one of the three Cautioners, could not *ex Natura Negotii* be further affected by *Mountquhany*'s Diligence than for a Third of the Sums, if Mr. *William Dundas* one of the Cautioners had not broke: According to the Deciſion, 19 *June* 1662, *Wallace* contra *Forbes*. And he having failed, it is only liable for the Half; The Hazard of the inſolvent Cautioner dividing betwixt him and *Mountquhany*. And ſeing *Mountquhany* hath adjudg'd for two Thirds, the Adjudication ſhould be reſtricted to a Half, conſequently his Accumulations muſt fall. 2. *Douglaſs*'s Adjudication in Implement could only make *Mountquhany* as Creditor to the Father preferable for his Principal and Annualrents: And *Lillie*'s Adjudication being Year and Day prior to *Mountquhany*'s proper Adjudication, was a *medium Impedimentum*, to hinder and cut off his Accumulations to the Prejudice of *Lillie*. For altho *Mountquhany*'s Debt be conſidered as a Burden affecting the Diſpoſition; Yet it was not *Debitum Fundi*, ſo as the Ground might be thereupon poinded and appryſed; In which Caſe only a ſubſequent Adjudication is drawn back to its Cauſe. But is like a Debt ſecured by Inhibition or ſome heretable Right which only hath Preference as to Principal and Annualrents.

Anſwered for Mountquhany. Whatever might be ſaid for a Cautioner taking ſimply a Diſcharge, and purſuing a Co-cautioner upon the Clauſe of Relief, yet where the diſtreſſed Cautioner has got Aſſignation to the Debt, and purſues as Aſſigny, *utitur Jure Cedentis*: And as his Cedent might inſiſt againſt any of the three Cautioners for the whole; ſo he as Aſſigny might exact the whole from any of the other two, deducing his own Third whereof he was bound to relieve them, 12 *January* 1665, *Kincaid* contra *Leckie*, obſerved by *Craigmillar*; 23 *February* 1671, *Arnold* contra *Gordon*, obſerved by *Stair*; Where the Lords found that one of more Cautioners as Aſſigny might purſue any of the Co-cautioners for the whole Debt, deducing his own Share. And theſe two Deciſions being plain and pat, do ſufficiently over-rule that one 19 *June* 1662, cited for *Lillie*. For *poſteriora derogant prioribus*; or perhaps there two Cautioners had ſuſpended the third, in which Caſe the Lords very juſtly ſuſpended *quoad* the Charger's Third, which agrees with the other Deciſions. 2. *Eſto* it were true, that *Mountquhany*'s Adjudication upon the third Cautioner's turning Bankrupt, ſhould be reſtricted to the equal Half of the Debt paid: Yet ſeing he had good Action in Law for two Thirds, tho' the ſame might have been elided by the Exception of the Cautioner's Inſolvency, that Exception being *Res Facti*, and not proponed, his Adjudication was juſtly led; and therefore he ought not to fall from his Accumulations. Yea, albeit the Lords ſhould allow the other Creditors as yet to propone the ſame, and ſhould reſtrict *Mountquhany*'s Adjudication to an Half, yet his Accumulations effeiring to that Half muſt ſubſiſt: Seing he adjudged only for what was due, and ought not to be puniſhed for the Defender's Neglect to make Exceptions *in facto*. 3. As to the Alledgeance, That *Lillie*'s Adjudication is a *medium Impedimentum*, hindring *Mountquhany*'s Accumulations; It is Anſwered, That his Debt being the Father's, and preferable by *Douglaſs*'s Adjudication in Implement, the Accumulations are but acceſſory thereto. And in the next Place, *Mountquhany* having paid as a diſtreſſed Cautioner, he has good Action againſt the Co-cautioner and his Eſtate, not only for principal Sum, Annualrents and Penalty paid out, but alſo for the Annualrents of theſe Annualrents and Penalty as Damages, whereof he by the Clauſe of Relief muſt bear an equal Share, as was expreſly found in the Caſe of *Kincaid* againſt *Leckie*; And *Mountquhany*'s Accumulations afford him no more, ſo that he hath no additional Right by his proper Adjudication.

Replyed for Lillie. 1. Co-cautioners are bound to relieve one another of Coſt, Skaith and Damage through their becoming Cautioners, whether the Damage happen by the breaking of the Principal, or of the Co-cautioners, even tho' there were no expreſs Clauſe of Relief, 27 *January* 1675, *Monteith* contra *Rodger*, and therefore *Mountquhany* ought not only to have deduced his own Third; but alſo the Half of the Loſs ſuſtained by the inſolvent Cautioner, whoſe Condition was notour before the Adjudication, by long Impriſonment in *Edinburgh*, or abſconding in the Abbey. As to the Deciſions adduced by *Mountquhany*, they are nothing to the Purpoſe: Becauſe that betwixt *Kincaid* and *Leckie* doth not mention the Debate that gave Occaſion to the Interloquitor, nor do's it appear that there was a broken Cautioner in the Caſe, but only two ſolvent Cautioners pleaded the *Beneficium Diviſionis*. And in the next Place, altho' the Cautioner was found to have Right to purſue as Aſſigny, in the ſame Manner as the Cedent or principal Creditor; yet theſe are not alike *in omnibus*, otherways the former needed not to have deduced his own Part of the principal Sum. 2. Relief among Cautioners is conſidered ſo narrowly, that a

Co-cautioner tranſacting an old Debt and taking Aſſignation to his own Behoof in a third Perſon's Name, was found to have Right to no more, but a Proportion of what was truly paid; ſince Relief never goes beyond Diſtreſs and Payment, 27 *July* 1672, *Brody* contra *Keith.* And 'tis offered to be proved by *Mountquhany*'s Oath, that he did not pay the whole Sums, Principal, Annualrents and Penalty to the Creditor. Conſequently having adjudged for more than he paid, the Adjudication is null in that Reſpect. 3. *Mountquhany*'s Decreet of Conſtitution and Adjudication being both in Abſence and *Periculo Petentis*, and the Exception of the third Cautioner's Inſolvency notour, tho' not judicially opponed; he ought for his own Security to have deduced the half of his Proportion. 4. *Mountquhany* cannot found his Preference for the Accumulations upon *Douglaſs*'s Adjudication in Implement: For that Adjudication doth not accumulate, being only led for Implement of, and to complete the Diſpoſition; and as a diſtreſs'd Co-cautioner he can only accumulate the Sum truly paid, upon which he muſt depone.

The Lords reſtricted *Mountquhany*'s Adjudication to the Half, and cut off his Accumulations. And ordained him to aſſign *Lillie*, upon Payment of the ſaid Half, to a proportionable Relief out of *Bonhard* the principal Debtor's Eſtate.

Eodem Die. Elliot, *againſt* George Home *of* Kaims.

George *Home* of *Kaims* having writ a Letter to his Brother *John Home* at *London* in theſe Terms, *That he was content to advance him* 30 *Pound* Sterling *to ſupply his Neceſſity, and had writ to* Edinburgh *to ſend him Credit for it: But if he thought it would be too long ere it came to his Hand that Way, he might ſhew his Letter to Mr.* Foulis, *and give him a Bill upon him for the* 30 *Pound which ſhould be honoured; and ſo to get the Mony from him or Mr.* Elliot, *and it ſhould be punctually paid. John Home* having taken up the 30 Pound *Sterling* from Mr. *Foulis*, drew a Bill upon his Brother *Kaims* for it, which was paid, and ſome Months after drew another Bill upon him for 13 Pound *Sterling* payable to Mr. *Elliot*, who purſued *Kaims* for Payment.

Alledged for the Defender. He could not be liable for the 13 Pound *Sterling*, becauſe his Letter was fulfilled by paying to Mr. *Foulis* the 30 Pound *Sterling* therein-contained ſeveral Months before his Brother received the 13 Pound from Mr. *Elliot*; and he could never be liable by his Letter for twice Payment of the ſame Sum, or any Part of it.

Replyed for the Purſuer. The Defender's Letter to his Brother being a Letter of Credit, for taking up 30 Pound *Sterling* from Mr. *Foulis* or Mr. *Elliot*; albeit he got the Sum from Mr. *Foulis*, yet having kept the Letter and ſhew'd it afterward to Mr. *Elliot*, he was *in bona fide* to advance Mony upon it; not knowing that *Foulis* had already made Payment. For the Defender after he paid the 30 Pound to Mr. *Foulis* ſhould have got up his Letter; and that being omitted, he ought to be liable for the 13 Pound.

Duplyed for the Defender. His Letter was not of the Nature of a Letter of Credit, but only a private Letter to his Brother; whereas Letters of Credit are always in uſe to be writ to ſome Factor for advancing Mony. 2. There lay no Obligation upon the Defender to intimate to Mr. *Elliot* the Payment of 30 Pound *Sterling* to Mr. *Foulis*, ſeing he had not writ to Mr. *Elliot* to advance any Mony; and the Letter to his Brother imports plainly that he was firſt to ſeek the Mony from Mr. *Foulis*; and upon his Refuſal to apply for it to Mr. *Elliot*: So that he, Mr. *Elliot*, ſhould not have advanced a Sixpence upon Sight of the Defender's Letter till once he had enquired at *Foulis*, if he had honoured it; and having advanced the 13 Pound without making any ſuch Enquiry, the

Defender cannot be liable to Reimburſe him. Nor was it to be expected that the Defender ſhould, when he paid, have got up the Letter from Mr. *Foulis*: Since by the Conception on't it was only to be ſhewed to Mr. *Foulis*. 2. The Letter being limited to 30 Pound *Sterling*, and the expreſs Deſign of it to get Mony anſwered immediately, leſt the Credit from *Edinburgh* ſhould have come too late; Mr. *Elliot* had all the Reaſon in the World to believe the Defender's Brother would not have wanted the Mony for Half a Year, which he was ſo earneſt to have immediately; and therefore ought to have ſpoke with Mr. *Foulis* before he ſatisfied the Demand: Eſpecially conſidering that he, Mr. *Foulis*, by the Tenor of the Letter was not to get it up upon advancing the Mony.

The Lords repelled the Reaſons of Suſpenſion, and found the Letters orderly proceeded.

July 27, 1705. *Sir* Gilbert Elliot *Lord* Minto, *againſt* William Gordon *Merchant in* Edinburgh.

William *Gordon* Merchant having granted to my Lord *Minto*, when Clerk to the Privy Council, an Obligement in the Terms following, *Upon the ſafe Arrival of my Ship the* Royal Ann *at* Leith, *for which the Lords of Her Majeſty's Privy Council have been graciouſly pleaſed to recommend me to Her Majeſty for procuring a Paſs to retire my Effects from* France; *I promiſe to deliver to Sir* Gilbert Elliot *an Hogſhead of the beſt Wine aboard as Payment of his Dues for Extracting the ſaid Act of Recommendation.* The Lord *Minto* being informed that Mr. *Gordon* had ſome Wine arriv'd at *Leith*, purſued him before the Judge Admiral for Delivery of the Piece of Wine or 12 Pound *Sterling* as the Price on't; and obtained Decreet.

Mr. *Gordon* offered a Bill of Suſpenſion upon theſe Grounds, 1. The Performance of the Obligement being Conditional upon the Recommendation's taking Effect, and the Arrival of the Ship *the Royal Ann* at *Leith*, and the Condition never exiſting, the Obligement fell.

Anſwered for the Charger. The Condition of the Obligement could not be underſtood as taxative to the *Royal Ann*. For the Wine might have been ſhipped in the *Royal Ann*, and ſhe periſhing by the Way, brought home in another Bottom; or *Gordon* who inclined at the Date of the Obligement to tranſport his Effects in the *Royal Ann*, might have afterwards altered his Reſolution, or the Name of that Ship might have been chang'd. 2. If *Gordon* had deſigned to oblige himſelf only upon the Event of the Succeſs of the Recommendation, he ſhould have expreſs'd it ſo: For *in dubiis* Words are always explained *contra Proferentem*.

The Lords refuſed the Bill.

July 31, 1705. Andrew M'farlan *Merchant in* Edinburgh, *againſt* Alexander Cowie.

A*ndrew M'farlan* and *Alexander Cowie* having in *September* 1704, by a Contract of Co-partnery mutually obliged themſelves to ſtock in equally in Mony and Goods to a certain Value to be imployed in Trade for their joint Uſe, and to be equal Gainers and Loſers; and their Affairs falling in Diſorder in *December* thereafter, ſo as they were forc'd to retire to the Abbey for Sanctuary: *M'farlan*, after they had componed with their Creditors cauſed regiſtrate the Contract, raiſed Horning thereon, and arreſted all *Cowie*'s Effects. Which Arreſtment, tho' proceeding on a regiſtrate Contract, that was a Kind of Decreet,

creet, The Lords allowed to be looſed upon Caution: Becauſe the Charge being general, and for no liquid Sum, is of the Nature of a depending Action.

November 14, 1705. Alexander Brown *Merchant in* Edinburgh, *againſt* Alexander Hume *of* Coldinghamlaw.

A*Lexander Hume* of *Coldinghamlaw* having in *July* 1703 drawn a Bill for 146 Pound *Scots* upon *Silias Foirſide* in *Eymouth*, (who owed him the like Sum by Bond) payable to *Alexander Brown* Merchant in *Edinburgh*, at *Lammas* thereafter, which was proteſted for not Acceptance; Upon the ſecond of *Auguſt Foirſide* accepted the Bill payable the ſixteenth Day of that Month; Upon the fifth and ſeventeenth Days the Poſſeſſor proteſted for not Payment; and in *September* following received from *Foirſide* 100 *lib.* in Part of Payment. And thereafter obtained a Decreet againſt the Drawer before the Commiſſar of *Lauder* for the Remainder. He ſuſpended upon this Reaſon, That the Charger had not duly negotiated the Bill, in ſo far as, he at his own Hand had prorogated the Term of Payment to the 16 of *Auguſt*, without the Drawer's Advice or Conſent, had neglected to proteſt for not Payment within the three reſpite Days after the Term in the Bill; and had not diſcuſſed the Accepter by uſing due and timeous Diligence againſt him before he turned Bankrupt; Nor did ſo much as return Advice to the Drawer by the firſt Poſt, That the Bill was proteſted for not Payment, to the End he might have taken Courſe with the Accepter: And therefore the Drawer was no further liable, but the Charger muſt ſeek the Accepter for what he wants of Payment of the Bill.

Anſwered for the Charger. He had duly negotiated the Bill, in proteſting for Non-acceptance upon the 30 *July* 1703, and for not Payment the 5 of *Auguſt*, the laſt of the reſpite Days: By which two Proteſts he ſecured to himſelf both the Drawer, and the Accepter, as having the Drawer's Effects the Time of proteſting the Bill. 2. The taking Acceptance after proteſting for not Acceptance payable fourteen Days after the Term of the Bill, was an Advantage to the Drawer. Becauſe, Mr. *Brown* could have got Mr. *Foirſide* decerned in Payment by an ordinary Action, as having the Drawer's Effects; And the inſiſting that Way would have exhauſted more Time than fourteen Days, beſide the Expence and Trouble. As Mr. *Brown*'s Procedure was to the Drawer's beſt Advantage: So it was conform to the Merchant Cuſtom; For, according to *Marius* upon Bills of Exchange, P. 21. The Poſſeſſor of a Bill having proteſted the ſame in the Terms of its Draught, can take an Acceptance as the ſame is offered: And Mr. *Forbes* Chap. 6. *Concerning proteſting of Bills* obſerves, That a Bill being duly proteſted for not Acceptance and Payment within the reſpite Days, preſerves both the Drawer and Accepter. 3. The Merchant Law preſcribes no further Diligence than duly proteſting for Non-acceptance and not Payment; and if Merchants ſhould not have ready Recourſe againſt the Drawers of Bills whom they principally truſt with their Mony, but be obliged to proſecute Accepters with utmoſt Diligence, that would involve them in inſuperable Difficulties; Eſpecially when the Sum is ſmall. If any Perſon, for Example, ſhall draw a Bill upon a *Zealand* Merchant, payable at *Edinburgh*, and accepted by him there: The Poſſeſſor, by duly proteſting the Bill for not Payment, has immediate Acceſs againſt the Drawer, and can never be obliged to go ſeek his Mony in *Zealand*. 4. There was no Neceſſity of writing Advice to the *Merſe* where the Drawer lives, when he was at *Edinburgh*, where the Charger had Occaſion to ſpeak with him every Day, and could depone that he acquainted him that the Bill was not honoured.

Replyed for the Suſpender. That it had been a greater Kindneſs to him, if the Poſſeſſor had not prorogued the Term of the Bill, but returned it proteſted for not Acceptance, that the Drawer might ſee to his own Security, by uſing Execution upon the deſigned Accepter's Bond, which he delayed in Confidence that his Bill was complyed with. 2. Albeit the Poſſeſſor might have proteſted for not Acceptance, he could not proteſt for not Payment till elapſing of the Term to which it was prorogated: But could only purſue in an ordinary Action the Perſon drawn upon, as having the Drawer's Effects. Nor could he recur againſt the Drawer, the Proteſt for not Acceptance being taken off and paſt from by the poſterior Acceptance and partial Payment. 3. A ſimple Proteſt, which is but the Aſſertion of a Notar, cannot be all the Diligence required in the Poſſeſſor of a Bill: For after Acceptance the Drawer is only liable *ſubſidiarie*, the Accepter who is conſidered as principal Debtor being firſt diſcuſt; and the Poſſeſſor ſhould uſe the ſummar Diligence allowed by the *Act* 20. *Par:* 3. *Ch:* 2. againſt the Accepter in Caſe of not Payment before any Recourſe againſt the Drawer; otherways that Recourſe had been competent ſummarly upon the regiſtrate Proteſt, and not by Way of ordinary Action. Mr. *Forbes* alſo in his *Treatiſe of Bills of Exchange, P.* 93. aſſerts, That any Accident happening to the Accepter after the Term of Payment, ſhould be upon the Poſſeſſor's Risk, it being juſt that the Drawer ſhould not ſuffer through his Neglect.

The Lords found the Drawer of the Bill liable; and repelled the Reaſons of Suſpenſion.

November 15, 1705. William Duncan *in* Woodend *of* Drum, *againſt* Marjory Forbes *Relict of* Alexander Irvine *of* Drum.

W*Illiam Duncan*, as having Right to three Bonds granted by the Lady *Drum* to his Father, having charged for Payment, ſhe ſuſpended on this Reaſon, That the Bonds were null as granted by her *veſtita Viro*, without her Husband's Conſent.

Anſwered for the Charger. Albeit by a common Rule with us a Wife's Obligation for Debt contracted during the Marriage is null, and not obligatory upon her, who is underſtood to be *ſub Poteſtate Viri*, and to have nothing at her own Diſpoſal: Yet this admits of ſeveral Exceptions; ſuch as a Wife may contract and oblige her ſelf *ſtante Matrimonio*, where ſhe has a ſeparate *Peculium*, Eſtate or Aliment exempted from the Husband's *Jus Mariti*; *December* 19, 1697, *Gairns* againſt *Arthur*. *February* 23, 1672, *Neilſon* againſt *Arthur*. Or when ſhe is *præpoſita Negotiis*, as has been often decided, and the Charger is preciſely in the Caſe of theſe Exceptions. For the Suſpender at the granting of the Bonds charged for had a yearly Aliment of 6000 Merks for ſubſiſting of *Drum*'s Family, which ſhe was impowered to uplift and grant Receipts for to the Adminiſtrators of the Eſtate, without the Concourſe or Conſent of her Husband, who as a weak and ſimple Man might be underſtood to have been *ſub Poteſtate Uxoris*; And it was her Fault only, that the Sum ſhe borrowed was not paid out of that alimentary Fund, which was altogether at her own Diſpoſal.

Replyed for the Suſpender. A Wife's Bond *ſtante Matrimonio* is null, *November* 28, 1623. *Schaw* againſt *Maxwell*, *December* 21, 1629, *Ayton* againſt the Lady *Halkertoun*, without the Husband's Conſent, and ſometimes with it; as in the Caſe of the Husband and Wife's joint Obligement to pay Sums or perform Deeds; *March* 24, 1626, *Greenlaw* againſt *Galloway*. *Hope*, Husband and Wife, *Douglaſs* of *Tofts* contra *Elphinſton*. *December* 15, 1665, *Ellies* againſt *Keith*. The Reaſon is, becauſe, *Reipublicæ intereſt*, to ſecure Wives from being induced to exhauſt by Obligements the Mean of their Subſiſtence after Diſſolution of the Marriage, nor can the Suſpender be denyed the Privilege of married Women, upon the ſquint Suggeſtion of the Laird's Simplicity: Since he was never declared incapable to be a Husband, and Law diſtinguiſhes not betwixt the Caſe of one Husband's Wife and another's. It doth not follow from his being weak and unfit for Buſineſs, that his Wife could be effectually bound by any Tranſaction *tanquam ſoluta*, without a ſpecial Act of Parliament: As was obtained for Miſtreſs *Anderſon* the Printer, and that was ever thought ſomewhat ſingular, and out of the Road of common Law. 2. The Deciſions adduced by the Charger do not meet the preſent Caſe. For *Elizabeth Arthur* had a ſeparate *Peculium*, or Fund from her Childrens Grand-father, for thoſe very Uſes for which ſhe had granted Bonds: Whereas the Lady *Drum*'s Bonds are not for Aliment; nor had ſhe any peculiar Fund of Aliment, for the Act of Council allowed of Receipts to the Adminiſtrators by her or him *alternative*. 3. A Wife that is *præpoſita Negotiis*, is not liable by the *Præpoſitura*, after Diſſolution of the Marriage, but only the Husband's Repreſentatives; *January* 29, 1631, *Porter* contra *Law*. And the Act of Council authorizing the Suſpender to uplift and Diſcharge the Aliment, was but a *limitata Cauſa*, which could have only a limited Effect, to warrand Payments made to her by the Managers of the Eſtate, and not to impower her to grant Bonds for borrowed Mony.

Duplyed for the Charger. Seing *Mulieribus deceptis, et non decipientibus, Jura ſubveniunt*: The Suſpender hath no Reaſon to quarrel her own Bonds granted by her in ſuch Circumſtances, for moſt onerous Cauſes; Nor ſhould the Charger be put off to ſeek Payment of his Debt from the Husband's Repreſentatives; but ſhe ſhould be decerned to pay, and left to ſeek Relief at their Hands; *November* 20, 1630, *Rutherford* contra *Halthrow*.

Triplyed for the Suſpender. No reſpect to the Caſe of *Rutherford* againſt *Halthrow*; For there it was thought reaſonable that the Wife as *intus habens* her Husband's Effects, ſhould be decerned: And it cannot be ſubſumed that the Lady *Drum* had any Effects of her Husband.

The Lords found, That the Bond granted *ſtante Matrimonio*, was null, and the Lady not liable: And therefore ſuſpended the Letters.

November 21, 1705. *The Creditors of Mr.* Alexander Paterſon *and* Robert Anderſon, *againſt* Robert Douglaſs *of* Earnſlaw *and Mr.* Alexander Douglaſs *his Uncle.*

MR. *Alexander Paterſon* having adjudged the Eſtate of *Earnſlaw* from Mr. *James Douglaſs*, as having Right thereto from *Grace Graden* his Spouſe, and Heireſs of that Eſtate; and Mr. *Alexander Douglaſs* having adjudged from *Robert Douglaſs*, Son to the ſaid Mr. *James* and *Grace Graden*, as charged to enter Heir to *John Graden* younger his Mother's Brother; Mr. *Paterſon*'s Creditors raiſed Reduction of Mr. *Douglaſs*'s Right, and a Declarator of their own.

Alledged for Mr. Alexander Douglaſs. That Mr. *James* was not in the Fie of the Eſtate, but only a Liferenter, in ſo far as by Contract of Marriage betwixt him and *Grace Graden*, ſhe *diſpones to him in Liferent, and the Heirs to be procreated betwixt her and him in Fie, which failing, to the ſaid Mr.* James *his nearſt Heirs and Aſſignies whatſoever.*

Replyed for the Creditors. The Husband by the Contract is clearly provided to the Fie. For altho the firſt Words thereof, *Diſponing to him in Liferent, and to the Bairns in Fie*, be a little perplexed by the Writer; Yet the following Words, *Whilks failing, to him, his own Heirs and Aſſignies, reſerving her Liferent*, clear his Title to the Fie. In Fortification whereof the Obligement to infeſt, and Procuratory of Reſignation is to him and her in Conjunct Fie and Liferent, and to the Heirs of the Marriage in Fie; Whilks failing to his own Heirs and Aſſignies. The Writs are all aſſigned, and the Obligement

ment of Warrandice conceived in Favours of him, his Heirs or Aſſignies: And he did all Acts of Property a Fiar could do, ſuch as the granting Infeſtments and Tacks without her Conſent, and receiving Renunciations in her Lifetime.

Duplyed for the Defender. Tho' in the Procuratory of Reſignation, the Word *Conjunct-Fie* is adjected to him, and her, and longeſt Liver of them Two, yet the diſpoſitive Clauſe bears only to him in Liferent: And a Conjunct-Fie to Man and Wife, ſometimes importing the Fie to be in the Husband, and ſometimes in the Wife, receives various Interpretations according to different Circumſtances. And here the Eſtate coming by the Wife, and the diſpoſitive Clauſe mentioning only the Liferent in Favours of the Husband, doth ſtrongly preſume the Fie to have been retained by the Wife: And that altho the Clauſe terminates in the Husband's Heirs; For theſe muſt be conſidered as ſubſtitute Heirs of Proviſion to the Wife.

The Lords declared, That by the Contract of Marriage, with the Charter and Seaſin following thereon, Mr. *James* was Fiar. Vid. *November* 29, *infra inter eoſdem.*

Eodem Die. Henry Gilleſpie *Son to the deceaſt* Edward Gilleſpie *Merchant in* Edinburgh, *and* Rachel Watſon *his Spouſe, againſt* Patrick Gilleſpie *and his Spouſe, and* Mark *and* James Carſes.

THE deceaſt *Edward Gilleſpie* Merchant in *Edinburgh* having, after diſponing ſome Tenements there to *Mark*, *James*, and *Janet Carſes* his Grand-children, diſponed the ſame to *Henry Gilleſpie* his eldeſt Son and apparent Heir, who obtained himſelf infeſt; And thereafter granted a new corroborative Diſpoſition to his ſaid Grand-children, who were thereupon infeſt, in Regard the firſt Diſpoſition in their Favours wanted a Procuratory of Reſignation and Precept of Seaſin: A Competition for Mails and Duties aroſe betwixt *Henry Gilleſpie* and *Patrick Gilleſpie* who married the ſaid *Janet*, and her two Brethren.

Henry crav'd Preference upon this Ground, That altho the Diſpoſition in Favours of the *Carſes* be anterior to his, his Infeſtment was prior to theirs.

Anſwered for Patrick Gilleſpie and the Carſes. 1. *Edward Gilleſpie* being firſt denuded by a Diſpoſition in their Favours, he could not afterwards in Prejudice thereof grant another Right to his apparent Heir. Which ſecond Diſpoſition is reduceable as meerly gratuitous, without any onerous Cauſe, and cannot hinder their poſterior Infeſtment on the corroborative Diſpoſition to be drawn back to the Date of the firſt. 2. *Henry*, as *Succeſſor Titulo lucrativo poſt contractum Debitum* to *Edward* by his foreſaid Diſpoſition and Infeſtment, is obliged to warrand their prior Diſpoſition, and therefore cannot impugn it.

Replyed for Henry. That in all Competitions of real Rights, the firſt Infeſtment is ſtill preferred. And the Date of the poſterior Seaſin cannot be brought back to the Date of the firſt Diſpoſition, which contained no Precept of Seaſin or Warrant for Infeſtment. Nor was *Henry*'s Diſpoſition gratuitous; ſince *Edward* could have been compelled to grant the ſame in Implement of his Contract of Marriage with *Henry*'s Mother, whereby the whole Conqueſt was provided to the Heirs of that Marriage, and conſequently to him.

2. He could not be liable to warrand his Father's Diſpoſition as *Succeſſor Titulo lucrativo*, in ſo far as the poſterior Diſpoſition to him had ſuch an antecedent onerous Cauſe as his Mother's Contract of Marriage.

Duplyed. However onerous a Contract of Marriage may be in Favours of the Wife, it is always gratuitous as to Proviſions in Favours of Heirs and Bairns, and can never be oppoſed even to poſterior Creditors. Nor can it exeem an apparent Heir from the paſſive Title of lucrative Succeſſor, *November* 29, 1678, *Higgins* contra *Maxwell*; *February* 22, 1681, *Mure* contra *Ferguſſon*. *Dirletoun* in his Queſtions Title *Succeſſor Titulo lucrativo*, is alſo of this Opinion. 2. Tho the Diſpoſition to the *Carſes* were gratuitous, yet they are *in pari Caſu* with *Henry*, his Diſpoſition being alſo gratuitous: And in a Competition betwixt two gratuitous Aſſignies, the laſt Aſſignation, tho firſt intimated, is reduceable upon the implied Warrandice of the firſt, againſt future Facts and Deeds of the ſame Nature; *July* 15, 1675, *Alexander* contra *Lundy*.

The Lords found the Diſpoſition made by *Edward Gilleſpie* to *Henry* in his Contract of Marriage, was not onerous as to his Intereſt therein, and could not prejudge the anterior Diſpoſition granted by the ſame *Edward* in Favours of his Grand-children the *Carſes*; Tho *Henry*'s Right was firſt perfected by Infeſtment: In regard he as Heir or lucrative Succeſſor could not quarrel or impugn his Father's Deed, in their Favours, but was liable to warrand the ſame; Reſerving to *Henry*'s Wife and Children after his Deceaſe to Debate their Intereſts in the ſaid Contract as onerous *quoad* them.

November 22, 1705. *Mr.* William Ayton *of that Ilk, againſt Dam* Margaret Colvill *Lady* Aytoun.

MR. *William Ayton* having raiſed Reduction and Improbation againſt the Lady *Aytoun* and her Children, of ſeveral Rights and exorbitant Proviſions made in their Favours by the deceaſt Sir *John Ayton* his Father; And Diligence being allowed to the Defenders for recovering ſuch of the Writs called for as were not in their Hands; and executed againſt *Patrick Hume* Writer; He compeared and acknowledged the having of ſome of the Writs called for, but refuſed to give them up till he was paid of his Accompt of writing.

Alledged for the Defenders. That no Certification could be granted at the Inſtance of the Purſuers, againſt Papers in the Hands of *Patrick Hume* the Father's Writer, more than if they were in the Purſuer's own Hands: Seing they are retained for Security of a Writer's Accompt, which Sir *John* by his Letter obliged himſelf to pay, and the Purſuer as Heir to him is liable for. 2. *Patrick Hume* having taken an Obligement for his Accompt from Sir *John Ayton*, he ought to deliver up the Writs to the Defender withour ſeeking Payment of any Part of the Accompt from her: Becauſe in Law a Hypotheck is competent to Writers only for Accompts before they be conſtituted, and not when they take Bonds, Tickets or other Obligements for the ſame.

Anſwered for the Purſuer. It is not to be imagined that a Writer ſhould be in a worſe Caſe by having a Miſſive Letter for inſtructing his Accompt than if he had none. 2. The Writs in Sir *John*'s Writer's Hands could not be ſaid to be in his own Hands, he having only a Right to recover them, far leſs can they be ſaid to be in the Son's Hands, upon any Repreſentation as Heir, which extends not to Acts of natural Poſſeſſion, and detaining of Things which requires Tradition. 3. The Purſuer is only ſerved Heir *cum Beneficio Inventarii*, and the Debts and Proviſions to the Defender and her Children of the ſecond Marriage exceed the Value of the Eſtate. 4. 'Tis none of the Purſuer's Concern to debate Matters betwixt the Lady and her Writer, Whether his Hypotheck be ceaſed or not: But ſeing both Terms for producing the Writs are run out, the Purſuer ought to have Certification againſt ſuch as are not produced.

The Lords allowed Certification to go out; In reſpect the Purſuer was ſerved Heir *cum Beneficio*, reſerving Action againſt the Repreſentatives of her Husband.

Eodem Die. Margaret Boſwal *and* William Hamilton *of* Grange *her Huſband, againſt Cornet* George Boſwal.

IN the Compt and Reckoning at the Inſtance of *William Hamilton* of *Grange* and his Spouſe, againſt Cornet *Boſwal*; The Lords, by their Interloquitor 25 *July laſt bypaſt, having abſolved the Defender from compting for Annualrents of Sums and Rents of Lands preceeding the Marriage, as falling under the* Jus Mariti *of* William Hamilton *who diſcharged the ſame, and is not reſtored againſt the Diſcharge.*

The Purſuers reclaimed by Bill, alledging that Rents of Lands or Annualrents could not fall under the *Jus Mariti* in this Caſe. Becauſe the Cornet as Curator to his Daughter was bound at the ceaſing of his Adminiſtration by her Marriage to accumulate Rents and Annualrents then due into a principal Sum bearing Annualrent: And Sums bearing Annualrent, whether by Paction or Law, fall not under the *Jus Mariti*. 2. If the Diſcharge be effectual as to Rents and Annualrents, it can only be extended to cut off ſuch as were reſting after Deduction of the Expences of Aliment, Wedding and publick Burdens, for which the Purſuers were then liable to the Defender; It being againſt Senſe to take theſe Deductions out of the Fie. 3. Since Fraud and Guile ought to help no Man, *Act* 54. *Par.* 3. *Ja.* 6. The Defender having impoſed upon his Daughter under his Truſt in the double Capacity of a Father and Curator, he ought to reap no Benefit by that Deed which was the Subject of the Leſion and Dole. And if the *Jus Mariti* ſhall hinder *Margaret Boſwal* to be effectually reſtored by depriving her of the Benefit of theſe Rents and Annualrents that Law aſſigns to the Husband as a legal Tocher, *ad ſuſtinenda Onera Matrimonii*, wherein ſhe has a joint Concern: Then the Benefit of her Reſtitution as falling under the *Jus Mariti* ſhould accreſce to him by the like Reciprocal. Therefore the Lords muſt either refuſe the common Benefit of Reſtitution to a Minor leſed, or grant it *cum Effectu*, ſo as both Husband and Wife might have Benefit by it: It being impoſſible in this individual State of Life to reſtore the one, and not the other; Eſpecially in *Scotland* where the Wife has a joint Intereſt with the Husband in the Moveables during the Marriage.

Anſwered. 1. 'Tis admired how it can be aſſerted that Rents and Annualrents due to a Woman at her Marriage fall not under the *Jus Mariti*. 2. If the Diſcharge granted by the Husband ſhould only reach what was due over and above the Cornet's Articles of Diſcharge, it would have no Effect; For the Rents and Annualrents would not ballance the Cornet's Claim: And if any ſuch Thing had been intended, the Husband, at the granting of the Diſcharge, would have obliged the Cornet to diſcharge alſo his Daughter. For had the Daughter aſſigned theſe Rents and Annualrents to a Stranger, the Cornet would have been liable to pay to the Aſſigny, and left to recur againſt his Daughter upon other Funds in his Hands: And he is in the ſame Caſe with the Husband a legal Aſſigny. 3. It is ſtrange, for the Husband to alledge that he muſt have the Benefit of his Wife's Reſtitution, as falling under his *Jus Mariti*: For then what muſt be the Fate of moſt of Contracts of Marriage within the Nation, where the Husband being Major takes Burden upon him for his Wife that is Minor, againſt which he can never be reponed, be his Leſion never ſo great; ſeing he was *Major, ſciens & prudens.*

The Lords adhered to their former Interloquitor in finding the Rents and Annualrents diſcharged: But that they muſt compenſe *pro tanto* the Articles of the Cornet's Diſcharge.

November 27, 1705. James Sinclair *of* Southdun, *againſt* George Sinclair *of* Barack.

IN a Declararor at the Inſtance of *James Sinclair* of *Southdun*, againſt *George Sinclair* of *Barack*; for extinguiſhing two Bonds granted to him by the Purſuer's Predeceſſor: The Purſuer offered to prove Payment by the Defender's Oath. And he having deponed, *That* William Bruce *Brother to* Stanſtell *being Debtor to him in 60 Pound which the Purſuer's Father promiſed to pay, the Deponent's Wife received the ſame by his Order from* Southdun.

The Lords found the Quality of the Oath intrinſick, and refuſed to deduce the ſixty Pound off the Sums in the Bonds.

Albeit it was alledged for the Purſuer. That the Quality ſhould be conſidered as extrinſick. Becauſe, The Defender's Oath cannot prove that *William Bruce* was Debtor to him, or fix a Debt upon *Bruce*, nor yet can it prove that the Purſuer's Father promiſed to pay ſuch a Debt. As a Creditor in a Bond by whoſe Oath the Debtor offered to prove Payment, acknowledging he got Payment but upon the Account of Merchant Ware or other Things furniſhed, would be obliged, notwithſtanding ſuch a Quality, to inſtruct the Furniſhing and Prices.

In Reſpect it was anſwered for the Defender. That the Purſuer having offered to prove Payment of the Bonds by the Defender's Oath; and he having deponed that the ſixty Pound was received upon another Account, the Purſuer muſt take the Oath as it ſtands. Seing, if the Defender had deponed that the Purſuer was owing him 60 Pound *per* Bond or Ticket which he gave up upon Payment: This could not have obliged *Barack* the Defender to prove that the Mony was due by the ſaid Bond, or Ticket. For the Caſe is not, Whether a Promiſe could be proven by the Deponent's own Oath: But that ſeing he did not acknowledge to have received the Mony controverted in Payment of the Bonds, the Purſuer doth not prove his Alledgeance.

November 28, 1705. Henry Ker *of* Greden, *againſt* Iſobel Abernethy *Relict of* Thomas Inglis *Merchant in* Edinburgh.

IN the Action at the Inſtance of *Henry Ker* of *Greden* againſt *Iſobel Abernethy*; The Lords found that a Seaſin by Heſp and Staple was equivalent to a Seaſin upon a Precept of *Clare conſtat*; and conſequently a ſufficient Title of Preſcription. Becauſe, the Baillies give Seaſin by Heſp and Staple upon Production or certain Knowledge of the Parties Rights, recorded in the Regiſters of the Burgh.

November 29, 1705. *The Creditors of Mr.* Alexander Paterſon *and* Robert Anderſon, *againſt* Robert Douglaſs *of* Earnſlaw *and Mr.* Alexander Douglaſs *his Uncle.*

IN the Reduction and Declarator (mentioned *ſupra November* 21, 1705) at the Inſtance of the Creditors of Mr. *Alexander Paterſon* againſt *Robert*

Douglaſs of *Earnſlaw* and Mr. *Alexander Douglaſs* his Uncle; It was alledged for the Defenders, That even *Grace Graden* Mr. *James Douglaſs*'s Spouſe had no Right to the Property of the Eſtate of *Earnſlaw*, in Reſpect *John Graden* her Father, to whom ſhe was ſerved Heir in ſpecial, and infeſt in the Superiority was before denuded of the Property in Favours of *John* her Brother by Diſpoſition and a baſe Infeſtment, and ſo could not tranſmit the ſame to her Husband, nor he to the Adjudgers.

Replyed for the Purſuers. *Grace Graden* was lawfully ſerved and infeſt as Heir to her Father, both in the Property and Superiority; in as much as an Infeſtment of Property and Superiority is in Effect the ſame Thing, the latter including the former: All the Difference betwixt them being, that a ſubordinate valid Right may carry away the Property from the Superior. 2. The Diſpoſition and Seaſin made by the Father to his Son *John* was only a baſe Infeſtment never regiſtrated nor clothed with Poſſeſſion, which upon his dying in Minority before his Father quite evaniſhed; at leaſt could never ſignify any Thing againſt a ſingular Succeſſor. Beſides, it had been ſuperfluous for *Grace* to have ſerved Heir to her Brother ſince as Heir to her Father ſhe had both the Property and Superiority, and was in his Place who might have evacuate the Son's Infeſtment at Pleaſure, by a publick Infeſtment in Favours of any ſingular Succeſſor. Nor is it of any Moment that the Son if he had lived and his Heirs might have an Action againſt *Grace Graden*, as Heir to her Father, to denude in their Favours. For 1. The Son and his Heirs might have had the ſame Action againſt the Father: But ſince it was never raiſed, as the Father might have made void the Son's Right by granting a publick Infeſtment, the Daughter coming in his Room might do the ſame. And whatever the Son and his Heirs might have claimed againſt the Daughter as Heir to her Father, their Seaſin not being regiſtred, is ineffectual againſt Mr. *James*'s Right flowing to him a ſingular Succeſſor from the Daughter. There being nothing more plain by the Act 1617, than that unregiſtrated Seaſins are null *quoad* ſingular Succeſſors, whatever Effect they may have againſt the Granters Heirs.

Duplyed for the Defenders. *Grace Graden*'s Retour is null *quoad* the Property, for theſe Reaſons, 1. There was no Warrant in the Brieve to ſerve her except to him who died laſt veſt, and ſeaſed, and that was her Brother, and not her Father. And tho' the Son's baſe Infeſtment could not militate againſt a publick Infeſtment directly flowing from the Father; yet it abſolutely excluded any Right in the Father, and conſequently in the Daughter as his Heir. And albeit the Inqueſt could not be quarrelled as *temere jurantes ſuper Aſſiza*, for that the Son's Infeſtment was not produced to them: Yet the Retour may be reduced or declared null; upon the leaſt Defect, tho' not appearing at the Service; *Stair*, *Inſtitut. Lib.* 3. *Tit.* 5. §. 42. *November* 23, 1671, *Rorieſon* contra *Sinclair*. *Hope Retour Laird of Lugtoun*, contra *and Fairly* contra *Fairly*, *February* 16, 1627, *Lord Colvill* contra *Herds*, *January* 11, 1673, *Lamb* contra *Anderſon*. Nor could any of the Nullities of *Grace Graden*'s Retour conſiſting in latent Facts be diſcovered from any Record by the Purchaſer from her, and yet the Purchaſer's Right would certainly fall in Conſequence with that of the Party ſo retoured. Becauſe whoever purchaſes from an Heir, *qua* ſuch, comes only in the Heir's Place as to the real Right, and *utitur Jure Authoris, qui non potuit plus Juris transferre quam ipſe habuit.* And it hath been found in many Inſtances, that ſingular Succeſſors grounding their Right immediately upon the Heir's Retour run the Risk of its Defects tho' never ſo latent and undiſcernible. Thus, in a Reduction and Improbation againſt *Powrie* at the Inſtance of the Lady *Edinglaſſie* Heir to his Debtor, the Lords granted Certification and reduced her Retour, ſince *Powrie* could not produce the Commiſſion granted by her and her Curators for ſerving her Heir: Tho' both the Retour and Seaſin had ſtood upon Record a Matter of 30 Years. And in the Caſe of Sir *William Keith* againſt *Sinclair* of *Diren*, Sir *William*'s

Right derived by a Seaſin not regiſtred was preferred to *Diren*'s Right flowing from her whoſe Seaſin was regiſtred. Becauſe, *Diren*'s Right fell in Conſequence of his Author's, who could not paſs by the Perſon laſt Infeſt tho' his Seaſin was not upon Record. And Regiſters were mainly deſigned for the Security of ſtranger Purchaſers. Nor can it be known from any Record that the Executions of a Brieve are falſe, or that there is a *proximior Hæres*, than the Perſon retoured at the Time, *&c.* and the Clauſe *ultimo veſtitus & ſaſitus de Feodo*, is as neceſſary to be obſerved in Execution of the Brieve as the Clauſe, *Quis eſt legitimus & propinquior Hæres*, &c.

Triplyed for the Purſuers. The Pratick betwixt Sir *William Keith* and *Sinclair* of *Diren* alledged on by the Defenders hath not the leaſt Reſemblance to their Caſe, for there Sir *William*, who derived Right from *Hugh Keith* whoſe Seaſin was unregiſtred, proved 40 Years Poſſeſſion conform, and that there was no Regiſter for the Time in *Caithneſs* where the Seaſin was taken, and Seaſins were not then in Uſe to be regiſtred in the publick Regiſter. Sir *William Keith*'s Father and Author's Right was confirmed and compleated by a publick Infeſtment before *Diren*'s Infeſtment; and the latter's Right too was not onerous but elicited. Nothing of all which can be alledged here by the Defenders. And if a baſe Seaſin unregiſtred not cled with Poſſeſſion granted by a Father to a Son, were ſuſtained after ſo long a Time to the Prejudice of ſingular Succeſſors and Creditors, eſpecially ſuch as have more than fourty Years Progreſs ſince the Date of the ſaid latent Deed and Poſſeſſion by Virtue thereof, then no Purchaſer or Creditor could be ſecure againſt ſuch Contrivances.

The Lords repelled the Defence founded on the Diſpoſition granted by *John Graden* to his Son, with the Seaſin following thereon; in Reſpect the ſame were not clothed with Poſſeſſion, and the Seaſin not regiſtred, and ſuſtained *Grace Graden*'s Retour, and therefore preferred her Husband's Creditors to Mr. *Alexander Douglaſs*'s Adjudication.

December 1, 1705. Margaret Grieve *Relict of* John Thomſon *younger Merchant in* Jedburgh, *againſt* John Thomſon *elder Merchant there.*

M*Argaret Grieve* as having Right by Aſſignation from the deceaſt *John Thomſon* her Husband to 500 Merks, which *John Thomſon* elder obliged himſelf in their Contract of Marriage to pay to the Cedent and his Heirs, charged her Father in Law for Payment. Who ſuſpended upon theſe Reaſons, 1. The Cedent had diſcharged the Sum betwixt the Minute of the Contract of Marriage and the extending of the Contract it ſelf. 2. He offered to prove by the Charger's Oath, that her Husband and ſhe had received Houſhold Furniture and Goods to the Value of the Sum charged for. The Lords repelled the firſt Reaſon of Suſpenſion, and reduced the Diſcharge granted betwixt the Minute and the Contract as *contra Fidem Tabularum nuptialium, & bonos Mores.*

When the Charger came to depone upon the ſecond Reaſon of Suſpenſion, the Suſpender paſt from her Oath and offered to prove the Alledgeance *Scripto.* And to that Effect produced an Accompt Book wherein there was a Receipt of 286 Pound written by the Suſpender, and ſubſcribed by his Son.

Alledged for the Charger. That the Suſpender had falſly with his own Hand made up and ſuperinduced that Receipt to her Husband's Subſcription, who when Apprentice to his Father had in a childiſh Way written his Name in ſeveral Places of that Compt Book, to try his Hand. And to fortifie the Suſpition of a fraudulent Contrivance, urged the Reaſons following, 1. The Suſpender deceitfully elicited the Diſcharge reduced as *contra bonos Mores:* And *ſemel*

ſemel malus, ſemper præſumitur malus, eſpecially in this Caſe, where the firſt Deed of Fraud was deſigned to evacuate the ſame Claim. 2. 'Tis inconceiveable why the Suſpender referred his Alledgeance to the Charger's Oath, when he had ſo clear a Diſcharge; But it ſeems he had not then filled up the Receipt, or entred ſo deep upon the Contrivance. 3. There being but eight Days interveening betwixt the Diſcharge reduced, and the Date of the poſterior Receipt quarrelled: It is not probable the Suſpender, who was ſo deſireous to pay nothing, would ſo ſuddenly have made Payment of the moſt Part; or that having a Receipt upon real Performance, he would have ſuffered his good Name to be called in Queſtion for the firſt Diſcharge, without ſupporting it by Production of the ſecond. 4. The Husband's Subſcription in the Book produced, is diſconform to his Subſcription in other Writs in his Manhood, and therefore has been writ by him when he was a Boy. 5. The Subſcription to the Receipt appears to have been a childiſh Scribbling: For the Subſcriber's Name ſtands written after the ſame Manner in twenty other Parts of the Book, which the Suſpender had induſtriouſly blotted out, to conceal the Congruity of theſe Subſcriptions with that of the Receipt. It may alſo be obſerved, That to cover the Scribbling under the Subſcription, there were ſeveral Accompts pinned on. Laſtly, There is no Article of Buſineſs marked in the ſaid Book after the Year 1697, except this Receipt in the Year 1703, and another in the 1701.

Anſwered for the Suſpender. 1. It cannot be concluded that every Thing that is contrary to the Law of *Scotland*, is *contra bonos Mores*: Nor can a Perſon, who is no Lawyer, be juſtly charged with Malice, for not obſerving the Niceties of the Municipal Law of his own Country. 2. The Reaſon why the Suſpender did firſt refer his Ground of Suſpenſion to the Charger's Oath, was to vindicate himſelf from her Calumny by her own Teſtimony. But afterwards being informed ſhe would prevaricate in her Depoſition, he thought fit to reſile, and prove his Alledgeance *Scripto*. And it is a moſt artificial and abſurd Inference, That the Suſpender referred the Cauſe to the Charger's Oath before he contrived the Receipt, and reſiled after contriving. 3. It is true, the Suſpender at firſt thought not himſelf obliged to pay the Sum charged for after the firſt Diſcharge: But immediately after the Marriage, he was told by intelligent Perſons upon what Head it was quarrelled; and therefore took the now controverted Receipt from his Son. 4. As the Charger's Husband was a Man of a very unconſtant Head, ſo he was a Man of a very unconſtant Hand, and varied his Subſcription frequently: And therefore nothing can be drawn from the Diſconformity of his Subſcriptions. 5. 'Tis a calumnious Gloſs to aſſert that the Father ſcored out the Son's Name in the Book to conceal the Congruity of the Subſcriptions: Since it is a thouſand Times more probable, That the Son was ſo Cautious as to delete his own Name for Fear of Superinduction, and that he would alſo have delete his Subſcription to the Receipt, had it not been a true Deed of ſuch a Date. As to the Inſinuation that ſome Receipts were pinned upon that founded on in the Book, the better to cover the Contrivance; There is no more Senſe in it than to conclude that where ſeveral Papers are tack'd together, that which falls to be uppermoſt was ſo plac'd to hide the Reſt. And no more could the Suſpender, if he were not an Idiot, fancy, That the pinning of other Papers upon the Receipt in the Book, might hide it, more than the firſt or ſecond Leaf of a Book could hide the third. Laſtly, The Reaſon why the Suſpender did not inſert other Buſineſs in that Book, was to conceal from his younger Children the Tranſactions betwixt him and his eldeſt Son.

The Lords found the Receipt in the Book founded on null, and not probative, and therefore repelled the Reaſon of Suſpenſion. And decerned the

Suſpender to pay all the Expences of the Proceſs, and the Chargers Damages to be given up in an Accompt by her upon Oath. And for his tampering to vitiate the Compt-book, he was fined in 500 Merks, and ſent to Priſon till he paid it, and applyed to the Lords for his Liberation.

December 7, 1705. *The Procurator-fiſcal of* Annandale, *againſt* George Carruthers *of* Holmains.

THe Procurator-fiſcal of *Annandale*, having purſued *George Carruthers* for 1000 Merks, as the Fine impoſed by the *Act* 34. *Par.* 1. *Ch.* 2. for an irregular Marriage; which Act was ordained by the *Act* 12. *Seſſ.* 5. *Par. K. W.* to be put to Execution at the Inſtance of the Procurator-fiſcal of the Juriſdiction where the Parties guilty ſhould be queſtioned; And the ſaid Defender (whoſe Eſtate and Reſidence is in the Pariſh of *Daltoun*, and Stewarty of *Annandale*) having procured a Diſcharge from the Miniſter of *Daltoun*, acknowledging his having given Satiſfaction to the Pariſh; And a Teſtificate from the Kirk-Treaſurer of *Edinburgh*, where the Marriage was celebrated, bearing Receipt of the Poors Dues, and a Diſcharge of the pecuniary Mulct for not marrying at the ordinary Time in the Church: The Lords found the Fine ſhould be applied to pious Uſes within the Pariſh with the Burden of the Purſuer's Expences to be modified by the Lords. And found the Miniſter could not diſcharge. And therefore repelled the Defence upon Payment made to him.

Eodem Die. *Sir* Thomas Young *of* Roſebank, *againſt* Alexander *and* Henry Bothwells *elder and younger of* Glencorſe.

SIr *Thomas Young* having, upon a Minute of Sale entred into betwixt him and *Alexander* and *Henry Bothwells*, concerning the Lands of *Gencorſe*, charged them to purge theſe Lands of all Incumbrances, and particularly of a Tailzie contained in the ſaid *Henry Bothwell*'s Contract of Marriage, whereby *Alexander* his Father tailzied theſe Lands to him, and the Heirs thereinmentioned, with a prohibitory Clauſe to ſell or anailzie, or contract Debt: They ſuſpended upon this Reaſon, That the Diſpoſition of Tailzie is no true Incumbrance. In ſo far as, 1. Albeit a Proviſion in a Contract in Favours of Heirs-male of the Marriage, is effectual to hinder gratuitous Deeds in Prejudice thereof, it cannot obſtruct this Sale, which is a Deed both juſt, onerous and neceſſary. True, the Proviſion contains a Clauſe prohibiting to ſell or contract Debt: But this bare Prohibition, without any Irritancy, ſhews only the more enix Deſire of the Contracters to preſerve the Eſtate to the Heirs of Intail; Irritancies being the only Thing that give Right to Heirs of Tailzie to quarrel Deeds againſt Receivers, whatever they may do by Virtue of a ſimple prohibitory Clauſe againſt the Granters. Nor can it be pretended that the Tailzie is ſecured by an Irritancy, from the Contract's bearing, *under the Conditions, Proviſions, and Irritancies after-mentioned*: Becauſe, this general is to be underſtood, *applicando ſingula ſingulis*; that is, of ſimple Proviſions and Conditions without the Clog of any Irritancy, and of others to which Irritancies are ſubjoined. So the only Proviſion conceived by Way of Irritancy, is, That about the Heirs of Tailzie marrying without Conſent. 2. This Tailzie is not valid againſt ſingular Succeſſors, not being made in the Terms of the Act of Parliament 1685, containing Reſtrictions and Irritancies with Conſent of the Superior, nor duly regiſtred as that Act preſcribes, but only recorded in the Commiſſar Books of *Edinburgh*: And therefore cannot ſtop the preſent Sale.

The Charger raiſed alſo Reduction and Declarator of Extinction of the Minute upon theſe Grounds, 1. The Suſpender's Infeſtment being affected with prohibitory and irritant Clauſes, and not a ſimple and abſolute Right of Fie, they can never make up a clear Right to a Purchaſer. 2. This Minute is *ipſo Jure null*: For there was *Dolus dans Cauſam Contractui*, in ſo far as the Sellers concealed the Tailzie, and the Purchaſer entred upon the Bargain with them as heretable and abſolute Proprietars: Whereas now their Titles appear to be ſo qualified and limited, as the Purchaſer, had he known ſo much the Time of the Minute, *non fuiſſet contracturus*; For who in his right Wits would give a full and adequate Price for ſo fettered an Eſtate? As to the Reaſons of Suſpenſion, It is anſwered, 1. Whatever might be ſuſtained in Favours of one who lent his Mony *bona Fide*, and came to affect the Eſtate for his Payment: 'Tis againſt all Reaſon to force the Charger to complete a Bargain *Rebus integris*, where there has emerged ſo notable and unexpected a Difficulty as the Lords thought worthy to be adviſed upon Informations after ſeveral Hearings in Preſence. And tho they ſhould find that *Glencorſe* might complete the Sale, it were hard to put the Purchaſer to depend upon a Deciſion, where the Parties concerned are Heirs of Tailzie *nati et naſcituri*, ſo indefinite and uncertain, That to bring them in the Field, or conclude them by any Proceſs is impoſſible: For the leaſt to be expected by Sir *Thomas*, is a Proceſs at the Inſtance of an Heir now not called, when the Circumſtances are out of Mind. And what Proſpect can he have to enjoy ſuch a Purchaſe quietly, when in the Caſe of *Saltcoats*, on Pretence of a Deſtination of Succeſſion made by a Minor without any Irritancy, near fifty Years ago, ſo much Duſt and Diſpute is raiſed? It imports not, That the Charger is a Purchaſer for an onerous Cauſe: Since he is conſcious of his Authors Dole, and is not ignorant of the Hazard when he accepts of this Diſpoſition. 2. 'Tis moſt apparent from the Conception of the Contract that the Irritancy concerns every prohibitory Clauſe. For to all the general Clauſes, the Proviſions and Irritancies are ſubjoined: And the Fiar is allowed in certain Caſes to burden the Eſtate with Annualrents and Wadſets, which had been unneceſſary, if the Prohibition were not underſtood to have the Effect of an Irritancy. Tailzies have have not yet arrived to any fix'd Stile: And many of the older Tailzies that are the Securities of great Families are conceived in Terms leſs ſtrict and prohibitory than this in Queſtion. 3. If Tailzies might be overturned for onerous and neceſſary Cauſes, then the ſtricteſt Tailzie would become arbitrary. Nor can Sir *Thomas* well rely upon the firſt Deciſion in ſuch a Caſe; eſpecially conſidering, That in *England* where the Conception of Tailzies is not ſo ſtrict, Allowance to diſpone for Reaſons of Neceſſity and Advantage is only obtained by Act of Parliament. Therefore, it is hoped Sir *Thomas* will not be found liable to advance 111000 Merks upon ſuch a viſible Hazard emerging now before Performance, whereof he had not the leaſt Suſpicion the Time of the Minute: But the Lords will reduce the Minute, and find Sir *Thomas* free thereof, ſince he is willing to quite the Bargain; according to the Deciſion, 28 *June* 1664, *Black* contra *Moffat* obſerved by Preſident *Gilmore*.

Replyed for the Suſpenders. Albeit in a perfect Tailzie duly made, regiſtred, and taking Effect by Conveyance of the Eſtate to one of the Heirs of Tailzie, the ſubſequent Heirs may pretend a *Jus quæſitum* and Intereſt againſt the preceeding Heir poſſeſſing only by Virtue of the Tailzie: yet here where there is no formal effectual Tailzie, becauſe not conceived with a Clauſe irritant, nor perfected by the due Solemnities of the Superior's Conſent, and Regiſtration; ſuch an inchoate Deſign of Tailzie may be eaſily and freely diſſolved by the Suſpenders who made it, and before were abſolute Fiars: Seing *unumquodque diſſolvitur eodem modo quo colligatur*. Nor can Heirs of

Tailzie, who have no *Jus quæſitum*, but *nudam Spem*, quarrel or impugn the Deed. So whatever Ground of Scruple the Purchaſer may fancy to himſelf, he has no Ground to reſile: And the Reaſon given, with the Lords interpoſed Authority, may ſatisfie all the Scruples; as they will relieve him of all Hazard.

The Lords found, That *Henry Bothwell* with Conſent of his Father could validly diſpone the Lands contained in the Minute of Sale for neceſſary Cauſes; notwithſtanding of the prohibitory Clauſe in the Contract of Marriage.

Thereafter *December* 18, 1705. It was alledged for Sir *Thomas*, That ſuppoſe young *Glencorſe* with Conſent of his Father could notwithſtanding of the Tailzie diſpone for neceſſary Cauſes, he could not diſpone the whole Lands, according to the Minute, but only ſo much as might ſatisfie theſe neceſſary Cauſes. And the Purchaſer could not be obliged to accept of a partial Diſpoſition, or partial Implement of the Minute, which he entred into upon the Hopes of lodging all his Mony together upon that Eſtate; more than a Creditor is bound to accept of partial Payment. Thus *July* 20, 1675, *Maitland* contra *Gordon*, a Minute of Agreement is null where complete Performance by one of the Parties is impreſtable. Nor is an Offer of real Warrandice or equipollent Security ſuſtained: Becauſe, the Maxim *Loco Facti impreſtabilis ſubit intereſſe*, holds only *in Contractibus Monopleuris*, and not in *Dipleuris*. Where Parties mutually contract, Performance muſt be preciſe *in Forma ſpecifica*, and when either fails to implement completely, the other is free, *ex Cauſa data non ſecuta*. It hath been often ſo decided, particularly betwixt *Gordon* of *Leſmore* and the Marqueſs of *Huntly*. Nor was Retention of a proportional Part of the Price equivalent to what was to be performed ſuſtained, as *Gilmore* obſerves, *Deciſ.* 156. *July* 1665, *Wedderburn* contra *M‘pherſon*. Yea, ſo far have the Lords regarded the Intereſt of Purchaſers, not only as to real Security, but even as to their Satisfaction of Mind in being free from the anxious Expectation of Pleas and Hazards, that a Perſon who for a Parcel of Cloth ſold to him, was bound by Contract to aſſign a Bond with Warrandice only from Fact and Deed, was not allowed to claim the Cloth, unleſs he would aſſign with abſolute Warrandice, 28 *June* 1664, *Black* contra *Moffat*. And a Buyer was not found obliged to accept of a fourty Years Progreſs, or acquieſce in abſolute Warrandice offered: In regard it was ſufficient for him to ſay that poſſibly there might be Interruptions, and perſonal Action upon Warrandice might be ineffectual, *June* 13, 1676, *Nairn* contra *Scrimzeour*.

Anſwered for Glencorſe. The neceſſary Cauſes mentioned in the Interloquitor, are not to be reckoned as adequate and commenſurate to the Sale: But only ſuch as might juſtly move any rational Man in ſuch Circumſtances rather to ſell, and ſave a Part of the Price for the Behoof of thoſe concerned therein; than to keep up a burdened Eſtate to the Ruin of the whole.

The Lords adhered to their former Interloquitor, the neceſſary Cauſes being always prior to the Contract of Marriage.

Eodem Die. James Murray *Taylor in the* Canongate, *againſt the Children of the deceaſt* Patrick Chalmers *Beltmaker in* Edinburgh.

IN the Action at the Inſtance of *James Murray* Taylor in the *Canongate*, againſt the Children of the deceaſt *Patrick Chalmers* Beltmaker in *Edinburgh*, the Defenders being found liable for a Debt of their Father's, as ſubjected to the paſſive Titles by their Procurators proponing peremptory Defences, and failling in the Probation: The Lords reponed them againſt the paſſive Titles, in regard they were Minors. Becauſe, Minors are not only reſtored *de Jure communi* againſt Contracts and Obligations entred into by them when

Leſion appears, but even againſt judicial Acts ; *Stair's Inſtit. P.* 57. *December* 1, 1688, *Steuart* contra *Steuart* ; *February* 14, 1677, Duke and Dutcheſs of *Buccleugh* againſt the Earl of *Tweddale*.

December 13, 1705. Gilbert Livington *and his Factor, againſt Miſtreſs* Margaret Menzies, *and the Heirs of Line of* Saltcoats.

GEorge *Livington* of *Saltcoats*, with Conſent of his Curators, having, in the Year 1655, by his Contract of Marriage with *Mary Hepburn* Daughter to the Laird of *Beinſtoun*, obliged himſelf to Tailzie his Eſtate to himſelf, and the Heirs-male to be procreated betwixt them ; Which failzieing, to his neareſt Heirs-male whatſomever ; *Alexander* his eldeſt Son diſponed the Lands to *George* the younger, and to his Heirs and Aſſignies whatſoever : Upon which Diſpoſition he was inſeft and entred by the Superior ; and granted a Diſpoſition or Bond of Tailzie in Favours of *Margaret Menzies* his Siſter Daughter. *Gilbert Livington* as Heir-male to old *George*, purſued a Reduction, Improbation and Declarator againſt her, for removing the Deeds to his Prejudice, and for declaring and making effectual his Right as Heir-male ; upon this Ground, That *Alexander* was a fatuous or furious Perſon, incapable to diſpone to his Brother ; And the Diſpoſition by *George* to *Margaret Menzies* muſt not only fall in Conſequence, *Quia reſoluto Jure Dantis reſolvitur Jus Accipientis* ; but alſo ſhould be reduced *ex Capite Lecti*.

Alledged for the Defenders. That the Subſtitution in *George Livington*'s Contract of Marriage 1655, (who was then Minor) in Favours of Heirs-male whatſoever, failzieing Heirs-male of the Marriage, was null and reduceable. Becauſe, 1. A Minor with Conſent of his Curators cannot cut off the natural and lineal Succeſſion of a Family by a Tailzie, which is an Act of the higheſt Importance, exceeding the Verge of Curators Adminiſtration ; and upon the Matter a Donation from which Minors ought to be reſtrained. 2. Tho' the Contract was ſo far binding, that the Obligement in Favours of the Heir-male of the Marriage, could be fruſtrated by no gratuitous Deed : Yet the Subſtitution to other Heirs-male, in which the other Party Contracter was not concerned, is no *Vinculum Juris*, producing Action, or a Ground of Inhibition, but a meer Deſtination or a Bond of Tailzie for Love and Favour revokable at the Granter's Pleaſure. And as the Subſtitution was no Ground of Action : So if any Obligement did thence ariſe, it is preſcribed *non utendo* for the Space of fourty Years, by any Infeſtment or Document upon it. 4. Albeit the Subſtitution had taken Effect by Infeſtment, *Alexander* the Fiar and Heir of the Marriage might alter the ſame, as he hath done, by diſponing to his Brother *George*, and to his Heirs and Aſſignies whatſoever ; ſince he was not tied up by a prohibitory Clauſe: *Multo magis* might he in this Caſe evacuate the Subſtitution, which ſubſiſts only in the Terms of an Obligement to make a Tailzie.

Replyed for the Purſuer. 1. A Minor may in his Contract of Marriage tailzie his Eſtate, with Conſent of his Curators, to Heirs-male for preſerving of the Family ; which is a juſt and rational Deed ordinarly done by prudent Men. *Minor enim qui Jure communi uſus eſt, non poteſt videri circumventus*, L. ult. C. *de integrum Reſtitutione. Et lædi vel decipi non videtur, qui Jus publicum ſequitur*, L. 116. ff. de Reg. Juris. And altho' the Proviſion of Tailzie had been quarrellable, it cannot be drawn in Queſtion now, the Minor who lived many Years after his Majority, having never revoked the ſame in his own Time. 2. The Right ariſing to Heirs-male failzieing Heirs of the Marriage, could not preſcribe ; ſeing they were not *valentes agere*, ſo long as Heirs-male of the Marriage were exiſting : And *George* the laſt of theſe died but lately ; upon whoſe Deceaſe the Purſuer immediately claimed his Right. And ſo it was decided *January* 25, 1678, Duke of *Lauderdale* againſt the Earl of *Tweddale*: As upon the like Ground Warrandice preſcribes only from the Date of Eviction. Again, Preſcription cannot take Place in this Caſe, Becauſe, the Poſſeſſion of the Heirs-male of the Marriage is, in the Conſtruction of Law, the Poſſeſſion of the other Heirs-male: As a ſingular Succeſſor is underſtood to have poſſeſſed by his Authors. 4. The Diſpoſition by *Alexander* in Favours of his Brother, is null and reduceable, and conſequently all that followed upon it; The Granter being long before and after the Diſpoſition a furious and fatuous Perſon, in ſo far as he conſtantly ran barefooted through the Country, roring and crying as a mad Man, to the Terrour of Neighbours; attempted to kill his Keeper, and alſo himſelf, by leaping over the Windows ſome Stories high in his Shirt, and running into the Sea and other Waters: He could not keep himſelf clean, nor know when his Excrements came from him; nor could tell his Fingers. And conſequently all that followed upon his Diſpoſition fell in Conſequence, ſeing *quod nullum eſt, nullum ſortitur Effectum.*

Replyed for the Defender. When in the civil Law Curators had not the Power to liberate and manumit Servants, as being no Act of neceſſary Adminiſtration, but of abſolute Dominion: Can it be thought that Law will allow Curators to make Tailzies at their Pleaſure? And therefore ſuch Deeds, tho' made ſeemingly with Conſent of Curators, ought to be underſtood in Law as Deeds of Minors having Curators without their Conſent, which are certainly null needing no Revocation: So that they cannot be underſtood as ratified by the Minor becoming Major his ſuffering the *Anni utiles* to elapſe. 2. An Obligement here in Favours of the Subſtitute, is much the ſame with a Bond of Tailzie granted in Favours of an Inſtitute, and Subſtitutes. Now, if the Inſtitute ſhould forbear to proſecute the Granter to expede his Infeſtment conform to the Bond of Tailzie; the Subſtitute might nevertheleſs by conveening the Granter and Inſtitute, compel the Granter to expede his Infeſtment conform to his Bond. 'Tis groundleſs to alledge that the Purſuer was not *valens agere*, albeit he was not *valens ſuccedere, & poſſidere*, which concerns only the Effect, and not the Force of the Obligement, that was no ways conditional. And therefore Preſcription did certainly run from the very Date of the Obligement, which is now preſcribed. 4. Tho' *Alexander* might have been weak and incapable to manage his Eſtate, yet he was not ſo always, and ſuch a fair and ſolemn Diſpoſition made by him to his Brother, by Advice and in Preſence of Friends, argue him to have been ſenſible and compoſed at the Time. Beſides, to raiſe a Queſtion, *de ejus Statu & Capacitate*, ſo long after his Death, is contrary to Law and reaſon. Yea, what *Alexander* did in Favours of his Brother *George*, was Rational, and could be quarrelled by none but *George* himſelf, who was ſo far from it that he accepted it, was entred by the Superior by Reſignation thereon, and obtained a Charter containing a *Novodamus*; and poſſeſſed by Virtue of theſe Titles for ſeveral Years after his Brother's Death, when he might have entred otherways by Service or Precept of *Clare conſtat*; which muſt be as effectual to Impower him to alter the Deſtination of Succeſſion provided in the Contract, as if he had been actually infeſt upon a Service or Precept of *Clare conſtat*. For many Caſes could be inſtanced where inhabile Titles are good and ſufficient to the Receivers acquieſcing in them, who had the only Right to quarrel 'em; *July* 25, 1672, *Gray* contra *Gray*. Nor are the Qualifications of Fatuity or Furioſity relevant, ſince it is not alledged that *Alexander* was ill continually and without Intermiſſion. Beſides, that the proving of Fury or Fatuouſneſs by Witneſſes ſo long after the Parties Deceaſe, would be dangerous, tending to take away Writ by Witneſſes, who can hardly prove that the Granter was not then in a lucid Interval. And here the Preſumption ſtands for *Alexander*'s being in ſuch an Interval, becauſe he uniformly ſigned his Name ſeven Times to the Diſpoſition in Favours of his Brother in the Preſence of his Friends and Relations, to each of whom he left juſt Proviſions which was a harder Trial than the telling of his Fingers.

Duplyed for the Defender. The Diſpoſition granted by *Alexander* to *George*, and his continuing to poſſeſs by Virtue thereof, can never ſupply the Want of Infeſtment as Heir in *George*'s Perſon, ſo as to give him any Right to alter the Deſtination of Succeſſion: Which were a ſtrange Sort of Tranſubſtantiation, *viz.* A ſubſtantial Change of one Right to another of a quite different Nature. And to ſupport the Diſpoſition in Favours of *Margaret Menzies*, upon the Fiction of *George*'s ſtanding infeſt as Heir to *Alexander*, ſince it was in his Power to be infeſt; were to allow *a Fictio Fictionis*, that is reprobated in Law. Beſides the Diſpoſition being reduced upon the Head of Fatuity, the Charter granted by the Superior upon *George*'s Reſignation falls with it. As to the Deciſion *Gray* contra *Gray*, the Infeſtment there was not null for Want of Conſent, but reduced as done on Death-bed. 2. If a furious Perſon's Deed were underſtood in Law to have any Effect, it could not be reduced unleſs the Purſuer could alledge Prejudice and Leſion thereby: But the Principles of Law don't require this. And in a Reduction of a Diſpoſition *ex Capite Metus*, the Lords repelled this Defence, that the Diſponer had no Prejudice by the Diſpoſition which was granted in Implement of a former Minute. And to ſuſtain this Diſpoſition in it ſelf null becauſe of the Poſſeſſion of one who was *alioqui ſucceſſurus*, would be of dangerous Conſequence and incourage the neareſt Agnats of furious Perſons to take Advantage of their Circumſtances, and to elicite Deeds from them whereby they may immediately attain to the full Poſſeſſion of their Eſtate. 3. The Qualifications urged for *Alexander*'s having lucid Intervals are no Ways relevant. For as a furious Perſon may exerce the Functions acquired and fixed upon him by Education the Time of his Health; ſuch as ſpeaking *Latin*, or *French*, writing his Name, whiſtling, or ſinging, and in the mean Time be as deſtitute of the Uſe of his Judgment as a Parrot: So a Man may ſubſcribe his own Name and yet be fatuous and furious, a late Inſtance whereof is *William Mitchel*. Yea furious Perſons are ordinarly taken up with nothing ſo much as writing, when at the ſame Time they neither underſtand what they write or act. 4. Fury is to be held as habitual and continued, contrary to the Nature of Lunaticiſm, that has Intermiſſions; unleſs the Defender will offer to prove that *Alexander* had lucid Intervals, or that the Cauſe of his fatuous Deeds was but temporary, ſuch as Intoxications by Drink or the like. *Vide* 19 *July* 1681, *Burton* contra *Burton*. And our Law diſtinguiſhes betwixt Lunaticks who by the Nature of their Diſtemper have lucid Intervals, and Perſons of continued Fatuity or Fury that are not preſumed to have ſuch Intervals, unleſs the ſame be proven: Inferring that the Deeds of Lunaticks, and not of furious or fatuous Perſons, are done in lucid Intervals, unleſs the contrary be proven. *Vid. Reg. Majeſt. Lib.* 1. *Cap.* 30. *N.* 3, 4.

The Lords waved the Point whether a Minor can break a Tailzie or make a new one. Nor did they decide anent the Preſcription of the Contract 1655, but generally thought it not preſcribed according to the Deciſion betwixt the Duke of *Lauderdale* and Earl of *Tweddale*, *January* 25, 1678. As to the other Point, they repelled the Reaſons of Fatuity and Furioſity condeſcended on, and ſuſtained the Diſpoſition made by *Alexander* to *George*, and aſſoilzied from the Reduction.

December 19, 1705. James Man *late Baillie in* Dundee, *againſt* Alexander Reid *Baillie there*.

A*Lexander Reid* having gotten from *Andrew Wales* Merchant in *Dundee* a Diſpoſition to, and Delivery of ſome Goods in Security of a Debt: *James*

James Man another Creditor to *Andrew Wales* arreſted in *Alexander Reid*'s Hand, and having obtained Reduction of the Diſpoſition as made after *Wales* was under Horning and Caption, and within ſixty Days of his flying and abſconding, he inſiſted in a Forthcoming againſt *Alexander Reid.*

Alledged for the Defender. That he could not be obliged to make forthcoming the Goods diſponed or Value thereof to the Purſuer, unleſs he would aſſign his Debt and Diligence *pro tanto,* as is ordinary in Competition of Creditors.

Replyed for the Purſuer. That he was only obliged to diſcharge, and not to aſſign: Payment being required out of the common Debtor's Effects, which being made extinguiſhes the Debt, ſo as it cannot be aſſigned to fortify another Creditor's Debt againſt which there may be lawful Objections. Nor is there here any Competition of Rights, the Defender's Diſpoſition being reduced and declared null as a fraudulent Deed. 2. The *Beneficium cedendarum Actionum* can neither take Place where the Perſon craving it is not prejudiced by a Diſcharge of the Diligence to be aſſigned; nor where the other Party would ſuffer Prejudice by the Aſſignment. Now the Purſuer's diſcharging his Debt is no Loſs to the Defender, ſince thereby the Deed and Diligence in his Favours may revive: And the Purſuer would be greatly hurt by conveying his Debt and Diligence to the Defender, ſince he gets not complete Payment. Whereas *Beneficium cedendarum Actionum ſine Diſpendio Creditoris futurum eſt, l.* 38. *ff. de Evictionibus*; and a Creditor is not bound to aſſign his Right to a Cautioner making Payment *prius quam omne Debitum exſolvatur, l.* 2. *C. de Fidejuſſoribus.* Therefore the Purſuer cannot be obliged to aſſign a Part of his Diligence to compet with himſelf. 3. Who knows but the Defender might accommodate a third Party with the Diligence aſſigned, and he a fourth, and ſo on, which would breed Confuſion.

Duplyed for the Defender. 'Tis true if the Debtor himſelf were purſued he behoov'd to hold himſelf content with a Diſcharge; but the Purſuer muſt tranſmit to a Creditor making Payment, ſince he gets his Mony rather out of the Defender's Effects than out of the common Debtor's: For in the civil Law *Hypothecarius poſterior priori Hypothecario ſolvens, ipſo Jure ſurrogatur in ejus Locum, & Privilegium.* And with us the Purſuer of a Reduction *ex Capite Inhibitionis* receiving Payment from the Defender, is bound to aſſign with this Quality that the Conveyance ſhould not be made uſe of againſt his other Rights, *February* 11, 1676, *Bruce* contra *Mitchel.* As Creditors muſt aſſign to Cautioners diſtreſs'd upon Payment made by them; a Wadſetter muſt convey to a ſingular Succeſſor having Right to a Reverſion, *Stair, Inſtit. Lib.* 2. *Tit.* 10. §. 13. And a ſecond Appriſer by redeeming a firſt comes *ipſo Facto* in his Right, *July* 18, 1676, *Gordon* contra *Watſon.* 2. The Purſuer can pretend no Prejudice, ſince the Defender is content that the Aſſignation be burdened with the Reſervation of what more is due to the Purſuer, and that it be not made Uſe of againſt him.

The Lords found Baillie *Man* the Purſuer obliged to aſſign, with Reſervation and Preference of what Debt was yet then reſting to himſelf.

December 25, 1705. Henry Ker *of* Greden, *againſt* Iſobel Abernethy *Relict of* Thomas Inglis *Merchant in* Edinburgh.

IN the Competition for Maills and Duties betwixt *Henry Ker* of *Greden* and *Iſobel Abernethy,* ſhe founded her Preference upon a Seaſin containing Inſtruments of Reſignation, with fourty Years continued Poſſeſſion on Seaſins by Heſp and Staple.

Alledged for Greden. By the Act of Parliament 1617 the fourty Years Poſſeſſion to ground a Preſcription muſt proceed either upon a Charter and Seaſin, or Seaſin on a Retour or Precept of *Clare conſtat.* Therefore *Abernethy*'s Seaſins are not a ſufficient Title of Preſcription; more than they would be a ſufficient ordinary Title: Seing theſe are but the Aſſertions of a Notar, and the Grounds of 'em might be taken away by Certification in an Improbation, *June* 21, 1672, *Mitchel* contra *Cowie*; Whereas the others have a Charter Precept or Retour for their Warrant.

Anſwered for Iſobel Abernethy. Infeſtments upon Reſignation in Burgage Lands do not require ſeparate Charters, nor yet do Infeſtments by Heſp and Staple require either Retour or Precept of *Clare*: Becauſe they are not given as other Seaſins by any Perſon as Baillie in that Part, nor extended by a common Notary; but the Baillie of the Burgh as Superior with the ſame Breath receives Reſignation and gives Infeſtment, or grants Seaſin by Heſp and Staple (which is the Burgher-retour) upon Production or certain Knowledge of the Parties Rights, or of their Propinquity of Blood to the laſt infeſt. Conform to which Infeſtment the Town Clerk *Virtute Officii*, and not as an ordinary Notar extends a judicial Inſtrument. It was for this Reaſon, and the more eaſie Conveyance of ſmall Tenements within Burgh, that when the Act 16, Parliament 1617 required the Regiſtration of Seaſins, Burgage Seaſins were excepted; the Clerk's Prothocal being the Town's Record. And when that Act of Parliament was corrected by the Act 1681, a ſecond Book of Regiſter is only appointed for Diſtinction ſake. For in old Time very little Solemnity was uſed in infeſting in Burgage Tenements: As appears from *Leges Burgorum, Cap.* 56. But that ancient Simplicity happening to be abuſed by the taking of Seaſins privately in Town without either Baillie or Clerk, the *Act* 27, *Parl.* 1. *J.* 6. ordained that no Seaſin be given within Burgh but by one of the Baillies and common Clerk thereof. Nor is it ſtrange that the Atteſt of a Clerk in his Office being a Notary ſhould ſupply the Want of a Procuratory of Reſignation; ſeing that, by our ancient Law, was *Inſtrumentum publicum*, and made full Faith. 2. Tho' a naked Inſtrument of Seaſin were no Title of Preſcription *per ſe*, as but one ſingle Act or Aſſertion; yet where ſuch a Seaſin unreduced hath been continued by ſubſequent Seaſins on Retours, or by Heſp and Staple, it muſt found Preſcription, becauſe confirmed by the Authority of an Inqueſt who are not preſumed to proceed merely upon the Seaſin, but upon Knowledge of the Ground and Warrant thereof. 3. It hath not been yet decided how far Seaſins by Heſp and Staple ſhould be ſuſtained in Removings and Maills and Duties, where no better Titles are competing. But then the Argument doth not hold equally in the Caſe of Preſcription as in ordinary Titles. Since for Inſtance, a Seaſin on a Retour without a Warrant would not be ſuſtained as an ordinary Title, tho' it be a good Title of Preſcription. It is not to the Purpoſe that Certification in an Improbation might be obtained againſt the Warrant of a Seaſin by Heſp and Staple: For Preſcription excludes not Improbation, or the Neceſſity of producing Grounds and Warrants. But even in Improbation, a Burgage Seaſin would be good without Production of a Charter, *Arg. Deciſ. December* 14, 1671, *Duff* and *Brown* contra *Forbes*. Yea, Charters under the great Seal, that are ſuſtained without producing either the Procuratory which is the Deed of the Party, or the Signature paſt in Exchequer which is the Superior's Deed, are but the Atteſts of Perſons in Office. Therefore in Burgage Tenements Reſignation made and Infeſtment given by the Baillie to the Parties perſonally, atteſted by the Clerk in his Office, ought to be ſuſtained in Matter of Preſcription, without Neceſſity of the Baillie's Subſcription or Production of the Parties Procuratory. So that within Burgh Seaſins upon Reſignation have the Effect of a Charter Precept and Seaſin, and Seaſins in Favours of Heirs by Heſp and Staple have the Effect of Seaſins and Retours or Precepts of *Clare*.

The Lords ſuſtained Preſcription upon the Seaſin in Burgage Lands containing Inſtruments of Reſignation with continued Poſſeſſion on Seaſins by Heſp and Staple.

December 26, 1705. Robert Dickie *Maltman in* Alloway, *againſt* Margaret Cowie *and others.*

R*obert Dickie* Maltman in *Alloway* Creditor to *John Cowie* elder of *Mainſbothkenner* in the Sum of 500 Merks and ſome Annualrents thereof, having confirmed himſelf Executor *qua* Creditor to *John Cowie* (who was Heir ſerved and Executor confirmed to old *John* his Father) without conſtituting the Debt by a Sentence againſt him in his Lifetime: The Lords ſuſtained Proceſs at *Dickie*'s Inſtance againſt *Margaret Cowie* and others as Debtors to *John Cowie* younger. Becauſe, young *John* by entering Heir and confirming himſelf Executor to his Father being ſubjected in his own Lifetime to the Father's Debts; as the Commiſſary might have decerned him, if alive, to pay the Debt: So he might upon an Edict ſerved without Objection, and Caution found, juſtly decern one of the Father's Creditors Executor *qua* Creditor to the Son.

December 28, 1705. *Captain* Alexander Gavin, *againſt Sir* Robert Montgomery *of* Skelmurly.

SIR *Robert Montgomery* of *Skelmurly* being charged upon a Decreet obtained againſt him and his Curators, at the Inſtance of Captain *Alexander Gavin*, where the Curators were not cited *in Initio Litis* with the Minor upon the *Induciæ legales* of two Diets, but *ex poſt Facto* only cited *cum Proceſſu* by Virtue of an Incident to compear upon two Days Warning: The Lords turned the Decreet into a Libel.

January 1, 1706. Marjory Row, *againſt* Charles Row *of* Innerallan *her Brother.*

IN the Reduction at the Inſtance of *Marjory Row* againſt *Charles Row* her Brother of a Decreet Arbitral pronounced betwixt them, ſhe inſiſted upon theſe Reaſons. 1. The Submiſſion bore to be ſubſcribed with the Blank on the Back thereof by the Parties and Arbiters upon the 7 *January* 1704; whereby it was in the Power of the Haver of the Submiſſion with that ſigned Blank to fill up the ſame at his Pleaſure. 2. The Decreet is intrinſically null for not being final, in ſo far as the Parties are ordained to compt and reckon anent a Sum therein mentioned.

Anſwered for the Defender. The Words of the Submiſſion being, *That the Parties and Arbiters in Token of their Acceptance have ſubſcribed theſe Preſents with the Blank upon the Back thereof the ſaid 7 of* January: Nothing can be underſtood thereby, but that the Parties and Arbiters in Token of their Acceptance ſubſcribed the Submiſſion, and that the Parties ſubſcribed the Blank on the Back, *applicando ſingula ſingulis*; For it had been Nonſenſe to the Arbiters to ſubſcribe the Blank before the Sentence, in Token of their Acceptance. Which is further cleared from this, that the Decreet bears Date the Tenth of the ſaid Month, upon which Day the Arbiters ſubſcribed before Witneſſes diſtinct from theſe that ſubſcribe the Submiſſion. 2. A Libel or Proceſs may be determined as to a Part and not as to the Whole, and ſo may any ſubject Matter ſubmitted.

Replyed for the Purſuer. Such an Application of *ſingula ſingulis* is inconſiſtent with the Words of the Submiſſion, which expreſly bear that the Arbiters ſigned the Blank of that Date, and the Decreet do's not bear that they ſigned thereafter. 2. By the civil Law (*Voet. Comment. in Pandect. Tit. de recept. Arbitris N.* 18.) *Ubi plenum eſt Arbitrium, non aliter videbitur Officio functus Arbiter, quam ſi omnes Quæſtiones ſua dirimerit Sententia,* &c. And the Reaſon why an Overſman was once an Eſſential in a Submiſſion, *Act* 88. *Par.* 6. *J.* 1. was, that the Deciſion might be final. It's in vain to pretend that in ſome Caſes Decreets pronounced *ultra Vires,* have been ſuſtained *pro reliquo.* For there is a ſignal Difference betwixt a Nullity ſeparable from the Writ, as when ſomewhat not ſubmitted is decerned: And a Nullity that influenceth the whole; as in the preſent Caſe, the not ſubſcribing of the Decreet Arbitral at the Date thereof; or it's not being final.

The Lords ſuſtained this Reaſon of Reduction, That the Blank on the Back of the Submiſſion was ſubſcribed by the Arbiters at ſubſcribing the Submiſſion, and not after inſerting the Decreet Arbitral thereon, relevant to reduce the Decreet Arbitral. And found the Reaſon proven by the Submiſſion.

January 2, 1706. George Dundas *of that Ilk, againſt* William Dundas *Merchant in* Edinburgh.

GEorge *Dundas* of that Ilk having inſiſted in his Declarator above-mentioned, (*July* 25, 1705.) The Defender objected that there could be no Decreet of Declarator. Becauſe, 1. By the Contract of Marriage betwixt *Walter Dundas* of that Ilk and Mrs. *Chriſtian Leſly,* the Heirs-male of the Marriage are to ſucceed to the Eſtate of *Dundas,* which runs in theſe Terms, *In Caſe there ſhall not be Heirs-male procreate betwixt the ſaid* Walter Dundas *and Mrs.* Chriſtian Leſly *to ſucceed to the Lands of* Dundas; importing as much as that it was agreed that the Heirs-male of the Marriage ſhould ſucceed. For Contracts of Marriage how ſimply ſoever expreſt, if plain and diſtinct, are ſtill to be underſtood *cum Effectu.* And tho' a Deſtination to Heirs-male contained only in the Rights and Evidents of the Eſtate might be alterable by the Fiar, yet any Alteration thereof, when contained in the Contract of Marriage, would be *contra Fidem tabularum nuptialium.* Therefore *George* and *Walter Dundas* the Parties Contracters could by no gratuitous Deed defraud the Heir-male of the Marriage, who was Heir of Proviſion by the Contract; and far leſs could they diſappoint the whole Iſſue thereof of the Right of Succeſſion. 2. *Ralph* and the Heirs male of his Body, by the firſt Bond of Tailzie made by old *George* and his Son *Walter,* being allowed to redeem the Eſtate upon Payment or Conſignation of an Angel of Gold: That Right of Reverſion could not be infringed or taken away by any poſterior Deed of old *George,* who became by the Tailzie a naked Liferenter, in ſo far as he reſerved only a Power to himſelf to ſell and contract Debts: Under which Reſervation of doing onerous Deeds, a Faculty to alter the Succeſſion, and gratuitouſly to diſcharge the Reverſion competent to *Ralph* and his foreſaids is not comprehended. All ſuch Reſervations being ſtrictly to be interpreted, as downright Incroachments upon the native Effect of Fie and Property; and the altering of the Channel of Succeſſion to the Prejudice of the Iſſue of the Marriage, was a direct Contravention of the Contract of Marriage by a fraudulent arbitrary Deed without any neceſſary Cauſe; which *George* could not do tho' conſidered in the Capacity of a Fiar. 3. Albeit the foreſaid Reſervation were ſufficient to impower *George* to make the ſecond Tailzie *quoad* theſe Parts of the Eſtate of *Dundas,* whereof he was abſolute Fiar before the firſt Tailzie; yet as to the Lands of *Overnewliſtoun* wherein *Walter* ſtood publickly infeſt as heretable Fiar before that firſt Tailzie, the Reſervation could not Impower *George*, who had only a Liferent Right of ſome Duties out of theſe particular Lands, to defraud *Walter*'s Heirs of 'em. 4. Albeit the Power of diſcharging the Reverſion had been duly reſerved to *George*, he did not exerce the ſame by the poſterior Deed, but only ſuſpend the Effect of the Reverſion until *Ralph* or his Heirs ſhould obtain the Conſent of ſome Friends: Which was only a temporary Impediment, or Reſtraint upon *Ralph*'s free Uſe thereof, deſigned as a Mean to reclaim him from Diſorderly Courſes, which naturally ceaſed upon his Death, or his returning to frugal Management. For the Friends could not diſſent without a reaſonable Cauſe: And the Want of their Conſent (when no reaſonable Cauſe could be given for their refuſing to Concur) might be ſupplyed by the Authority of a Competent Judge. And as *George* did not abſolutely diſcharge the Reverſion, he could not tranſmit by Delegation ſuch a perſonal Faculty to others. Far leſs could they exerce it by Virtue of ſuch a Delegation after his Death: Since *Morte Mandantis expirat Mandatum*; and all Delegations are Mandates. 5. The Diſcharge of Reverſion is in it ſelf null and cannot be regarded, Becauſe, the Friends appointed by *George* in the ſecond Tailzie to be Judges of *Ralph*'s Miſcarriages, ought all to have conveened and precognoſced the ſame before diſcharging the Reverſion: Whereas only the major Part of 'em met; which was not ſufficient in a Matter of ſingular Truſt and Judgment, where there was a Delegation and perſonal Confidence. 6. Albeit *George* could have delegated the Faculty to theſe Friends, and they could have diſcharged; they could not do it arbitrarily: But upon Cognition of *Ralph*'s continued Miſcarriages, which was not obſerved. For the very naming of 'em Judges to his Behaviour obliged them to proceed *ſecundum Arbitrium boni Viri*, and the Rules of Law and Equity. Nor could their Sentence upon this Account after Cognition have juſtly gone beyond the Perſon of the Delinquent. And therefore *Ralph*'s Miſcarriages could never afford a reaſonable Ground to deprive his innocent Children of their juſt Right of Succeſſion.

Anſwered for the Purſuer. Seing the Lords have found, That there was no Obligement of Fie of the Lands provided in Liferent to *Walter*'s Lady, intended in Favours of the Heirs-male of the Marriage, where it might naturally have occurred: *Multo minus*, can it be thought by the bare Suppoſition of the Eſtate's being provided by the old Infeſtments to Heirs-male premiſed to the Daughters Proviſions, any Obligement to Heirs-male was deſigned in the Contract, *ubi id minime agebatur.* Conſequently it is unaccountable to conclude, That *Dundas* elder and younger could do no gratuitous Deed to fruſtrate an Obligation that in effect never was in Being. Beſides, any Expectation that the Earl of *Leven*, and Contracters on the Lady's Part could have in Behalf of the Heirs-male of the Marriage, was fully ſatisfied by providing the Fie to *Walter* the ſecond Son thereof. 2. The Reſervation in the Tailzie 1669, is as broad and ample as could be conceived; And 'tis groundleſs to alledge, That it carry'd a Power to Sell and Contract, but not to Diſcharge *Ralph*'s Reverſion gratuitouſly. For he that reſerves a Power to Sell and Diſpone, *&c.* Siklike and as freely in all Reſpects, as if the Bond of Tailzie and Reverſion therein-contained had never been granted, hath a free and abſolute Power to alter and diſcharge the Reverſion at Pleaſure. And Reſervations in Favours of Perſons denuding themſelves of the Fie of their Eſtates in Favours of their own Heirs or Deſcendents, being a Right of Property not conveyed, are amply to be interpreted in Favours of the Diſponers. So that *George* the abſolute and illimited Fiar might diſcharge the Reverſion as he did, which was a moſt rational Deed to prevent the Confuſion, Ruin and Diſhonour of the Family, of more Weight than any Inference from an imaginary implied Obligement. 3. As *Walter* the Fiar of

Overnewliſtoun might have re-inſtated *George* his Father in the Property by re-diſponing the ſame to him : So he might *a Majori*, by ſubſcribing to the Tailzie 1669, confer upon his Father a leſſer Intereſt, by taking the reſerved Faculty to the longeſt Liver. 4. The Reſervation of a Faculty to diſpoſe as freely as before making of the Reſervation, is not perſonal. But he that can abſolutely diſpoſe at his Pleaſure may impower Truſtees for exercing what himſelf might have done: And who doubts of this muſt be an abſolute Stranger to the *Roman Fideicommiſſa*, and Laws of other Nations. *George*'s Deed ſuſpending the Reverſion being never taken off, and now, as Things ſtand, impoſſible to be taken off, is equivalent to an actual Diſcharge; And he thereby ſubſtituted the Purſuer to the Heirs of young *Walter*. So that by old *George*'s own Deed, *Ralph* and the Heirs-male of his Body ſtand perpetually excluded. 'Tis needleſs to inquire what the Friends would or ſhould have done, if *Ralph* had become a better Man : Since he was never reclaimed, and they who were made Judges of his Manners and Merit, never conſented, nor were required to conſent to his uſing of the Reverſion ; But alſo *Ralph* and his Heirs-male were ſo excluded by the Deed of old *George*, tho the Delegates had never interpoſed. Delegations and Truſts of this Kind are not to be conſidered as temporary Mandates, that die with the Mandant: For when a Mandate like this is to take Effect after the Mandant's Death, it falls not by his Death. Yea, moſt of Mandates according to the Meaning of the Mandant are now reputed to ſubſiſt even after his Deceaſe. The *Boni viri Arbitrium* can take no Place here, where *George* has already determined upon the Cauſes why he thought fit to debar *Ralph* his Grand-child from the Succeſſion, and allowed none but certain Friends to decide the Reverſion. And whatever Pretence there might have been for the *boni Viri Arbitrium*, if they had not conſented through meer Negligence or Omiſſion : to admit of it now when the Friends have expreſly determined the Matter, were to make a new Deed, and not to complete what *Dundas* had formerly done. 5. The Diſcharge of the Reverſion is moſt formal in the Terms of the Truſt which was expreſly committed to the Major Part of the Friends named, and ſo many do ſign the Diſcharge. This Caſe cannot be regulated by the ordinary Rules of judicial Procedure : ſince no Parties were to be cited, nor Probation to be led, or any other Formality obſerved ; Each Perſon's proper Knowledge being the ſole Rule of their Judgment. Beſides, Tutors may ſubſcribe in the ſame Manner. And even the Preſence of a *Quorum* is ſufficient to authorize the Sentences of Judges. The Truſt here committed to the Friends making them Judges of *Ralph*'s Miſcarriages, was not ſo extraordinary, if it be conſidered that, without Regard to new Miſcarriages, they were impowered to proceed upon theſe already precognoſced by the Grand-father. 6. *George* himſelf did firſt exclude *Ralph* and his Deſcendents from the Reverſion, and the further Power intruſted to the Friends, was exerced by them upon the very Grounds precognoſced by himſelf; Becauſe never amended or removed. Which Truſtees being all Men of Honour, and *Ralph*'s neareſt Relations on both the Father and Mother Side, not to be ſuſpected of Malice or Ignorance of his Conduct ; Their Diſcharge of the Reverſion muſt be looked upon as the Determination of an impartial Inqueſt. Nor can *Ralph*'s Heir-male, however innocent, have the leaſt Pretence to Succeſſion, whoſe Father is excluded from whom any Right he could claim muſt deſcend.

Replyed for the Defender. 1. If the Tenor of the Clauſe in the Contract, did not import a Proviſion of Succeſſion in the Eſtate to the Heirs-male of the Marriage, this Abſurdity would follow ; That in caſe of the Exiſtence of an Heir-male of the Marriage, the Proviſions in Favours of the Daughters would fall, being only made upon Suppoſition of the failing of Heirs-male ; And if that Heir-male were not to ſucceed by the Contract, it could not be ſaid that any ſettled Proviſion was made for the Iſſue of the Marriage, Male or Female. 2. There is a great Difference betwixt Rights and Infeftments of Truſt, and the Delegation of the Faculty in Queſtion. For Rights of Truſt convey the Subject diſponed thereby to the Truſtee, ſo as he may Implement the Terms of the Truſt after the Diſponer's Death: But here no Right to any Thing is tranſmitted, but only a Commiſſion given to Truſtees for exercing a Faculty reſerved to the Granter, which did not diveſt him of any Right, but was revokable as other Commiſſions, and became extinct when not executed in his Lifetime.

The Lords found, That the Contract of Marriage of *Walter Dundas* elder with his Lady, contains no Obligement expreſs or implied to provide the Eſtate of *Dundas* in Favours of Heirs-male of that Marriage; And that old *George* by Virtue of the Faculty reſerved in the Tailzie *1669*, had full Power to divert and alter the Succeſſion, or Suſpend and Diſcharge the Reverſion in Favours of *Ralph*, and the Heirs-male of his Body. And found, That the ſaid *George* elder his diſcharging of *Ralph*'s Liferent, and ſuſpending the Force and Effect of the Reverſion reſerved to him by the Tailzie, until he or his Heirs-male ſhould procure the Conſent of the Friends therein-mentioned, with Power to theſe Friends to Diſcharge the ſaid Reverſion; And their Diſcharging accordingly, doth reſolve into a perpetual Suſpenſion or Extinction of the Reverſion: And that the Friends or their Heirs could never thereafter concur in the Redemption; nor *Ralph* Redeem without their Concourſe: And that the Heirs-male deſcending of him are excluded by the ſaid Suſpenſion and Diſcharge, as effectually as he was. And found that *Ralph* and his Heirs-male, are excluded from the Lands whereof *Walter* elder had the Fie before the Tailzie *1669*, in the ſame Way as from the reſt of the Eſtate, in reſpect of the foreſaid Faculty reſerved to *George* and *Walter*, and longeſt Liver in the ſaid Tailzie: And that *George* the Surviver exerciſed the ſaid Faculty by the ſecond Deed; And that the Diſcharge by Nine of the Eleven Friends, being the Plurality, is ſufficient.

January 3, *1706*. *Sir* Andrew Kennedy *of* Cloburn, *againſt Sir* Alexander Cuming *of* Culter *Advocate*.

SIr *Andrew* thinking his Liferent Right to be Conſervator of the *Scots* Privileges in the *Netherlands*, unjuſtly invaded by Sir *Alexander Cuming*'s procuring a Gift and Commiſſion of the Office from the Queen; raiſed a Reduction of the ſaid Commiſſion before it paſt the Seals, and a Declarator of his own Right and Poſſeſſion. Sir *Alexander*'s Gift being afterwards expede under the Great Seal, he preſented it to the States General, and the Town of *Camphire*, who received him and recorded his Commiſſion.

At the calling of Sir *Andrew*'s Summons before the Lords, he firſt inſiſted for declaring his Poſſeſſion; and decerning Sir *Alexander* to deſiſt from troubling him in the Exerciſe of the Office ſo long as his Commiſſion ſtood unreduced.

Alledged for Sir Alexander. That himſelf was in the Poſſeſſion by Virtue of a Gift from the Queen, proceeding upon a legal Cognition by Her Majeſty of Sir *Andrew*'s Malverſations, who was competent to judge him in that Matter by the 82 *Act*, *Par. 6. J.* 4. Aud by the Nature of his Office, being a foreign Miniſter.

Replyed for Sir Andrew. That the Property and Rights of the Subject ought to be determined by the eſtabliſhed Judicatures of the Nation: The Act 1681, aſſerting a cumulative Juriſdiction to the Sovereign being reſcinded by the 28 *Act*, *Parliament* 1690. Therefore, tho Offices granted *durante Beneplacito* may by Her Majeſty be diſpoſed of and revoked at Pleaſure; Liferent Offices cannot be taken away upon the Head of Malverſation, but by the Sentence of an ordinary Judicature. Yea, all Grants from the Queen being obtained *Periculo Impetrantium*, upon the Application and Suggeſtion of private Perſons are under the Controul of Her Judicatures, if conform to Law. So Grants relating to Her Majeſty's Revenue are ſubject to the Review of the Treaſury and Exchequer; And the Lords of Seſſion are Her Council and Judges as to Gifts concerning private Rights. So that Sir *Alexander*'s Gift is null as againſt the Claim of Right which declares all Forfeitures before Sentence, that is of a Judicature, to be contrary to Law. And his Poſſeſſion after Sir *Andrew*'s Reduction and Declarator was unwarrantable and downright Intruſion. As to King *James* the Fourth's Act of Parliament, it was made before the Eſtabliſhment of the College of Juſtice, when Judicatures for cognoſcing upon Right and Property were not fixed. Nor are the Words to be taken diſjunctively, for the King's Council repreſents his Perſon; and to anſwer before them, is to anſwer before the King. Beſides, *non conſtat* that the Conſervator's Office was then conferred *ad Vitam aut Culpam*: And the Act obliges only the Conſervator when he ſends a Procurator for him, without coming home, to certifie the King, or his Council: But does not determine the Manner of Cognition of Things laid to his Charge.

Duplyed for Sir Alexander. Sir *Andrew*'s Proceſs could not render Sir *Alexander*'s Poſſeſſion unwarrantable. Becauſe, 1. It is executed as a Reduction and Declarator, without a Word of Poſſeſſion, and the filling up of a Concluſion afterwards, could not interpel him ſo, as to make his Poſſeſſion unwarrantable; no more than a Reduction and Declarator could hinder a Perſon to complete a Diſpoſition by a Charter and Seaſin, and obtain Maills and Duties before an inferior Court; or could hinder the Decreet of a Baron Baillie (the meaneſt Judge) removing a Tenant to take Effect until it were ſuſpended, or actually reduced. And therefore Sir *Alexander* might well attain Poſſeſſion from the States of *Camphire*, who were moſt capable to give it, upon Her Majeſty's Gift founded upon a previous Cognition, which is all the neceſſary Solemnity in ſuch a Caſe, and of more Weight than the Authority of any inferior Judge. 2. If Sir *Andrew* was not in Poſſeſſion, Sir *Alexander*'s Poſſeſſion muſt be warrantable: But *ita eſt*, Sir *Andrew* was not theſe ſeveral Years in Poſſeſſion, by holding of Courts or perſonal Attendance, which the Nature of the Office and Terms of his Acceptance obliged him to. Nor can Sir *Andrew* found upon his Son's Poſſeſſion, who is no Purſuer in this Proceſs, and whom he hath been careful to ſeparate from himſelf, by refuſing to anſwer for his Behaviour before the Burrow-Commiſſioners at *Camphire*. 3. Sir *Alexander*'s Poſſeſſion was attained upon the Queen's Right in a natural Way, altho' Sir *Andrew*'s Office for Life were a Right of Property. In ſo far as Perſons have for Malverſation been turned out of Liferent Offices within the Kingdom, without the Solemnity of a Proceſs of Declarator. *Muſhet* counter Warden of the Mint, and *Williamſon* Sheriff Clerk of *Perth*, were deprived by the Privy Council, who are not Judges of Property. The Town of *Edinburgh* turned out Sir *William Thomſon* from being their Clerk. Conſequently the Queen may much more reaſonably take a ſummar Way with the Conſervator, who is a Miniſter repreſenting Her Majeſty in a foreign State. And ſo have former Conſervators been treated; Mr. *Nathanael Edwards* was recalled, and Mr. *Drummond* put in his Place; and he turned out again without Sentence or Declarator; Mr. *Hary Wilkie* was removed ſummarly, and Sir *James Kennedy* put in his Room: Who all had Liferent Commiſſions, as well as Sir *Andrew*. Her Majeſty's Right to judge the Conſervator is not pleaded as founded upon the Act 1681, *concerning cumulative Juriſdiction*, but upon former Laws and inviolable Practice, whereby our Sovereigns have Power of ſending

Miniſters to foreign States, and recalling them at Pleaſure. And Sir *Andrew*'s Liferent Gift hath only this further Effect, that where other Miniſters may be recalled *indicta Cauſa*, he could not be exauctorated without a Reaſon; of which Her Majeſty was Judge, as juſtly claiming the Interpretation of Her own and Her Predeceſſors Grants, according to the Rule, *Quem modum eſſe Beneficii ſui vellet, ipſius Æſtimationem eſſe, L. 191. ff. de Reg. Jur.* Which is a neceſſary Prerogative for the Good of Her Subjects, and Preſervation of the decent Forms and good Correſpondence with foreign States. For it is not to be imagined that the *Dutch* could be obliged to proſecute their Grounds of Complaint againſt the Conſervator before the *Scots* Judicatures, and to wait the *Remoras* thereof: More than upon a Breach of the Staple Contract by the *Dutch*, our Queen ſhould addreſs their *Schepins* or other Judges. And therefore Sir *Andrew Kennedy* thinking himſelf leſed by Sir *Alexander*'s Gift, ſhould have applyed directly to Her Majeſty for Redreſs, and not have raiſed ſuch an unwarrantable Declarator.

Triplyed for Sir Andrew, 1. The raiſing a Reduction and Declarator at the Inſtance of one in Poſſeſſion of the Right to be declared, includes plainly his Right and Poſſeſſion. And the Executions never mention the Poſſeſſion but only the Summons to which they relate: And a Perſon thereby interpelled cannot but underſtand that the Purſuer intends to claim and eſtabliſh his Right of Poſſeſſion. As for the Inſtances of a Diſpoſition completed, and a Baron Baillie's Decreet taking Effect after commencing of Reduction and Declarator; they are ſo many Inſtances againſt Sir *Alexander*. For in the one he ownes that a Diſpoſition, Charter and Seaſin is not ſufficient without a Decreet of Maills and Duties, and in the other there muſt be a Decreet for removing the Tenants. Now this is what Sir *Andrew* from the Beginning complained of, that his Poſſeſſion was ſummarly inverted upon a bare Title, a Gift without a Decreet or Sentence thereon, even after he had interpelled the Donatar by his Declarator. Who albeit he might complete his Gift by paſſing the Seals, notwithſtanding of the Declarator, could not take Poſſeſſion without a Decreet, the Office being full. And the executed Declarator was equivalent to a Suſpenſion, and the only habile Remedy in Law to maintain Sir *Andrew*'s Poſſeſſion: Seing Grants under the Great Seal cannot be ſuſpended. Sir *Alexander* is in the Wrong to alledge that the States only can give Poſſeſſion to the Conſervator: For he derives both Right and Poſſeſſion from *Scots* Powers, having only a Tolerance and Allowance from the States where he locally exerciſes his Juriſdiction. 2. Whatever has been Sir *Andrew*'s Poſſeſſion, Sir *Alexander*'s can never be good, being plainly uſurped at his own Hand without Admiſſion by the Royal Burrows, or qualifying in the Terms of Law. Sir *Andrew*'s Abſence or Neglect of the Duties of the Office, tho' true, as it is not, would not evacuate his Poſſeſſion, which once attained *reteinetur ſolo Animo*, till voluntarily renounced or direlinquiſhed: But only afford Ground of Malverſation. There are ſeveral other Acts of Juriſdiction and Deeds of Poſſeſſion, beſides the holding of Courts, wherein he, his Conjunct or Depute have been conſtantly in the actual Exerciſe of: As granting Commiſſions to vacant Offices, giving in Memorials to the Magiſtrates of *Camphire* for Convoys, proteſting for not ſending ſufficient Convoys, or for not ſending them in due Time; giving up Liſts to the Magiſtrates of *Camphire* of ſuch as have Freedom and Privilege; giving Teſtificates to Skippers for teſtifying to the reſpective Cuſtom-houſes in *Scotland* that they came to the Staple-Port without breaking Bulk; appointing *Scots* Commiſſioners to meet with *Dutch Vrede-makers*, i. e. Peace-makers to adjuſt incident Differences betwixt *Scots* and *Dutch*, &c. 3. It is neither inconſiſtent with the Government nor common Senſe, that a Conſervator having a Liferent Right ſhould be tryed as to his Behaviour by a ſolemn Proceſs. For a Liferent Office can no more be taken from a Man without a Proceſs, than an heretable

Juriſdiction can. The Inſtances of Perſons deprived are not to Sir *Alexander's* Purpoſe, *Boſwall* was preferred to *Muſhet* by a Decreet of the Lords of Seſſion; *Williamſon* was turned out by the Privy Council for an Act of high Contempt of Authority and Malverſation libelled and proved; Sir *William Thomſon* was turned off by his proper Judges the Town Council of *Edinburgh*, conform to a Sentence. As to *Hary Wilkie*, if he was removed contrary to Law, his voluntary Acquieſcence is no Prejudice to the Right: Beſides, he had not taken the Teſt, and the Act 1681 anent the cumulative Juriſdiction was then ſtanding. It doth not appear that *Nathanael Edwards* was recalled by the King, but that he renounced the Office and had never been admitted by the Burrows; Mr. *Patrick Drummond* was turned out by the Committee of Eſtates for not ſwearing the Covenant, and reponed at the Reſtoration. The Staple Concern has not that immediate Dependence upon Her Majeſty as other State Matters: For the Staple Contract 1612 was entred into with the Town of *Camp-vere* and the Royal Burrows, and hath been always ſo renewed; and only ratified by our Sovereigns. And the Conſervator, tho' his Commiſſion be under the Great Seal, is received and inſtalled and gets his Inſtructions from the Burrows: Who are in Uſe upon preſenting the Sovereign's Commiſſion, to proteſt that the admitting thereof ſhall be without Prejudice of their Right to name the Conſervator; whoſe Salary is paid, adjuſted and altered by them at Pleaſure, without Advice from the Sovereign. So that the Conſervator who is Judge of the *Scots* Colony or Incorporation in *Holland*, has his Office during Life under Security of the ſame Laws, as any other Judge in *Scotland*, and is wholly diſtinct from Her Majeſties other Envoys or Reſidents in State-matters: And the naming him alſo Reſident is but conſequential to his other Office of Conſervator; for expediting whereof it is neceſſary in Caſe of Attempts upon the Privileges of the incorporate Body. As to Her Majeſties Power of Interpretation of Her own Grants, the Meaning of the cited Maxim of Law is, That She or any private Party may qualify their gratuitous Conceſſions in the giving; but a *Jus quæſitum* by the Grant receives its Interpretation and Determination from the Nature of the Thing, and Laws of the Nation. If there ſhould be no other Difference betwixt his Office and other Reſidents, than that they may be recalled *indicta Cauſa*, whereas a Conſervator for Life cannot be removed without a Reaſon: It would be under an arbitrary Diſpoſal, and upon the Matter little better than an Office during Pleaſure. 'Tis no Novelty to ſee foreign States injured apply for Redreſs to the ordinary Judicatures. Are not all Matters of Prize and Repriſal ſo cognoſced? And if a foreign State ſhould complain of Unjuſtice done by our Judges of the Admiralty, their Decreets would be reviewed by the Lords of Seſſion. The Accuſations and Complaints by *Gundamar* the *Spaniſh* Ambaſſador were not judg'd by King *James* the Sixth, but in Form of Proceſs before the King's Bench. The Sovereign's Part is to make Enquiry and to remit the Matter, if probable, to be cognoſced by the Judges competent. Nor is the Inconveniency ariſing from Delay in theſe Matters to be regarded: Since the ſame is alike to all Nations.

Quadruplyed for Sir Alexander. Tho' the Judge Admiral determines Prizes and other Caſes relating to Foreigners, there are vaſt Diſparities betwixt him and the Conſervator. For the one, and not the other, muſt by his Office ſtay abroad in the Face of the injured, which after publick Affronts and Breaches is diſhonourable to Majeſty. The Admiral's principal Buſineſs is to decide in maritim Affairs betwixt Subjects. The Caſes of Foreigners *qua* private Perſons falling in by Accident only: Whereas the Conſervator hath chiefly to do with a neighbouring Sovereignity *qua* ſuch, and his Juriſdiction over *Scottiſh* Subjects there, is no more than a Pendicle. There is alſo a ſpecial Law and Cuſtom concerning the Conſervator, which concerns not the Admiral, or any other Judge: And the Queen is liable for the Miſdemeanours of Her Conſervator abroad, but not for Her Judges at home. A Judge at home malverſing or committing Iniquity may be allowed to continue in Poſſeſſion till formal Deprivation: Becauſe, what he do's amiſs may be remedied by Suſpenſion, Reduction, Proteſtation for *Remeid of Law*, Reprival, Remiſſions, *&c.* Whereas a Conſervator's Deeds of Unjuſtice to the States and Strangers there, are only reparable by the Sovereign, who may ſummarly remove for preventing Miſchiefs that cannot be redreſt. A Reſident could not indeed be corporally puniſhed by Fining, Baniſhment, *&c.* but in the ordinary Form of Law: But the Privilege of cenſuring, ſuſpending or depriving ſuch a one belongs to Her Majeſty; and the ſtudied Specialities of the annex'd Juriſdiction can never deprive Her of it.

The Lords found, That Sir *Alexander Cuming* could not warrantably attain any Poſſeſſion upon Her Majeſties Gift after Sir *Andrew*'s Reduction and Declarator was intented, before the ſame was determined, or a Decreet obtained at Sir *Alexander*'s Inſtance declaring his Right.

January 9, 1706. *The Lord* Balmerinoch, *againſt the Earl of* Strathmore.

THE deceaſt Lord *Balmerinoch* as apparent Heir to the Lord *Coupar*, having commenced a Purſuit againſt the Earl of *Strathmore*, upon a Clauſe of Warrandice in a Contract of Alienation in the Year 1638, betwixt the Earl of *Kinghorn* the Defender's Predeceſſor, and the Lord *Coupar*; The Lords found that the preſent Lord *Balmerinoch* being ſerved Heir to the Raiſer of the Proceſs who died in the ſimple State of Apparency, and alſo to the Lord *Coupar*, might inſiſt in the ſaid Proceſs without Neceſſity to raiſe a new one.

January 15, 1706. John Wat *Writer in* Edinburgh, *againſt* David Forreſt *Baillie.*

JOhn *Wat* as Creditor to the deceaſt Major *Lauder* having purſued *David Forreſt* as Heir to his Daughter *Helen* of a firſt Marriage, who was Heir to the Major for Payment of his Debt; The Defender alledged he could not be liable *paſſive* becauſe his Cognition as Heir to his Daughter *Helen* was null, in ſo far as ſhe had a Siſter of a ſecond Marriage *in Utero* at the Time who *pro nata habetur*, and as *propinquior* excluded the Father, and the Time of that ſecond Daughter's Deceaſe there was a Brother *George in Utero* who now lives.

Replyed for the Purſuer. The Defender's Service as Heir to his Daughter who had a Siſter *in Utero* was not null *ipſo Jure*, but only *Ope Exceptionis*, and reduceable at the Inſtance of that Child when born, if ſhe thought fit to uſe her Privilege, and object the Nullity. So that the Defender in the mean Time ſtands liable to the Debts: For the ſaid Daughter *in Utero* the Time of his Service died without being entred Heir to her Siſter, and the Brother yet an Infant was ſerved Heir by the Defender his Father only as a Blind to evade the paſſive Title himſelf who hath poſſeſt theſe ten Years bygone under the Colour of Heir to his Daughter whom he ſerved Heir to the Major. Nor could the Defender's Service be nullified by the Son who was neither gotten nor born at the Time; and when he comes to be a Man will certainly *ex Capite Fraudis & Minorennitatis* reduce his Service to ſuch a *damnoſa Hæreditas*, whereby the Creditors will be balked of their Expectation from him.

Duplyed for the Defender. The Service of a Father to a Child while another exiſts is certainly null *ipſo Jure* as contrary to Law: Seing there cannot be an Heir where there is no *Hæreditas delata*, more than a Siſter or younger Brother's Service to a Father upon an abſent elder Brother's being reputed dead, would have any Effect in Law when he returns; Or than there could be any Obligation ariſing from Marriage with a Woman, who, tho' reputed free at the Time, is thereafter diſcovered to ſtand married to another; or that a Man corroborating his Predeceſſor's Debt would be excluded from founding on a Diſcharge thereof afterwards found out. For the Service of a remoter, while a nearer, tho' not known at the Time, exiſts, is *ipſo Jure* null; *January* 11, 1673, *February* 16, 1627, which is founded in the very Nature of the Thing, and Stile of our Brieves that run in the preſent Tenſe, *Quis eſt propinquior*, &c. the Time of the Service, which the Defender was not. It imports not that the ſecond Daughter died afterwards unentred, and the Son was not born at the Time: For the Service being originally null by her Exiſtence *in Utero*, the Nullity is keeped up by the Superveniency of the Brother, who ſtill hindered the Caſe to exiſt where the Father might be Heir. For *quod Initio non valet Tractu Temporis non convaleſcit*; eſpecially *cum non devenit in Caſum a quo incipere potuit*. By the civil Law a Perſon who, thinking himſelf true Heir by Miſtake, acquires the Heretage and ſubjects himſelf to *Onera hæreditaria*; *nec Hæres erit, nec obligatur Hæreditati, l.* 22. *ff. de acquirenda vel amitt. Hæred.* Nor doth the *l.* 12. *C. de Petit. Hæred.* advance any Thing to the contrary: For where two are pretending to the Heretage, and behaving as Heirs, a Creditor during the depending Competition may purſue either. But here the Party ſerved diſcovering his Error diſclaims the being Heir, when there can be no Inheritance: And is content to compt for his Intromiſſions *in Valorem* as Adminiſtrator of Law to his Son, who exiſted before intenting of this Action; which ought to be taken off his Hand as ſufficient, as well as a vitious Intrometter becomes only liable *in Valorem* by a Confirmation before any Creditor's Purſuit. 2. *Et ſeparatim* whether the Defender's Service as Heir to his Daughter be null *ipſo Jure*, or reduceable, it hath the ſame Effect. For Reductions are declaratory Actions operating *retro* as far as the Reaſons founded on.

Duplyed for the Purſuer. That the Defender's Service was not *ipſo Jure null*; for the Daughter *in Utero* might have miſcarried and not been born, or born a Monſter: In either of which Caſes the Maxim, *Non eſſe & non apparere ſunt paria*, would have taken Place. And this Point may be further cleared by the Similitude of a Teſtament *ruptum Agnatione Poſthumi*, which continues valid, and the teſtamentary Heir liable *paſſive*; unleſs quarrelled by the *Poſthumus Agnatus*. The *l.* 22. *ff de acquirend. vel amittend. Hæred.* is nothing to the Purpoſe, for it ſays only that the wrong Heir cannot retain the Heretage: And *eſto* the Defender might be brought to an Account and diſpoſſeſſed by his Son, he is ſtill liable to the Creditors as once being Heir; and as *Poſſeſſor Hæreditatis, l.* 12. §. 1. *C. de Petit. Hæred.* Albeit if afterwards called to Account for the Rents by his Son inſiſting *in petitorio*, he may claim Allowance of all the Debt he pays. *Ibidem.*

The Lords ſuſtained the Defender's Service as Heir to his Daughter to make him *paſſive* liable for Major *Lauder*'s Debt.

Eodem Die. John Spence *Procurator-fiſcal of* Brechin, *againſt* Chriſtian Duncan *Relict of Mr.* William Chaplain, *now Spouſe to Mr.* Andrew Geddie *Miniſter at* Farnall.

THE deceaſt *James Carnegie* of *Balnamoon* being confirmed Executor to his Father who died in *April* 1700, *John Spence* Procurator-fiſcal of *Brechin* his Creditor in 1000 ℔. confirmed himſelf in the Terms of the *Act* 4. *Parl.* 1695, Executor *ad Omiſſa* to the Father, and purſued *Chriſtian Duncan* as Executrix Teſtamentar to Mr. *William Chaplain* for the Crop 1699 of the Lands of *Balnamoon*, omitted by the young Laird out of his Father's Teſtament, and intrometted with by *Chaplain*.

This Defence being proponed for Chriſtian Duncan, That her Husband was only a Servant to the Lairds of *Balnamoon*, and as he had intrometted with the Rents of that Eſtate: So he had compted and cleared and made *bona Fide* Payment to, and obtained a general Diſcharge from the laſt *Balnamoon* who was Heir and Executor to his Father.

Alledged for the Purſuer. The Diſcharge being relative to particular fitted Accompts, can only exoner in ſo far as is ſtated in theſe Accompts: And that notwithſtanding of a general Clauſe in the ſaid Diſcharge diſcharging all other Accompts and Intromiſſions whatſoever. In Regard the laſt *Balnamoon* having no direct Right to the Crop *1699* unconfirmed in his Father's Teſtament, could not in Prejudice of Creditors diſcharge at Random all Intromiſſions by a general Clauſe: Tho' the Diſcharge be ſuſtained as to what is inſtructed to have been particularly compted for upon the Pretence of *bona Fides* in paying to one who had a Shew or Colour of Right. And the Purſuer offered to prove Super-intromiſſion by *Chaplain* over and above what is contained in the fitted Accompts, *prout de Jure*, as Intromiſſion with Rents and Bargains of Victual are probable.

Anſwered for the Defender. Mr. *Chaplain* having intrometted as Servant to both the old and young *Balnamoon*, by their verbal Order, and not *ſuo Nomine*: That was not properly his, but *Balnamoon*'s Intromiſſion by him as the Hand. For which the Defender cannot be liable altho' her Husband had obtained no Diſcharge: Since he is preſumed to have delivered the Rents to his Maſter as he received them; and far leſs can ſhe be liable when he was honourably diſmiſs'd by his Maſter with a general Diſcharge; *November* 25, 1671, *Irvine* contra *Falconer*, obſerved by the Lord *Stair*; *February* 17, 1676, *Abercromby* contra *Atchiſon*, obſerved by *Dirleton*. And tho' Witneſſes be competent to prove Receipt of Victual where uſually for Commerce ſake Writ is not interpoſed, and the Seller wants the Price: Yet they cannot be admitted in this Caſe to take away Writ, *viz.* The general Diſcharge ſubſequent to the Intromiſſion.

The Lords found Mr. *Chaplain*'s Super-intromiſſion over and above what is contained in the fitted Accompts relevant to be proven by the Purſuer *Scripto*, but not by Witneſſes: In Reſpect of the general Diſcharge; tho' *regulariter* the uplifting of Victual Rent may be ſo proven. Beſides, ſuch a Thing might expoſe Servants to great Danger, who commonly by their Maſter's verbal Order take in and deliver the Rents without any Receipt.

January 16, 1706. Janet Buchanan *and* Buchanan *of* Leny *her Husband for his Intereſt, againſt the Marqueſs of* Montroſe.

IN an Exhibition *ad deliberandum* at the Inſtance of *Janet Buchanan* as apparent Heir to *John Buchanan* of that Ilk her Father, and to her Grandfather and great Grand-father, with Concourſe of her Husband, againſt the Marqueſs of *Montroſe* and ſome of his Friends and Doers, ſhe called for all Writs conceived in Favours of theſe her Predeceſſors, or granted by them importing a Burden upon, or Clauſes in Favours of the Heir. And ſpecially a Diſpoſition granted by her Father to Major *George Grant*, containing a Tailzie, Reverſion and other Clauſes in Favours of her ſelf, together with ſome Diſpoſitions and Conveyances by the Major, to the deceaſt *James* Marqueſs of *Montroſe*, and Adjudications of the Eſtate.

Anſwered for the Defenders. The Right and Space to deliberate being only a pretorian Warrant indulged as a Courteſie by the civil Law to apparent Heirs, that they *ſine Damno alterius* might within a Year *poſt delatam Hæreditatem* get Inſpection of their Predeceſſors Writs, which otherways they could not touch or meddle with without incurring a Behaviour or paſſive Title. By our Cuſtom an Exhibition *ad deliberandum* doth only take Place where the Purſuer or his Predeceſſor had either Right or Poſſeſſion, at leaſt by legal Preſumption. That s, all Writs granted to the Predeceſſors, or granted by them to Perſons *in Familia*, and not to Strangers, fall under an Exhibition *ad deliberandum*; *December* 6, 1661, *Tailzifer* contra *Sornbeg*; *December* 22, 1675, *Maxwell* contra *Maxwell*. Becauſe, Law allows Men to keep their own Evidents as cloſe as they pleaſe, *& non edere contra ſe* merely to ſerve another's Conveniency. And the Lords are ſo tender of opening Charter Cheſts at Random, that they ſuſtain abſolute Diſpoſitions by the Defunct to exclude all further Exhibition as to the Subject diſponed; and never ordain Compt-books to be exhibited in Proceſs without Neceſſity, and then all the Leaves are ſeal'd or lock'd wherein the Purſuer has no particular Intereſt. The Reaſon of the Diſtinction betwixt Rights to Perſons *in Familia*, and to Strangers is, becauſe Writs granted to theſe *in Familia* ſeem in a Manner to be in the Defunct's Cuſtody and are moſtly granted *Intuitu Mortis*, without any onerous Cauſe, or perhaps without a Diſpenſation as to the not Delivery.

Replyed for the Purſuer. Exhibition *ad deliberandum* being called *Jus deliberandi*, is not a Matter of meer Civility or Courteſie; unleſs under that Notion we comprehend Law it ſelf, the Bond and Tie of civil Society. The Title of the Action is the Intereſt of Blood and Apparency of Succeſſion, and the Deſign of it to facilitate the Tranſmiſſion of Heretage, that an Heir apparent might not be put upon the hard Lock of raſhly either paſſing from an *Hæreditas lucroſa*, or ſubjecting himſelf to vaſt Debts by entring to an overburdened Eſtate. Now whether *Hæreditas* be *damnoſa* or *lucroſa* can appear by no other Means than an Exhibition of Writs granted by the Defunct which might affect the Heir if entred in his Perſon or Eſtate, that the Defunct's Effects and Debts may be ballanced. And no Creditor or other Party can pretend Prejudice, ſince in an Action of this Nature there is no Certification againſt Writs not fraudulently ſuppreſt or abſtracted. Yea, the Benefit of Deliberation *intereſt* not only *Defunctorum ut habeant Succeſſores, & Viventium ne precipitentur quamdiu juſte deliberant, l.* 6 *ff. de Interrogationibus in Jure faciendis.* But *Gothofred* obſerves upon the *l.* 5. *ff. de Jare deliberandi*, that *deliberandi Tempus in Creditorum & Hæredum Favorem introductum eſt. Voet.* in his *Comment. in Pandect. Tit. de Jure deliberandi, N.* 6. And the Author of *Les Loix civiles dans leur ordre naturelle*; *Par.* 2. *Tit.* 2. and other Lawyers are of Opinion, that Creditors muſt produce the Grounds of their Debts in an Exhibition *ad deliberandum*. And ſo the Lords decided *February* 26, 1633, Laird of *Swintoun contra* Laird of *Weſtnisbet*. The Exhibition *ad deliberandum* was not by the *Roman* Law confined to a Year: For as *Voet. ibid.* obſerves, *Vti Facultas adeundi totis triginta durat Annis*; *ita quoque deliberandi Jus ipſi cohærens Hæreditatis Delatione.* True by the *Roman* Law, any Perſon having Intereſt could oblige the Heir to enter, who being required might have got Time to deliberate, which was confined to a Year, if ſought from the Emperor himſelf; and to nine Months, if from a Magiſtrate. A hundred Days was the ſhorteſt Space that uſed to be indulged to the Heir. Of which there is ſome Veſtige in our Cuſtom; where an Heir even after fifty Years may be charged to enter who then has fourty Days to deliberate. Which fourty Days Deliberation we ſeem to have borrowed from the *French* Practice. But all this is nothing to the Purpoſe: Seing by our Cuſtom Exhibitions *ad deliberandum* are ſtinted to no Time. The Brocard, *Nemo tenetur edere Inſtrumenta contra ſe*, is as impertinently applyed: For in Actions *ad deliberandum* the Rights of Creditors are not quarrelled; nor is there any perſonal Concluſion againſt them except for Inſpection, which ought to be granted. Becauſe, *Aditio Hæreditatis eſt quaſi Contractus*, whereby the Heir is preſumed to contract with the Creditors of the

Deſunct

Defunct, or others to whom he may be *paſſive* liable, and the *Jus deliberandi* is the previous Communing: Now in all Communings 'tis but reaſonable the Parties ſee one another's Rights, and underſtand the Conditions upon which they tranſact. Beſides, the Maxim *de non edendo contra ſe* takes very little Place with us: Nor did it in the Civil Law hinder Exhibitions *ad deliberandum*. As to the Deciſion 1661, it is ſomewhat differently marked by my Lord *Stair* and *Gilmore*, and the former did not agree to it. Again, it is more an Opinion than a Deciſion. As to that in the Year 1675, it doth not meet the Caſe, for the Action there was a Reduction and Improbation at the Inſtance of a Co-heir, that was incompatible with an Exhibition *ad deliberandum*. The Inſtance of Compt-books exhibited for clearing any Point, where the Lords are cautious not to ſuffer the Party craving Inſpection to be curious beyond his true Intereſt, cannot be applyed to the preſent Caſe: Becauſe, Compt-books contain the Secret of a Man's whole Affairs, with Relation to all Sorts of Men; Whereas this Proceſs concerns only Writs granted to one particular Perſon, and is as reſtricted as a Compt-book produced with a Lock or Seal upon ſome of the Leaves. No good Reaſon can be aſſigned why Rights granted to Perſons *in Familia* ſhould rather be exhibited, than theſe in Favours of Strangers: Seing the Heir may more eaſily come to the Knowledge of the former than of the latter; And may more ſafely truſt the Diſcretion of Relations, than Strangers. But then have not Perſons *in Familia* as good Right to their Writs, as Strangers have to ſuch as are granted to them: And is not the Heir equally liable to both? And tho the Caſe of Creditors *extra Familiam* be more favourable in Competitions, than that of Creditors *in Familia*, they have the ſame Privilege as to Actions againſt them at the Inſtance of the Heir, who is as much bound to the one, as to the other. It is altogether precarious to alledge, That Writs in Favours of Perſons *in Familia* are underſtood to be more in the Granter's Power: And what ſignifies the Granter's Power after his Deceaſe, when Exhibitions *ad deliberandum* commence. So that what the Purſuer craves is founded in Law and Equity, and no more than is granted every Day to meer Strangers by Way of Diligence for proving Points admitted to their Probation.

Duply'd for the Defender. If it be a good Defence againſt Exhibition *ad deliberandum* of Writs granted to Predeceſſors, that they were denuded in the Defender's Favours: *Multo minus* can Exhibition be allowed of Writs granted by Predeceſſors to himſelf, wherein he has the like Intereſt. 'Tis in vain to pretend that the Exhibition craved is innocent and innoxious, being only to the Effect of Deliberation. For the expoſing of the Defender's Papers may be prejudicial to him, in furniſhing Occaſions whereupon his Rights may be quarrelled; And a promiſcuous Exhibition might be made Uſe of by apparent Heirs, in Order to diſcover the Weakneſs of Mens Rights without any Deſign to enter. Nor can the Defender have a *Res judicata* againſt one who has no fix'd Intereſt or Title: For one apparent Heir having got Exhibition may ly by and make Place for another, and ſo furth one may ſucceed to another to the Defender's endleſs Vexation. Nor is an extraordinary Remedy of opening Charter Cheſts to be allowed when the Purſuer might have attained the pretended Deſign in an ordinary Way, by entring *cum Beneficio Inventarii*, or by cauſing all to exhibite in a Reduction upon an Adjudication. And conſequently the Refuſal to produce is not to be imputed to the Conſciouſneſs of Defects, but to the reaſonable Deſire of being free of groundleſs Pleas by an ultimate Deciſion. As to the Deciſion 1633, it has certainly had ſome Speciality. And perhaps the Lords then ſo decided, for that the Exhibition was purſued *intra Annum*; Whereas the Purſuer has been Twenty four Years in thinking upon the Commencement of this Action: which argues that her Deſign is rather *ad* *expiſcandum*, than *ad deliberandum*; And therefore ſhould be diſcouraged. Whatever was my Lord *Stair*'s Opinion in the Year 1661, he was over-ruled by the Plurality: Whoſe Opinion was again expreſly confirmed in the Year 1675, by refuſing Exhibition of Bonds. And moſt juſtly: It being ſtill evident that I may *uti Jure meo*, and refuſe Exhibition of Bonds granted to me where no Intereſt but Inſpection is pretended, which no doubt may be dangerous where legal Diligence hath proceeded upon theſe Bonds. An apparent Heir in Proceſs *ad deliberandum* is not in the Caſe of a Contracter with Creditors, but is only when entred a *quaſi* Contracter: And therefore may well be refuſed ſuch an unlimited Exhibition, that is not like the Exhibition of a particular Writ, which any Party may have an Intereſt to ſeek for Probation.

Triply'd for the Purſuer. Inſpection wounds no Man's Right, and Heirs ought not to be frighted from the Benefit of Succeſſion by covered Claims and Debts. For if theſe are defective or lame, or not founded in material Juſtice, they deſerve not the Protection of Law: And if good, they may be looked into. It's a very Sophiſm and precarious to pretend, That no Exhibition can be granted where the Defunct was denuded by an abſolute Diſpoſition, and the Obligation in a Bond is a Right as abſolute. For even an abſolute Diſpoſition muſt be exhibited to prevent the Trouble of Exhibiting a Progreſs of the Subject diſponed; and *multo magis* a Bond, which affects the Heir, whereas a Diſpoſition does not. As to the Inconveniencies of allowing ſuch an ample Exhibition, they do not ballance the Reaſon and End of the *Jus deliberandi*. As to the Alledgeance, That Heirs have other Means to obtain Exhibition, by ſuffering an Adjudication to be led againſt themſelves; or by ſerving *cum Beneficio Inventarii*; It were ſtrange that the Lords ſhould incourage Heirs to enter by Boutgates. Is not an Adjudication led by an apparent Heir leſs favourable, as commonly made Uſe of to cover his Fraud, than a Deſire fairly to enter: And leſs effectual for diſcovering the Condition of the Heretage? Does not Action upon an Adjudication expoſe a Creditor to more Hazard, than a naked Exhibition for Inſpection? Or have Services by Inventary been ſuch an Advantage to Creditors as to force Heirs deliberating upon the Expedient? Certainly it cannot be aſſerted. Beſides, the Purſuer could not enter *cum Beneficio Inventarii*, ſhe being left an Infant by her Father, who died long before the Act introducing that Privilege.

The Lords finding that former Deciſions had varied in this Point, reſolved to fix ſuch a Rule for the future, as apparent Heirs might be as little vexatious to Creditors and Purchaſers, as is conſiſtent with the legal Privilege. And therefore found the Marqueſs not obliged to produce any Writs granted by the Purſuer's Predeceſſors to Strangers, or Perſons not *in Familia*.

Eodem Die. *The Lord* Roſs, *againſt* Gray *of* Newtown *and others.*

David *Roſs* as having Right by Indorſation to a Sixty Pound *Sterling* Bill from Mr. *Robert Gordon*, drawn by *Sutherland* of *Kinald*, upon, and accepted by Mr. *John Middleton*, purſued the Accepter, who offered to prove by the Oath of the Poſſeſſor of the Bill, that he was but *Kinald*'s Truſtee, and by *Kinald*'s Oath that he had received ſome partial Payments. *David Roſs* deponed that by *Kinald*'s Order and Advice, he had filled up his Name in the Indorſation when blank, for Payment to himſelf of 200 Merks, and Annualrents thereof due to him by *Kinald*, and was to apply the Remainder to pay a Debt due by *Kinald* to the Lord *Roſs*. Upon this, Compearance was made for my Lord, and alſo for *John Gray* of *Newtown*, both Creditors to *Kinald*, and Arreſters in the Hands of *John Middleton* and *David Roſs*.

Alledged for Gray of Newtown. That he ought to be preferred to the Superplus Sum in the Bill, over and above the 200 Merks, and Annualrents thereof due to *David Roſs*; in reſpect his Arreſtment in the Hands of the Accepter, was prior to that laid on in his Hands by the Lord *Roſs*, and both had arreſted in the Hands of *David Roſs* on the ſame Day. And the ſaid Superplus Sum continued to be *Kinald*'s Mony, notwithſtanding his Orders to *David Roſs* the Truſtee, anent the Application in Favours of my Lord *Roſs*, which he could freely alter and countermand at any Time before Payment: In the ſame Manner, as if *Kinald* having ordered *David Roſs* to pay my Lord out of ſo much depoſited Mony might *Re integra* call back for his own Mony from the Depoſitar, or order him to diſpoſe of it otherways. Eſpecially ſeing, the Order was never intimated to my Lord, and he could pretend no *Jus quæſitum* by ſuch an Order, whereof he knew no more than the Man i'the Moon. For its ordinary among Merchants to get Bills conſigned from abroad, with Advice to poſt them to ſuch a one's Accompt, and ſometimes a ſecond Advice comes afterward recalling the former. But then the Perſon in whoſe Favours the firſt Advice was ſent never pretends any Intereſt thereby, if countermanded before actual Application, by Credit given conform. And a contrary Practice would deſtroy Trade, and occaſion innumerable Pleas among Merchants, by purſuing Repetition from ſuch as got Payment of Bills, by Virtue of Letters of Advice in their Favours, upon Pretext that others had Right to theſe Bills by former Advice, which might be proved by an Exhibition of the Conſignatar's Books and Letters of Advice.

Anſwered for the Lord Roſs. That he ought to be preferred as to the Remainder of the Bill more than ſatisfied *David Roſs*'s own Debt; in reſpect the ſame was in *David*'s Perſon for my Lord's Behoof, as appears from his Oath, and he cannot be obliged to denude but in the Terms thereof: Which Oath is as good to my Lord *Roſs*, as if the Delegation in his Favours had been concerted by a Back-bond. Nor is it of any Moment that he knew not of what paſt: Seing *Kinald* might have ordered the Payment of that Debt without his Lordſhip's Knowledge. 2. *Newtown*'s arreſting before my Lord *Roſs* in the Accepter's Hand, cannot afford him any Ground of Preference: Becauſe Mr. *Middleton* was properly Debtor to *David Roſs*, by Virtue of the Indorſement of the Bill; and Arreſtment was only proper in his Hand.

Replyed for Gray of Newtown. The Oath is not in the Caſe of a Back-bond or written Delegation; But in Caſe of different Orders concerning the Application or Diſpoſal of Mony depoſited with a Factor or Truſtee, whereof the Property remains in the Mandant, till the Execution of his laſt Orders by Payment. 2. If any Back-bond had been given in the Terms of the Oath to *Kinald* without Intimation to my Lord *Roſs*, that *Negotium* betwixt *Kinald* and his Truſtee could not hinder him to Deſtroy the Back-bond, and call for his Mony *in Specie* from his Truſtee.

The Lords found that the Property of the Mony remained with *Kinald*, and was therefore arreſtable by his Creditors.

Eodem Die. Alexander Aitkin *of* Middlegrange, *againſt* James Guidlet *of* Abbotſhaugh.

IN the Action at the Inſtance of *Alexander Aitkin* of *Middlegrange*, againſt *James Guidlet* of *Abbotſhaugh* his Wife's Father, for the Annualrent of her Portion from the Sixteenth Year of her Age till her Death.

Alledged for the Defender. Abſolviture from any Annualrent till his Daughter's Marriage; Becauſe, till then he had alimented her *in Familia*, which compenſed the Annualrent for ſo long. And as to Annualrents during the Marriage, Compenſation by the Expences of her Funerals deburſed by the Defender conform to a ſtated Accompt.

Replyed for the Purſuer. 1. Had the Defender's Daughter aſſigned the Annualrents of her Portion for an onerous Cauſe, or her Creditor arreſted them, the Defender could not have compenſed upon the Aliment not liquidated before the Arreſtment, or Intimation of the Aſſignation. Therefore *a pari*, the Purſuer being Aſſigny *Jure Mariti*, and his Aſſignation intimated by the Marriage, he cannot be put off with Compenſation upon a Debt neither liquidated nor conſtituted to this Day, eſpecially ſuch a general Debt as Aliment, which differs ſo vaſtly in different Caſes, as to the Manner, Quantity, and Quality. 2. If the Compenſation be ſuſtained, the Purſuer takes it off by Recompenſation upon the principal Sum yet reſting to his deceaſed Wife. 3. No Compenſation can be obtruded to the Purſuer upon his Wife's Funeral Expences, which muſt burden her Executors to whom ſhe has left Means ſufficient to defray the ſame.

Duplyed for the Defender. 'Tis certain that the Annualrent before the Marriage was in Place of the Aliment; And the Purſuer by his *Jus Mariti* could be in no better Caſe than his Wife, if ſhe had purſued for Annualrent after her Age of Sixteen.

The Lords found, That ſo long as the Purſuer's Wife was unmarried and *in Familia* with her Father, her Aliment compenſed the Annualrent: But that the Funeral Expences affect her Executors.

Eodem Die. Alexander Young *and* James Man *Boxmaſters to the Incorporation of Seamen in* Preſtounpans *Supplicants.*

ALexander *Young* and *James Man*, Seamen and preſent Boxmaſters to that Incorporation of Seamen in *Preſtounpans*, gave in a Petition, craving a Warrant to get up from the Commiſſar Clerk of *Edinburgh* a principal Bond, that through Miſtake had been incompetently regiſtred in the Commiſſar-books there, upon reſtoring the Extract, in Order to Regiſtrate in the Books of Seſſion, that unqueſtionable Diligence might be uſed thereon. The Deſire of which Petition the Lords refuſed. Becauſe, albeit Decreets in Matters not conſiſtorial before the Commiſſars have been quarrelled as contrary to the Inſtructions 1666; In a Competition betwixt two Adjudications, a poſterior was preferred to a former proceeding upon a Decreet obtained before the Commiſſar of *Inverneſs*; And lately in the Caſe betwixt *Weir* of *Blackwood* and *Cochran* of *Kilmaronock*, an Arreſtment laid on by a Commiſſar Precept was caſt: Yet Regiſtrations in their Books, which are Decreets of Conſent, are not quarrellable. But on the contrary are warranted by the *Act* 19. *Par.* 23. *J.* 6. where the Prices of their Regiſtration are tax'd and ſet down; *Act* 177. *Par.* 13. *Act* 7. *Par.* 21. *J.* 6. allowing Execution to paſs upon them; and the *Act* 38. *Par.* 1685, diſcharging Regiſtration without the Juriſdiction where the Party dwells, which inſinuates nothing againſt the Competency of the Commiſſars, for Regiſtration of Writs againſt Perſons living within their Bounds.

January 18, 1706. Daniel Campbell *Collector at* Port-glaſgow, *againſt Sir* Alexander Anſtruther *of* Newark.

THe ſaid *Daniel Campbell* having charged Sir *Alexander Anſtruther* to perform a Minute of Sale of the Lands of *Shawfield*, and others about the

Town of *Rutherglen*, he ſuſpended upon this Reaſon, That the Charger had paſt from his Bargain: In ſo far as, the Suſpender having afterwards acquainted him by a Letter, That he could get his whole Intereſt in *Kilbryde* ſold to the Dutcheſs of *Hamiltoun*, if theſe in the Minute were included: The Charger returned Anſwer, That he would be ſorry if his Bargain ſhould obſtruct the Suſpender's ſelling the reſt; But if the Dutcheſs were ambitious of his little Bargain, ſhe ſhould be welcome to it for ſome Conſideration. Upon the Faith of which Letter the Suſpender had entred into a Contract with the Dutcheſs for the Lands in the Minute.

The Lords found the Letter was not an overgiving of the Bargain, and did not put Sir *Alexander in tuto* to enter into a new one with the Dutcheſs. But that he behoved to fulfil and perfect the firſt Minute. *Vide February* 13, Dutcheſs of *Hamiltoun* contra *Campbell.*

January 22, 1706. Gilbert Livington *againſt Miſtreſs* Margaret Menzies.

IN the Reduction and Improbation at the Inſtance of *Gilbert Livington* as general Heir-male and of Proviſion to *George Livington* of *Saltcoats*, againſt Miſtreſs *Margaret Menzies* and his other Heirs of Line, the Lords having *December* 13, 1705, *repelled the Reaſon of Fatuity and Furioſity*; The Purſuer inſiſted upon this Ground, That the Contract of Marriage 1655, contained a Tailzie to Heirs-male of the whole Eſtate of *Saltcoats*, and *Alexander Livington* being only infeſt in a Part of that Eſtate, his Diſpoſition to his Brother *George* and Heirs whatſoever, did not alter the Deſtination as to Lands he was not infeſt in. Now, that the whole Eſtate was tailzied to Heirs male, the Purſuer endeavoured to make appear from hence, That *George* the Father, by the Contract of Marriage, was obliged to infeſt himſelf in the whole Eſtate, and the old Lady, for the well and ſtanding of the Houſe of *Saltcoats*, quit a Part of her Liferent Lands in Favours of the ſaid *George* his Heirs-male. And there is another Clauſe in theſe Terms, Becauſe the Eſtate of *Saltcoats* is tailzied to Heirs-male, ſo that the Daughters and Children Female are excluded from all Benefit thereof, therefore it was agreed, That they ſhould have certain Portions. Whereby it is ſufficiently clear, That the Parties intended a Tailzie of the whole Eſtate in Favours of Heirs-male: And the Will or Meaning of Parties is the Rule in all Contracts, eſpecially in Tailzies and Deſtinations of Succeſſion, *Qui ſapiunt Naturam ultimarum Voluntatum, l.* 18. *§.* 3. *ff. de Inſtruct. vel Inſtrum. Legat. vid. Jul. Clar.* Lib. 3. *§. Teſtamentum, Quæſtio* 76. *& Mantica de Conjecturis ultimarum Voluntatum.* 2. *Alexander Livington*'s Service could not carry Right to the Proviſion in the Contract of Marriage in Favours of Heirs-male, ſo as by any Diſpoſition from him to his Brother, he could alter or revoke the Clauſe in the Contract in Favours of Heirs-male whatſoever. Becauſe, *Alexander Livington* is not infeſt but only ſerved Heir general of Line, and not Heir of Proviſion of the Marriage, which are diſtinct Proviſions having different legal Effects. 3. Albeit heretable Proviſions and Obligations diſtinct from the Lands, ſuch as a Bond to diſpone Lands or grant Infeſtments of Annualrent, may be carried by a general Service: Yet when perſonal Obligations go with the Lands, as in the Caſe of Tailzies, the Heir of Tailzie cannot, tho' ſerved Heir in general and ſpecial, diſpoſe of the Lands unleſs he were infeſt.

Anſwered for the Defender. 1. The whole Eſtate was not provided by the Contract to Heirs-male whatſoever, but only the Lands of *Saltcoats* within the Sheriffdom of *Haddingtoun*, in ſo far as, the firſt Clauſe is expreſly ſo reſtricted, and the poſterior Clauſe appointing Portions to the Daughters, becauſe the Eſtate of *Saltcoats* was tailzied to Heirs-male, is relative to the former; And the

Eſtate therein mentioned *narrative* cannot be underſtood in a more extenſive Senſe than to comprehend what lyes within the foreſaid Sheriffdom. Therefore *Alexander* being infeft in theſe, had Power to alter the Tailzie, even after the Purſuer's Way of reaſoning, (whoſe ſtrained Conjectures from the Meaning of Parties are againſt Law) Since there is not one Clauſe in that Contract but what is Taxative; And *Actus Agentium non debent operari ultra eorum Intentionem*. 2. *Et ſeparatim*, *Alexander*, without being infeft in the whole Lands provided by the Contract to Heirs-male whatſoever, had Right by his general and ſpecial Service as Heir of Line, to deſtroy the Tailzie. Becauſe, 1. As Heir of the Marriage, he had, even without Neceſſity of a Service, Right to the Proviſion in the Contract, ſubſiſting *in nudis Finibus Obligationis*: The Heir of the Marriage being Creditor as to that. Altho' if the Father had fulfilled the Contract by taking the Rights to himſelf and the Heirs-male of the Marriage, theſe could not paſs into the Perſon of the Heir without a Service. So *January* 12, 1665, *Wallace* contra *Wallace*, a Purſuit was ſuſtained at the Inſtance of a Bairn of the Marriage, for Implement of the Contract, without being ſerved. And *in Anno* 1694, the Lords ſuſtained Proceſs of Conſtitution at the Inſtance of *John Carnegie* only Son of *Kinfaun*'s ſecond Marriage, without a Service, for Performance of the Obligements of the Contract to Heirs of the Marriage, theſe being only mentioned *deſignative*. 2. *Alexander* being ſerved Heir general and ſpecial of Line, as eldeſt Son to his Father, had eſtabliſhed in his Perſon all that could belong to him by that Propinquity, in the ſame Manner as a ſpecial Service includes the general; Altho' the Rights carried by the general Service could not then be thought of. So in the Caſe of *Janet Kennedy* and her Husband, againſt *Matthew Cuming*, *Matthew* was found to have Right *Jure Mariti* to certain Proviſions in the Contract of Marriage betwixt his Wife's Parents; Albeit ſhe was only generally ſerved Heir of Line, and the competing Party was the Contracter's Grandchild. And *January* 20, 1666, Lord *Rentoun* contra Feuars of *Coldinghame*, a Diſpoſition with Reſignation and Infeftment was ſuſtained, altho' the Diſponer was never infeft. Becauſe, the Superior who might have received the Diſponer upon a Precept of *Clare*, did receive the Aſſigny upon a Reſignation, which virtually contained all that was needful. *Ergo, multo magis*, a ſolemn Cognition of the Propinquity by Service and Retour, ought to be allowed to convey all Rights belonging to the Party ſerved by that Propinquity. Yea, an Heir of Line by diſponing in Implement to the Heir of Proviſion, would eſtabliſh the Right in his Perſon without being ſerved: And therefore *Alexander*'s being both Heir of Line and Heir of Proviſion, the two Obligements were confounded.

Replyed for the Purſuer. The Deciſions cited by the Defender, do not at all meet. For as to that of *Wallace* againſt *Wallace*, and *Matthew Cuming*'s Caſe, the Lords ſuſtained Proceſs at the Inſtance of the Bairns of the Marriage. And in the Lord *Rentoun*'s Caſe there was no Service, but the Vaſſal's having, after receiving a Precept of *Clare conſtat* from the Superior, made Reſignation, and obtained a new Charter, upon which he was infeft in the whole Lands, was found ſufficient. And this Point is of univerſal Concern: For if a general Service ſhould be ſuſtained to carry ſuch Proviſions, then by the ſame Reaſon an Heir of Tailzie ſerved Heir in general, might, without being infeft, diſpoſe of the tailzied Lands in Prejudice of the Subſtitute in the Tailzie, which is diſagreeable to our Law.

Duplyed for the Defender. Tho' Heirs of Line and Proviſion may be diſtinct Perſons, having different Intereſts; yet where they are in the ſame Perſon, the Cognition of the Propinquity which furniſhes the Right is effectual to all Intents and Purpoſes depending upon that Propinquity or Nearneſs of Blood. And we have but one common Form of Brieve for the Heir general and of Line;

all the Diſtinction of Heirs being made in the Service, in anſwer to the Heads of the Brieve. And as in ſpecial Services the Heir would have obtained a Precept for infeſting; ſo by virtue of a general Service he may take out any Letters upon perſonal Rights competent to the Defunct. The Objection to the Deciſion betwixt *Rentoun* and the *Feuars* of *Coldinghame* is nothing to the Purpoſe: For the Precept of *Clare conſtat* never being completed by Infeſtment, was of ſo much leſs Authority, as it is leſs ſolemn than a Service.

The Lords found that the Contract of Marriage *in Anno* 1655, can be extended to comprehend no other Lands than theſe particularly therein enumerated, and lying within the Sheriffdom of *Haddingtoun*; And that *Alexander Livington*'s general Retour as Heir of Line to his Father, gave him the Benefit of the Proviſion contained in the ſaid Contract, and enabled him to diſpone in Favours of his Brother, albeit he was not infeſt.

Eodem Die. *Mr.* Alexander Maitland *againſt* Alexander Brand *of* Caſtle-brand.

IN the diſcuſſing of a Suſpenſion of a Decreet of Declarator of Nonentry of the Lands of Eaſter and Weſter *Hales*, obtained by the Earl of *Lauderdale* againſt *Alexander Brand* of *Caſtle-brand*, *in Anno* 1700, and aſſigned by the Earl to his Brother Mr. *Alexander Maitland*; This Decreet was ſuſpended, and the Lords *February* 14, 1705, having found that the Lands held of the Earl, and were in Nonentry: They found this Day the full Duties only due from the ſaid Interloquitor 1705. Becauſe the Vaſſal had Reaſon to doubt if the Earl was true Superior, having produced a Progreſs holding of the Crown ſince the Reformation: And the Earl having a Certification in an Improbation againſt any Rights granted by his, to the Defender's Predeceſſors. For, *Nemo tenetur propter Metum hujus Periculi temere Jus ſuum indefenſum relinquere, l.* 40 *in Fin. Pr. ff. de Hæred. Petit.*

January 23, 1706. Patrick Begbie *Heir of Conqueſt to the deceaſt* John Begbie *in* Over-boltoun, *againſt* William Begbie *the Heir of Line.*

IN the Competition betwixt *Patrick Begbie* elder Brother and Heir of Conqueſt to *John Begbie*, and *William Begbie* the younger Brother and Heir of Line, for the Right to a Thouſand Merks Bond reſting by Mr. *Alexander Wedderburn* Advocate, to the ſaid *John* his Heirs or Aſſignys, ſecluding Executors: It was alledged for *Patrick*, That he as Heir of Conqueſt ought to be preferred to the Bond, the ſame being heretable, and conqueſt by the Defunct.

Anſwered for William *the Heir of Line.* That nothing could be comprehended under Conqueſt with reſpect to Succeſſion, except Lands or Tenements, or Subjects whereupon Infeſtment did or might follow: As is clear from the Book of *Quoniam Attachiamenta*, or *Baron Laws*, *Cap.* 88. and 97. and King *Robert* the Third's *Parliament* holden at *Scoon. Craig de Feudis. Lib.* 2. *Dieg.* 15. *P.* 244. The Diſtinction betwixt Heretage and Conqueſt being derived to us from the *Feudal Law* and *Norman Cuſtom*. 2. The Heir of Line ſucceeds to Tacks, *Hope Succeſſion*, The Earl of *Dumbar*'s Heirs; *June* 23, 1663, *Ferguſſon* contra *Ferguſſon*; Penſions, Heirſhip-Moveables, or other Rights not requiring Infeſtment, tho' acquired by the Defunct, *Stair*, Title *Heirs*. And can there be no tolerable Reaſon aſſigned why theſe ſhould fall to the Heir of Line, and a Sum ſecluding Executors to the Heir of Conqueſt? So the Brocard that

Conqueſt aſcends, and Heretage deſcends, muſt be explained and applyed according to the Analogy of Law and *ſubjecta Materia.* Again, if there were any *Quæſtio Voluntatis* in the Caſe, Law would favour the Heir of Line; becauſe Succeſſion naturally deſcends, and Conqueſt, as an Exception, or Deviation from the Rule, is not to be preſumed. Beſides, the Heir of Line is more favourable, as being the Tutor of Law, and firſt ſubject to Debts and Burdens: *Et quem ſequuntur Incommoda, eum ſequi debent Commoda.*

Replyed for Patrick *the Heir of Conqueſt.* Bonds ſecluding Executors, *Fictione Juris*, are like ſo much Land, and the Act of Parliament 1661 puts them upon the ſame Foot with thoſe containing an Obligement to infeſt; by declaring all Bonds moveable except they bear an Obligement to infeſt, or ſeclude Executors, both which are made heretable. 2. Our Cuſtom hath determined to the Heir of Line Heirſhip-moveables, as Things periſhing that wear with the uſing, and Tacks, Penſions, *&c.* as being only temporary Rights that expire after elapſing of a definite Tract of Time, which therefore may be called *quaſi* heretable Rights. But this is not to be extended to properly heretable permanent Rights, ſuch as Bonds ſecluding Executors, which muſt belong to the Heir of Conqueſt, whom Law ſtill favours in dubious Caſes, *ob Prærogativam Primogenituræ*, and for the preſerving of Families. 2. There can be no Argument adduced from our old Laws againſt the Heir of Conqueſt's Right to Bonds ſecluding Executors: Since theſe were not then in Uſe; and by the Canon Law all Bonds bearing Annualrent were reprobated. 3. My Lord *Stair*, *Inſtit. Tit. Heirs*, *P.* 457, ſays, that Heirs of Conqueſt ſucceed to heretable Bonds bearing a Clauſe of Annualrent; and therefore *multo magis* ought they to ſucceed to Bonds ſecluding Executors, which are declared heretable in all Caſes by the foreſaid Act of Parliament.

The Lords found this Bond ſecluding Executors was not properly Conqueſt in the Senſe of Law, and that therefore it fell to *William* the Heir of Line, whom they preferred to *Patrick* as Heir of Conqueſt.

January 23, 24, and 25, 1706. *The Earl of* Sutherland, *againſt the Earl of* Crawford.

IN the Action at the Inſtance of the Earl of *Sutherland* againſt the Earl of *Crawford*, for declaring the lineal Deſcent of his Dignity from *William* Earl of *Sutherland*, who lived in the Year 1275, and conſequently his Right of Precedency to *Crawford*, whoſe Predeceſſors were not Earls till about the Year 1399, as appears from *Fordon*, *Buchanan*, and *Leſly*. The Purſuer inſtructed the Concluſion of his Summons in Manner after-mentioned. He produced an Agreement betwixt *William* Earl of *Sutherland* and *Archibald* Biſhop of *Caithneſs*, *Anno* 1275, of a Controverſie about the Property of ſome Lands betwixt that Earl's Father, and *Gilbert*, *William* and *Walter*, three preceeding Biſhops of *Caithneſs*: Which *Gilbert* (as *Spotſwood* obſerves) died at *Scrabſter* in the 1245; and ſome of theſe controverted Lands are preſently poſſeſt by the Purſuer. The Earl of *Sutherland* is mentioned by *Prinn* in his Hiſtory of *Edward Longſhanks* in the Year 1296; is a conjunct Signer with *Gilbert de Hay* Conſtable, and *Robert de Keith* Mariſchal of *Scotland*, and *David de Lindſay*, of that famous Letter writ to the Pope in the Year 1320 by the *Scottiſh* Nobility and Gentry. There is an Agreement betwixt *Kenneth* Earl of *Sutherland* Son to Earl *William*, and *Rynold de Moravia* Son to *Aydan de Moravia* of *Colbin* in the Year 1330; Which *Kenneth*, according to *Fordon*, was ſlain in the Battel of *Halydownhill* in the Year 1333. King *David* the *Bruce* in the Year 1347 granted a Charter erecting the Earldom of *Sutherland* into a Regality, in Favours of *William* Earl of *Sutherland*, and the Lady *Margaret* his Spouſe the

King's Siſter, *& Hæredum inter ipſos.* Mr. *Rymer* in his Letters to the Biſhop of *Carliſle,* wherein the Extracts from the Records in the Tower of *London* are publiſhed, tells us that in the Treaties 1351, 1357, betwixt the two Kingdoms, *John* Son and Heir to *William* Earl of *Sutherland* was given as one of the Hoſtages, who in Law is preſumed to have ſurvived his Father. He was ſucceeded by Earl *Nicolas,* who had many unfortunate Quarrels with his Neighbours; and of whom the *Sutherlands* of *Dilrite* are deſcended. In an Agreement 1389 betwixt *Euphan* Counteſs of *Roſs,* and *Alexander* Earl of *Buchan* her Husband, at the Interpoſition of the Biſhops of *Murray* and *Roſs, Robert* Earl of *Sutherland* is Surety for the Earl of *Buchan*'s Performance. *Buchanan* mentions that the Earl of *Sutherland* was one of the Leaders of the Army that went into *England* about the Year 1388. *John* Earl of *Sutherland* ſucceeded to *Robert,* who reſigned the Earldom in Favours of *John* his Son, and his Heirs ſimply, reſerving his Frank-tenement by a Charter 24 *February* 1455, in which the Lord *Keith* Predeceſſor to the Earl of *Marſhal* is Witneſs. To this *John* Earl of *Sutherland* another Earl *John* ſucceeded in the Year 1512, whoſe Seaſin proceeding upon a Retour and Precept is produced. *Elizabeth* Counteſs of *Sutherland* in the Year 1514 was ſerved Heir to the ſaid *John* her Brother-german; and being married to *Adam Gordon* a Son of the Family of *Huntly,* ſhe, with Conſent of her ſaid Husband, deſigned Earl of *Sutherland,* reſigned the Earldom of *Sutherland* to *Alexander Gordon* their Son, to be held as honourably of the King as the Counteſs her ſelf and her Predeceſſors had held it, reſerving the Frank-tenement, *&c.* to her ſelf and *Adam Gordon* her Spouſe *Ratione Curialitatis Scotiæ.* Whereupon there followed a Charter of Reſignation under the Great Seal, dated the firſt of *December* 1557. *John* Earl of *Sutherland* is ſerved Heir to his Grand-mother the Counteſs *Elizabeth, June* 23, 1567, to whom *Alexander* his Son is retoured Earl of *Sutherland, July* 18, 1573: Who reſigned in Favours of *John* Maſter of *Sutherland* his Son, and upon the Reſignation there is a Charter by King *James* the Sixth, dated *March* 23, 1580, who granted another Charter in *April* 1601, to *John* then Earl of *Sutherland,* upon his own and ſome others Reſignation; erecting the Lands reſigned with theſe formerly belonging to the Earl in a free Regality. This Earl, in Order to declare his Precedency, did cognoſce his Propinquity to the old Earls of *Sutherland* by three ſeveral Services and Retours expede at *Inverneſs* 1630; where the Inqueſt conſiſted of Perſons of undoubted Credit, and beſt known to the Matter, who might have had good Information from old Men and Writs, which the Courſe of Time and Accidents have deprived us of. To this *John* Earl of *Sutherland* Earl *John* his Son was ſerved and retoured *June* 4, 1661: And ſucceeded by his Son *George* Earl of *Sutherland,* who died in the Year 1702. Earl *George* was ſucceeded by his Son the preſent Earl the Purſuer, who alſo adduced ſeveral ancient Documents and Charters to make appear that the Earl of *Crawford*'s Anceſtors were later by 150 Years aſſumed into the Order of Nobility, than the Purſuer's Predeceſſors; and that the former were deſigned only *Milites* and *Barons* de *Crawford,* when the latter were Earls of *Sutherland.*

Anſwered for the Earl of Crawford. 1. *Eſto* the Deſcent of the Dignity from the old Earls of *Sutherland* to the Purſuer were inſtructed by a connected Progreſs, as it is not, the ſame is preſcribed: In ſo far as the Earl of *Crawford* has now for a hundred Years poſſeſs'd the Precedency before the Purſuer; conform to a ſolemn Decreet of Ranking in the Year 1606, pronounced by Commiſſioners appointed by the King and Council for that Effect, where the Earls of *Crawford* and *Sutherland* were cited and compearing, which is *Res judicata.* 2. The Defender's Precedency is eſtabliſhed by immemorial Poſſeſſion antecedent to the Decreet of Ranking, which is the ſovereign Rule to determine all Queſtions of Dignity and Precedency; eſpecially when the ſame can be referred to antecedent Titles, and no Doubt one of the Grounds the Commiſſioners proceeded upon. The Reaſon why Dignity and Precedency muſt ſtand by Poſſeſſion, is, becauſe, it goes by the Blood, and can hardly be verified by expreſs Conſtitutions. Upon which Account *Craig*, *Lib*. 1. *Dieg*. 12. ſays, *Non negarem Nobilitatem concedi aliquando ex Vſu & Poſſeſſione tanti Temporis cujus Memoria non extat.* And *Tyraquellus de Nobilitate*, *Cap*. 14. and many other Lawyers are clear, that *Nobilitas præſcribitur ex Vſu & quaſi Poſſeſſione* for the Space of fourty Years, or immemorial Poſſeſſion; and that *ſufficit Scientia Magiſtratuum aut Officiariorum Principis, aut alterius, adverſus quem hæc Jura incorporalia præſcribentur.* 3. The old Dignity of the Earls of *Sutherland* was interrupted by *Elizabeth*'s marrying *Adam Gordon* a younger Son of *Huntly*: And a new Creation made, above which the Purſuer cannot aſcend. For tho' Feus Baronies and Earldoms might with us about that Time have been tranſmitted to Heirs whatſoever, the Dignity was never then carried with the Eſtate to an Heireſs. Nor did an Eſtate paſs to Females unleſs provided *Hæredibus quibuſcunque*; Males being only underſtood by Heirs ſimply or *Hæredes inter ipſos.* And where the Proviſion was to Heirs whatſoever, the Heir-male was ſtill preferred, and the Females ſucceeded only *æquis Portionibus*. It was yet much later that an Heir-female was allowed to ſucceed to a Dignity with Juriſdiction, upon the Account of perſonal Unfitneſs, and the Abſurdity of poſſeſſing the indiviſible Title with a Part of the divided Eſtate. The Dignity in this Caſe was not rendred Feminine. By King *David*'s Charter to *William* Earl of *Sutherland* and the Lady *Margaret* his Spouſe; for that neither conveyed the Eſtate nor the Dignity, but only added a Regality to it; in Favours of *William* and his Spouſe *& eorum Hæredibus*, which muſt be underſtood of Heirs-male, the Adjection of *quibuſcunque* being omitted. That the Dignity did not deſcend to *Elizabeth* is cleared thus: In her Service as Heireſs ſhe is not deſigned Counteſs, but only by her Name; and her Husband *Adam Gordon* in the Charter of Reſignation in Favours of *Alexander* their Son, is called Earl of *Sutherland*, which he could not be by the Marriage, but only by a new Creation. Seing it is evident from many recent Examples, that a Perſon is not dignified by his marrying an Heireſs to a Dignity without a new Patent. And if *Adam* was Earl by a new Creation, the old Title infallibly ceaſed and was extinguiſhed. For it was no leſs incompatible in Law and Herauldry, for *Adam*'s Lady to be Counteſs in the Right of Succeſſion, and himſelf Earl by new Creation, than *duo Domini ejuſdem Rei in ſolidum.* Now for further evincing that *Adam* was Earl by new Creation, and the Title and Precedency deſcends to the Purſuer from him: All the Earls of *Sutherland* ſince his Time, till of late, have born the Name of *Gordon*, and not the ancient Name of *Sutherland*; and have given Place to the Earls of *Huntly*, who yielded to the Earls of *Crawford*. 4. As to the Writs and Documents produced by the Purſuer, the Defender takes Liberty to make the following Remarks. Theſe from the 1275 to the 1347, are not authentick Writs, but private Deeds, of which we may ſay, *Quis Rem tam veterem pro certo affirmet.* King *David*'s Charter 1347 to *William* Earl of *Sutherland* and his Spouſe, and their Heirs, carries neither the Eſtate nor the Title. For it bears that *William* was Earl before; and only erects the Earldom in a free Regality in Favours of Heirs-male, who, according to the Conſtruction of theſe Times in Succeſſion to Dignity and Juriſdiction, were meant by Heirs ſimply expreſt: And the Earl of *Crawford* was preferred upon the Account of his Poſſeſſion, notwithſtanding of the ſaid Charter produced in the Ranking 1606. The Service of *Elizabeth* Spouſe to *Adam Gordon* Earl of *Sutherland*, and the Charter of Reſignation in their own and their Son *Alexander*'s Favours is already ſpoke to. As to the Services expede in the Year 1630, they are little better Verifications of the Progreſs and Deſcent they aſſert, than Sir *Thomas Vrquhart* Chancellor of the Inqueſt his fanciful Derivation of his own Pedigree from *Adam* and *Noah*. For the Members of Inqueſt ſeem to have ſworn *temere* upon Matters of greater Antiquity than they could certainly know, or taken their Evidence from the Inſtructions now produced, in which Caſe the Verdict makes no more Faith than the Writs themſelves. And in a former Proceſs at the Inſtance of the Purſuer's Father againſt the Defender's Father, *January* 3, 1667, the Lords took Exception at the ſaid Retour for the Reaſons foreſaid: Upon which the then Purſuer thought fit to withdraw his Proceſs. So that the Declarator upon the Purſuer's Titles, tho' they could be drawn as far back as *Adam*, and the Progreſs were ten Times better connected than it is, is ſufficiently excluded by the viſible Breach of the old Dignity of *Sutherland*, and the new Creation of *Adam Gordon*, and the Deſcent of the *Gordons* of *Sutherland* from him, joined with the foreſaid Defences of Preſcription upon the Decreet of Ranking 1606, and immemorial Poſſeſſion: Which the Earl of *Crawford* ſhall make out by any Rule the Lords ſhall think fit, particularly by the Rolls of Parliament, and *Sederunts* of Council, as far back as any Records can be found.

Replyed for the Earl of Sutherland. The Purſuer's Precedency ought to be declared conform to the Antiquity of his connected Title, without Reſpect to the Defender's uſurped Poſſeſſion: Whatever other Rule hath been pretended by competing Princes: *Quis enim in uno eodemque Genere Dignitatis prior eſſe debuerat, niſi qui prior meruit Dignitatem*? L. 1. *Cod. de Conſulibus*. The Decreet of Ranking is not *Res judicata*, or a final Sentence pronounced by an ordinary Judge at the Inſtance of either of the Parties concerned: But only an Interdict of Poſſeſſion, or *interim* Regulation pronounced by the King's Commiſſioners, to preſerve the Peace till the Point of Right ſhould be determined in Law. For by a Clauſe in the Commiſſion, the Determination thereon is declared to ſtand in full Force till a Decreet in the contrary were recovered before the Judge ordinary. The Preſcription urged for the Defender is a Novelty: For the E. of *Crawford* cannot pretend to have acquired a Title to the Earl of *Sutherland*'s Precedency, otherways than by preſcribing a Right to be E. of *Sutherland*; The Precedency of the Dignity of *Sutherland* being *proprium quarto Modo*, agreeing to the Earl of *Sutherland ſoli & ſemper*, as inſeparably as the Shadow is inſeparable from the Body. Titles of Honour cannot be acquired by Preſcription; Becauſe, they are *Jura Sanguinis*, *extra Commercium*, which cannot be diſponed, *July* 11, 1633, *Oliphant* contra *Oliphant*: As an Immunity from Teinds is not acquirable by Poſſeſſion. Preſcription takes no Place in our Law without expreſs Statute; Nor doth the Act of Parliament 1617 relate to *Jura Sanguinis, quæ nullo Jure civili dirimi poſſunt*, but only to real Rights. The ſaid Act requires alſo a Title by Charter and Seaſin before the fourty Years; And the Earl of *Crawford* can produce none for his Precedency older than his own moſt ancient Documents; for the Decreet of Ranking is neither Charter nor Seaſin. Beſides, it were ridiculous to fancy the Dignity preſcribed by one Title, and the acceſſory Order of Precedency by another. Nor is it very conceivable how Preſcription ſhould be founded upon ſuch a Decreet, where the *Salvo*, like a Reverſion, qualifies the Right perpetually. And as a Man having *Agrum limitatum*, cannot preſcribe beyond the Bounds of his Charter: So neither could the Earl of *Crawford* preſcribe Precedency beyond the Antiquity of his Evidents, which do regulate Precedency, as bounded Charters confine Property. But granting the Decreet of Ranking were a competent Title of Preſcription, that could only run forward from the 1617, there being no ancienter Law for Preſcription of heretable Rights in *Scotland*. And in theſe fourty Years reckoned from the Act 1617, Interruption was uſed by a Summons in the Year 1630, Proteſtations in the Parliaments 1641, 1647, 1661; Since which Time Preſcription cannot be pretended. Yea, in the Parliaments from the 1640 to the 1648, the Earl of

Sutherland ſat and took Place of the Earl of *Marſhall* one of the Lords ſet before him in the Decreet of Ranking, which was an aſſerting of his Right againſt the ſaid Decreet. 2. 'Tis a Miſtake that the Titles of Honour in this Kingdom are only founded upon Uſe and Cuſtom. For Nobility was conferred by ſome particular Veſtiture, as may be inferred from the Earl of *Crawford*'s Predeceſſors being deſigned in Charters *Milites* about the Year 1399, and Earls very quickly thereafter; The Earl of *Errol*'s Predeceſſor deſigned *Miles* about the 1450, and Earl in the Year 1455, at which Time alſo the Earl of *Marſhal*'s Predeceſſor is called Lord *Keith*, who lately before had been deſigned *Miles*: Which Titles of Nobility could not have been acquired *Uſu* in ſo ſhort a Time; And Hiſtory acquaints us, that new Dignities were conferred at the Coronation of our Kings. True, where Families have been long in Poſſeſſion of Titles of Honour, our Cuſtom doth not oblige them to the Impoſſibility of producing their Patents, or the Minutes of Parliament where they had been received and inveſted: But ſtill requires Inſtruction in Writ that they were dignified with ſuch Titles; according to the Antiquity of which Evidents the Precedency is determined. The Authorities of *Craig* and *Tyraquellus* (who rather do not deny, than affirm that Titles of Honour may be acquired by immemorial Poſſeſſion) concern not this Caſe. For tho' the E. of *Crawford* might claim the Title of an Earl by ſimple Poſſeſſion: The Lawyers cited never dreamed that Poſſeſſion could entitle to Precedency in a Competition with other Earls demonſtrating more ancient Rights. And the Defender cannot pretend to immemorial Poſſeſſion: Becauſe, the Purſuer can tell when the Dignity of Earl of *Crawford* commenced. 3. The Diſtinction that a Female did not ſucceed by Virtue of a Proviſion *Hæredibus inter ipſos*, but only by Proviſions *Hæredibus quibuſcunque*, is redargued by the Deciſion, *July* 11, 1633, *Oliphant* contra *Oliphant*, and the Books of *The MAJESTY*, *Lib.* 2. *Cap.* 25, 27, 41, 42, 48, 57, 58, and 59: where no Mention is of *quibuſcunque*, nor indeed was the Word in Uſe in Charters till much later, when the different kinds of Heirs began to multiply. It is true Heireſſes in Fies with Juriſdiction and Dignity owed only Fidelity, and did no Homage, which was performed by their Huſbands for the Land and Honour belonging to them *Ratione Curialitatis*: But if Heirs Female had no Title to Dignities, their Husbands could have nothing to do Homage for. The Exception againſt Counteſs *Elizabeth*'s Succeſſion, from her not being ſtiled *Comitiſſa* in the Service, but only *Elizabeth Sutherland*, is of no Import: Becauſe, ſhe might have forborn the Title for ſome Years, and aſſumed it when ſhe pleaſed. Nor was it neceſſary to deſign her Counteſs in the Service: Seing her immediate Predeceſſor *John* Earl of *Sutherland* is deſigned in his Service *John Sutherland* Heir to *John* Earl of *Sutherland* his Father; And the Stile in theſe Matters varied, for the Counteſs aſſumes her Title in the Charter of Reſignation to *Alexander Gordon* her Son; And *Adam Gordon* her Husband is in one Part of the Charter deſigned *Comes Sutherlandiæ*, and in another Part *Adæ Gordon Sponſo ſuo*. But further, it appears that the Dignity deſcended to *Elizabeth* from this, That *John* her Grandchild was ſerved Heir to her. The Reaſons alledged for *Adam Gordon*'s being an Earl by new Creation are of no Weight, for there are Abundance of Inſtances where a Perſon marrying an Heireſs to a Dignity did aſſume the Dignity without a Patent. Did not the Earl of *Douglaſs* upon his Marriage with the Counteſs of *Marr*, aſſume the Title of *Marr*? Did not *John Maxwell* ſecond Son to the Lord *Maxwell*, aſſume the Title of *Lord Harries*, which came by his Lady? Doth not the Family of *Athol* enjoy the Title and Precedency of *Athol* by Marriage, altho' the Sirname is altered, *&c.*? But the Defender is in a fundamental Error, for there were no Patents of Honour diſtinct from Charters in the 1514, which only began under Queen *Mary*: Nor does the modern Uſe diſprove the ancient Practice Two hundred Years ago; Whereby the Husband did partake of the Wife's Fie and Dignity, and did Homage for her upon that Account. The Pretence that there cannot be two *ejuſdem Rei in ſolidum Domini*, is weak and conſtrained, and ſufficiently redargued by the Reſignation *in Anno* 1527, where *Adam Gordon*'s Title is expreſt to be *Ratione Curialitatis*. Can any Man imagine that *Adam Gordon* would for the Vanity of being called an Earl, have taken upon him a new Title to prejudge his Heir's Precedency? Or, That his Heirs would have acquieſced in any Innovation of the ancient Titles? Here there is no Place for ſuch a Conceit. And if the Earl of *Sutherland*'s Antiquity were to be computed from Counteſs *Elizabeth* and her Huſband, then his Precedency ſhould be regulated conform to that Date, whereas he enjoys without Diſpute the Precedency to a Matter of Ten more ancient Earls. The aſſuming of the Name of *Gordon* doth not alter the Caſe: For how often have our great Families changed their Sirname, retaining the Dignity? As by the civil Law one of the Senatorian Order adopted by a Plebeian, acquired the Name and Right of a Son in the Family he was adopted in, without loſing any Honour belonging to him *Jure Sanguinis*, *l.* 35. *ff. de Adoptionibus*: So *a pari*, the Deſcendents of Counteſs *Elizabeth* might have enjoyed any Acceſſion of Honour from their Father without Prejudice to their ancient Dignity. And *eſto* the Earl of *Sutherland* had ceded out of Reſpect to the Earl of *Huntly*, Will that give the Earl of *Crawford* a Title of Precedency? *Nullo Modo.* 4. How can the Writs produced between the 1275 and 1347, be only private Deeds, when in the Senſe of Law they are authentick and ſolemn *Inſtrumenta publica*, making Faith that there was a *Series* of Earls of *Sutherland* of the ſame Blood: Eſpecially when this Period is atteſted by *Fordon*, *Prinn*, *Dugdale*, and ſome other *Engliſh* Writers? Are not the Documents either Writs under the Great Seal, Extracts of Chancery, ſolemn Atteſts of Notars, or principal Charters granted by, or Agreements made with the Earls of *Sutherland*, concerning third Parties as well as themſelves, wherein creditable Witneſſes are inſert? And the Defender has not the leaſt Ground to quarrel the ſame, ſince his Predeceſſors cannot pretend to be Earls for many a long Year after. The Retours are of unqueſtionable Authority by the Law of *Scotland*, as being the moſt ancient known Way for the Cognition of Propinquity of Blood: And Retours not quarrelled within Twenty Years, are by expreſs Statute irreducible. Nor do any Retours deſerve greater Credit than theſe produced for the Purſuer; the Members of the Inqueſt being Gentlemen of Quality in the neighbouring Country, of undoubted Fame, Reputation and Knowledge; who might have proceeded upon the Documents of private Families deriving Rights by Charter or Contract from the Earls of *Sutherland*; upon the conſtant Fame of the Country, the Genealogies of neighbouring Families, and the Acquieſcence of all who had any Title by Nearneſs of Relation to quarrel. 'Tis true, the Defender in his Gaiety objects againſt Sir *Thomas Urquhart* as an ill Genealogiſt; And it is owned that his Derivation from *Adam* and *Noah* was fantaſtick enough, and indeed but *Luſus Ingenii*: But after all, the Defender's Criticiſm will not hinder him to paſs for a moſt knowing Gentleman. The great Diſtance of Time interveening betwixt *John* Earl of *Sutherland* ſerved Heir in the 1630, and his Predeceſſor's who died about the middle of the Thirteenth Century, doth not diminiſh the Authority of the Verdict, whether examined according to the Rules of Hiſtory or Law. For the Inqueſt in a Matter of that Antiquity, no doubt proceeded upon ſuch Evidence as the common Senſe of Mankind requires: And Propinquity may be cognoſced at any Time, ſince no Courſe of Time takes away the Right of Blood. The Earl of *Strathern* was ſerved at near as great a Diſtance to his Predeceſſors then; as *John* Earl of *Sutherland* was, and yet his Service was not reduced on that Ground, *March* 22, 1633. And in a general Service of the Earl of *Caſſils*, the Lords found it might be put to the Trial of an Inqueſt, If the Predeceſſor to whom he deſired to be ſerved dyed at the Faith of King *James* 3, or any of his Succeſſors in the Royal Dignity. And if the Line of *William* Earl of *Sutherland* ſhould now fail, the Lord *Duffus* as deſcending of *Nicolas*, owned his Brother in the Year 1364, would exclude an *ultimus Hæres*. The Rolls of Parliament can be no Rule to determine Precedency: Becauſe, the Nobility were not therein ranked according to the Order of Antiquity, but in the Order they came up to the Parliament, or *intraverunt*. Earls being ſometimes ranked before Dukes, ſometimes even before the Chancellor, an Earl for the Time. Sometimes again younger Noblemen are ranked before theſe of the ſame Dignity that are more ancient. Nor are the *Sederunts* in the Council Records of any greater Force, theſe being as irregular. But then in a *Sederunt* of Council *May* 26, 1572, the Earl of *Sutherland* was ranked before the Earl of *Crawford*.

Duplyed for the Earl of Crawford. Not to contend about Names, or whether the Decreet of Ranking ought to be called *Res judicata* or not; It is a ſovereign and ſolemn Decreet ratified by King and Council, and nothing therein determined can be quarrelled for Iniquity. The Qualifications thereof *ay and while*, &c. And *but Prejudice*, &c. are to be civilly underſtood: So as theſe who found themſelves aggriev'd, might in the Terms, and within the legal Space of Fourty Years, have Remedy by obtaining Declarator upon better Rights than were then produced, and not by Reduction upon the Head of Iniquity; which is conſiſtent with a *Res judicata*. *Eſto* a Dignity running in the Blood could not preſcribe ſimply *non utendo*: Yet one Perſon may exclude another neglecting his Right by the poſitive Preſcription. The Caſe of the Earl of *Strathern* is not to the Purpoſe: For he was not objected againſt on the Account of a *non utendo*, but on this Ground, That the King was nearer in Blood to the Defunct. And there is the ſame, if not more, Reaſon for the poſitive Preſcription of Precedency in Titles of Honour, as in any other Caſe, viz. *Ut aliquando ſit Finis Litium*, which in Points of Honour are ordinarly warm and dangerous. The Meaning of the Brocard *Jura Sanguinis nullo Jure civili dirimi poſſunt* is only this, That natural Relation cannot be diſſolved by civil Relation: And not that any Thing founded *in Jure Sanguinis* cannot be loſt by Preſcription, or other legal Ways. Precedency being an heretable Right, falls clearly within the Compaſs of the *Act* 1617: Which Statute clears that the Fourty Years Preſcription had been formerly in Uſe in *Scotland*; by allowing Thirteen Years after for making Interruption by thoſe againſt whom Preſcription had run; And ſo was but a declaratory Act, determining more diſtinctly the Grounds of Preſcription. No Reſpect can be had to the Purſuer's Interruptions. Becauſe, the Summons 1630, without Act and Letters of Continuation or Citation thereon could not interrupt; Nor was the Interruption renewed every ſeven Year in the Terms of Law. Proteſtations in Parliament are not a habile Way of Interruption: Nor was any Proteſtation taken till the Year 1647, after Preſcription had run upon the Decreet of Ranking 1606. Which muſt be computed from the Date of the ſaid Decreet, and not from the Date of the Act 1617, which was only a declaratory Law. And altho a Proteſtation in Parliament might paſs for an inchoate, it cannot be reckoned a complete Interruption, without an execute Summons: more than a Minor's Revocation *intra Annos utiles*, without an execute Reduction could be termed ſuch. 2. *Homagium* being the proper *Reddendo* and Recognizance of a Dignity; If an Heir-female (as the Purſuer acknowledges) could not *præſtare Homagium*; She could not ſucceed to the Dignity, whereof *Homagium* was the proper Badge. *John*'s Service as Heir to his Grand-mother *Elizabeth* was in Order to tranſmit the Eſtate, and not the Dignity, which goes by the Blood without a Service. And the Grand-father being Earl, 'tis preſumed in Law, That the Title rather flowed from him as *Perſona dignior* than from the Grand-mother. The Argument againſt the new Creation of Earl *Adam*, that it would put the Purſuer after ſeveral Earls who give the Paw to him, doth not concern the Defender: Seing others neglect to claim their Right of Precedency, cannot hinder him to plead his Grounds of Preference. It is directly contrary to the Rules of Law and Honour, that an Heireſs of a Dignity ſhould tranſmit the ſame to her Husband by Marriage: And if any Inſtance be adduced, the Conveyance has been by Reſignation; And ſince it is not alledged that *Adam Elizabeth*'s Husband became Earl by Reſignation, he muſt owe his Title to a new Creation. So that the Muſter or Parade the Purſuer makes with his ancient Writs and Documents, and the Schemes and Trees he forms thereon, to demonſtrate the Antiquity of his Dignity, is to no Purpoſe againſt the Defender, whoſe Precedency is invincibly founded upon the three Grounds above-mentioned. 3. If we are to believe that the Inqueſt 1630, (whoſe Verdict is at moſt to be regarded but as a *Clare conſtat*) might have had good Information from ancient Men and Writs, which the Courſe of Time and Accidents have deprived us of: Muſt it not be confeſſed that the Judges in the Decreet of Ranking 1606, Twenty four Years before, had far greater Advantages to know the Truth and Grounds they proceeded on? And tho Retours after Twenty Years are not quarrellable by the Heirs of thoſe to whom the Perſons retoured are ſerved: They make not a full Proof againſt third Parties. So that whatever the Purſuer may found upon the Retours 1630, againſt any pretending to be neareſt of Kin to the Earls of *Sutherland*: They ſignify nothing to eſtabliſh a Precedency in his Favours againſt the Defender.

Triplyed for the Earl of Sutherland. The Defender induſtriouſly ſuppreſſeth one Half of the Reaſon of Preſcription, viz. *Ne Dominia manerent in incerto*: Becauſe, it cannot congruouſly comprehend *Jura Sanguinis*, or any Thing but what is *in Commercio.* If Preſcription obtained before the Act 1617, then what need was there to prorogue it for Thirteen Years after? Laws indeed ſometime take Place from the Date, and ſometimes have a Retroſpect: But it requires a great Diſpoſition to believe that a profitable Act ſhould be made confirming an eſtabliſhed Cuſtom, and yet ſuſpending the Effect thereof for Thirteen Years. The noble Families of the Nation are ſtrangely deluded, if a Proteſtation in Parliament do not import Interruption of Preſcription, after it hath been ſo frequently uſed for that Effect by Advice of the beſt Lawyers. Who ever denied that Interruptions might be made *Via Facti*, or that judicial Acts are more effectual Interruptions than Citations, tho never ſo often renewed? And is not the Parliament the ſupreme Judicatory where Precedency of all Things may moſt competently be interrupted? And what Time more proper for ſuch Interruptions than at the calling of the Rolls, when all Parties concerned are preſent or bound to be preſent? The Objection againſt Interruption by the Summons 1630, that it was only executed to the firſt Diet is frivolous: For Preſcription may be effectually interrupted by a Citation upon the laſt Day of the Fourty Years, which could not be, but by an Execution to the firſt Diet. Yea a null Execution of a Summons was ſuſtained ſufficient to interrupt, *November* 25, 1665, *White* contra *Horn.* So a Proceſs at the Inſtance of an apparent Heir dying before his Service was ſuſtained as an Interruption: And *March* 4, 1630, Lord *Leſly* contra *February* 17, 1665, *Butter* contra *Gray*, *January* 9, 1675, *M'intoſh* contra *Fraſer*, a Citation to the firſt Diet was found a legal Interruption. The Acts 1669, and 1685, anent the renewing of Interruptions concerns real or perſonal Rights, and not *Jura Sanguinis*, which are Rights of Families called *Jura Gentilitatis.* The foreſaid Acts again did only take Place where Preſcription was interrupted by a naked Citation: But here Interruption is both by Citation, and Proteſtations in Parliament ; The Interruption by the Summons 1630, being continued by the ſubſequent Proteſtations. Nor can the foreſaid Acts of Parliament regulate the preſent Caſe upon this Ground, that the Act *1669.* is adapted only to poſterior Citations for Interruption; And the Seven Years from the Promulgation of the Laws made in the Parliament 1685, did not expire till *June* 1693, deducing the Year of the Surceaſe of Juſtice, and the Adjournment of the Seſſion from *June* 6, to *July* 2, 1690: And the Purſuer's Father tabled this Proceſs before the Parliament *per Modum Querelæ*, and obtained a Remit to the Lords of Seſſion *May* 23, 1693. There is an evident Diſparity betwixt Proteſtations taken in Face of King and Parliament againſt a Competitor, in the Hands of the Clerk-regiſter, and inſert in the Records of Parliament; and a Minor's extrajudicial Revocation, which perhaps never goes further than the Revoker's Cabinet. But this Debate concerning Interruptions may ſeem ſuperfluous, ſeing the Earl of *Sutherland* did by Poſſeſſion of his Title preſerve the Precedency as an Acceſſory ; as well as the receiving of Annualrent from a Principal, doth interrupt as to the Cautioner, *December* 18, 1667, *Nicolſon* contra *Philorth*; And the Poſſeſſion of an Annualrent out of a Tenement hindred the Right to preſcribe as to another Tenement, tho poſſeſs'd more as Fourty Years by a ſingular Succeſſor, *June* 22, 1671, Lord *Balmerino* contra *Little-preſtoun*. It is hoped upon the whole, The Lords will not regard the conſtrained Exceptions againſt the Documents of the Purſuer's Deſcent from the ancient Earls of *Sutherland* ; Nor the Defender's vain Pretence to long Poſſeſſion : Since a Deciſion in this Matter, will in the Example concern the Precedency of our Princes (whoſe Deſcent from their ancient and illuſtrious Anceſtors hath been injuriouſly conteſted by Strangers); The Royal Family having changed their Names, and the ſending of publick Miniſters from our Kingdom to treat with foreign States and Princes, having for many Years been intermitted.

The Lords found, That the Citation at the Earl of *Sutherland*'s Inſtance, againſt the Earl of *Crawford* in the Year 1630, was not renewed in the Terms of the *Act* 15, *Par.* 1685, by the Remit of Parliament 1693, in Reſpect the ſame is not within Seven Years of the Date of that Act the 13 of *May* 1685, and Eleven Months and Fifteen Days more allowed to be deduced in ſhort Preſcriptions conform to the *Act* 40, *Parliament* 1690 : And therefore the ſaid Citation can import no Interruption of Preſcription. But found, That Proteſtations made in Parliament are legal Interruptions of Preſcription of Precedency : And the Preſcription of 40 Years doth commence from the Act of Parliament 1617, and not from the Date of the Ranking in *Anno* 1606. And found the Rolls of *Sederunts* of Parliament, not to be a ſufficient Document of the Earl of *Crawford*'s Poſſeſſion of Precedency to the Earl of *Sutherland*, when both were marked preſent. And found, That the Deſcent of the Dignity by Propinquity of Blood from *William* Earl of *Sutherland*, who married King *David*'s Siſter, to Earl *John* who ſucceeded in the Year 1512, is ſufficiently inſtructed : But that the Dignity was not conveyed from him with the Eſtate to his Siſter *Elizabeth*.

January 24, 1706. *Miſtreſs* Margaret Schaw, *againſt Sir* John Schaw *of* Greenock.

MIſtreſs *Margaret Schaw* and her Curator *ad Litem*, having purſued Sir *John* her Brother, for Payment of the principal Sum and Annualrents contained in her Bond of Proviſion : The Defender *non fecit Vim* as to the Annualrents; But alledged he could not be obliged to pay the principal Sum, being a Debt fairly acknowledged and ſecured beyond Exception, to a Curator *ad Litem*, where there was no *Lis*, or neceſſary Action. Eſpecially conſidering, That the Bond is ſo qualified, that it was not in the Creditor's Power to aſſign without an onerous Cauſe; And ſhe dying without lawful Heirs of her Body, or without diſpoſing for onerous Cauſes, the Portion ſhould return to the Defender; Whereby he has an evident Intereſt to retain, at leaſt to elide any Proceſs intented in Minority without Conſent of Curators having an univerſal Authority.

Replyed for the Purſuer. The Defender is only a Subſtitute in certain Events; And albeit the Purſuer cannot aſſign but for onerous Cauſes, ſhe may exact Payment, at leaſt with a Quality that the principal Sum ſhall be reimployed in the Terms of the Subſtitution: As was decided betwixt the Lord *Ballenden* and the Earl of *Roxburgh*; And in the Caſe of Miſtreſs *Margaret Douglaſs*, againſt *Douglaſs* of *Bridgefoord*.

Duplyed for the Defender. Neither is the Purſuer a ſimple Fiar, nor the Defender a naked Subſtitute, nor is the Caution offered ſufficient to hinder the Alteration of the Deſtination. For the Mony being uplifted and diſcharged, altho once reimployed in the ſame Terms: It were eaſie by a new Remove to evacuate the Conditions of the Bond to the Prejudice of the Defender. 2. It was found, 25 *February* 1663, betwixt *James* and *Marjory Aikenheads*, That a Sum aſſigned to *James Aikenhead* and his Heirs, which failing, to the ſaid *Marjory* and her Heirs, could not be uplifted by him in his Minority.

The Lords found the Defender liable for the Sums in the Bond of Proviſion: But that the Purſuer could not uplift the Principal, but only the Annualrents, in her Minority, unleſs for an onerous Cauſe. And therefore decerned in the Conſtitution of the Debt againſt the Defender, ſuperſeding Execution as to the Principal during the Minority except for onerous Cauſes.

Eodem Die. William Wilſon *Merchant in* Edinburgh, *againſt the* Lord Saline.

WIlliam Wilſon having Right by Progreſs to a baſe Infeſtment of Annualrent out of *Alexander Short*'s Eſtate, expede in *May* 1661, but never cloth'd with Poſſeſſion, purſued Reduction againſt the Lord *Saline*, of a Diſpoſition granted to him by the ſaid *Alexander Short* his Brother in Law, completed by a publick Infeſtment in *February* 1662; As being a preſumed gratuitous Deed to a conjunct Perſon in Prejudice of the Purſuer, a prior lawful Creditor. The Defender produced a Bond for 20000 Merks, granted to him by the Granter of the Diſpoſition of the ſame Date with it, which he contended was a ſufficient onerous Cauſe to ſupport the Diſpoſition; As it would have been a good Title to adjudge or uſe any other real or perſonal Diligence upon; And differ'd from the Caſe where the onerous Cauſe is ſpecified in a Diſpoſition, upon which Narrative no Execution could have followed. Now if a Bond of borrowed Mony granted to a conjunct Perſon cannot be reduced upon the Act of Parliament as gratuitous, *June* 28, 1665, *Monteith* contra *Anderſon*; But proves its onerous Cauſe by the Narrative: Why may not a Diſpoſition of Lands be granted by one conjunct Perſon to another in Satisfaction of ſuch a Bond? 2. Albeit the Diſpoſition had been gratuitous it muſt ſubſiſt: Becauſe, the Diſponer had *aliunde* a ſufficient Eſtate to pay his Debt; *November* 10, 1680, *M^c^kell* contra *Jamiſon* and *Wilſon*.

Replyed for the Purſuer. The 20000 Merks Bond cannot be obtruded as the onerous Cauſe of the Diſpoſition, in Reſpect they are of the ſame Date, and yet have no Relation to one another; But might have been made Uſe of ſeparately againſt the Debtor and his Eſtate. There is again a manifeſt

Diſparity betwixt a Bond of borrowed Mony in the ordinary Way of Commerce, and a Bond granted for ſo great a Sum at the ſame Time with a Diſpoſition containing the Bulk of the Granter's Eſtate: But no material Difference betwixt a Diſpoſition containing the onerous Cauſe in the Narrative, and one of the ſame Date with a latent Bond for a great Sum; except that theſe two concurring argue more Fraud in the Contrivance. The Deciſion 1665 is not to the Purpoſe: Seing the Bond was not there craved to be reduced as made *inter conjunctas Perſonas*, but as being granted after *Anderſon*'s Diligence, which was juſtly repelled, for that Horning doth not hinder a Man to contract Debt. 2. A gratuitous Right cannot prejudge another's ſpecial Right of the ſame Subject; more than a poſterior Donation could prejudge a prior, for that the prior Donatar by the Warrandice implied in his Right is a Creditor as to the Subject gifted; and his Debt could not be rendred ineffectual by a voluntary gratuitous Deed: *Multo magis* ought the Reduction to proceed at the Inſtance of the Purſuer a lawful and onerous Creditor. The Deciſion 1680 doth not meet the Point: For the Purſuer doth not inſiſt to have the Diſpoſition in Favours of the Defender reduced upon the Head of Bankrupt, but upon this Reaſon, that the Annualrent diſponed to him out of certain Lands by *Alexander Short* could not be prejudged by any poſterior gratuitous Diſpoſition, tho' firſt completed by a publick Infeſtment.

The Lords found the Diſpoſition to the Lord *Saline* was preſumed gratuitous, and the 20000 Merks Bond not ſufficient to inſtruct the onerous Cauſe thereof. And repelled the Alledgeance of a ſeparate Eſtate in Reſpect of the Purſuer's prior Infeſtment.

January 25, 1706. Archibald Fleeming *of* Farm, *againſt* Sir James Calder *of* Muirtoun.

ARchibald *Fleeming* of *Farm* as Aſſigney by Sir *George Hamilton* having charged Sir *James Calder* of *Muirtoun*, upon his Bond as Cautioner to the Tackſmen of the Cuſtoms and foreign Exciſe for *John Murray* their general Receiver and Caſh-keeper, for Payment of the Sum of 13068 ℔. 10 ſh. 6 d. as the Ballance of *Murray*'s Intromiſſions not compted for by him: Sir *James* ſuſpended upon this Ground, That he could not be liable upon the Bond in Reſpect it was never delivered to the Tackſmen, but was only put in *Murray*'s own Hand to have been delivered in Caſe they ſhould not otherways truſt him to be their Caſh-keeper, and ſo it is that they did truſt him without Regard to any ſuch Bond; which Sir *James* offered to prove was found among his Papers after his Death, and but lately recovered *Viis & Modis* out of the Hands of his Children.

Anſwered for the Charger. The Bond being out of the Charger's Hand, is underſtood to be the Tackſman's Evident wherever lodg'd, albeit permitted by them to ly in their Caſh-keeper's Hands with the reſt of their Papers whereof he had the Truſt, and the not Delivery can only be proved *Scripto, vel Juramento*. 2. It can never be quarrelled by the Suſpender as an undelivered Evident; becauſe, it was not only poſterior to an Act of *Sederunt* of the Tackſmen admitting *Murray* to be their Receiver he finding Caution, and ſo preſumed to have been granted conform to the ſaid Act, ſince *facile præſumitur quod fieri debet*: But alſo Sir *James* by his miſſive Letter, and by the Exception in a general Diſcharge to *Murray*'s Relict and Children as to all Action might be intented upon his Bond of Cautionry, acknowledged himſelf liable as Cautioner for *Murray*.

Replyed for the Suſpender. 1. *Præſumptio cedit Veritati*, and he offers to prove the indirect Way how the Charger's Cedent came by the Bond of

Cautionry long after *Murray*'s Deceaſe. And the Lords ſuſtain ſuch an Alledgeance relevant to be proved by Witneſſes, *March* 21, 1628, *February* 13, 1679, *Cathcart* of *Carleton*. Becauſe the ſo ſeeing of the Writ is a ſenſible Fact neceſſarily inferring an Excluſion thereof, and the proper Subject of Probation by Witneſſes, as well as Fraud or Force. Beſides, there are Inſtances in Law of Writs found null upon proving of Facts importing the Creditor's coming by them in an undue Way, *January* 11, 1676. 2. The Letter and Exception of the Diſcharge amount only to infer a Suſpition in Sir *James*, that his Bond of Cautionry might have been delivered by *Murray* the Principal which has not been done. 3. *John Murray* the Principal in the Bond of Cautionry being free through the not Delivery thereof in his Lifetime, Sir *James*'s owning himſelf liable as Cautioner could not bind him: Becauſe, the Cautionry was but an acceſſory Obligation which *ſequitur Conditionem Principalis*.

The Lords ſuſtained the Bond charged on, and repelled the Defence againſt the not Delivery thereof; in Reſpect of the Anſwers and Writs produced.

January 29, 1706. Janet Carruthers *and* James Maxwell *of* Barncleugh *her Husband, againſt* Gavin Johnſton *of* Elſhiſhiels.

IN the Action at the Inſtance of *Janet Carruthers* Relict of *Alexander Johnſton* of *Elſhiſhiels*, and her preſent Husband for his Intereſt, againſt *Gavin Johnſton* of *Elſhiſhiels*, for cognoſcing and declaring in Favours of the ſaid *Janet* a Terce out of the Lands of her former Husband the Defender's Father.

The Defender alledged. There could be no Terce granted except out of Lands wherein her Husband died infeſt, and ſhe is already ſerved to a competent Terce out of theſe.

Replyed for the Purſuer. That a Relict has Right to a Terce of Lands wherein her Husband might and ſhould have been infeſt, before his Death, as well as of ſuch wherein he died actually infeſt. Becauſe, 1. The old Laws of *the Majeſty* point more at the Defunct's Right to Lands, than his Infeſtment. For that Wives *Jure Communionis Bonorum* have Right by natural Equity after Diſſolution of the Marriage to the equal Half of what then belonged to both. Which, being reſtricted by our Cuſtom to the Liferent of a Third called the *Widows Terce*, ought to be moſt amply and favourably interpreted, without any other Limitation than what is put on Moveables, whereof Relicts have the neat Half or Third according to the Families Circumſtance. Eſpecially conſidering, that the Ground for introducing Terces ariſeth from the Obligation upon a Man to provide for his Relict, and theſe are reckoned the ſame in the Analogy of Law with the Legitimes of Children. And tho' perſonal Eſtates were not ſo frequent of old, when the Brieve of Terce was contrived; the like Reaſon extends a Declarator to them now. When a Reverſer redeems Wadſet Lands out of which a Relict is ſerved to a Terce, ſhe has Right to a Third of the Annualrent of the Mony as the *Surrogatum* in Place of her Husband's Heretage. Again, the Relict of one who diſponed his Heretage before his Deceaſe would have no Terce, tho' her Husband died laſt infeſt: *Ergo a contrario*, the Receiver of a Diſpoſition dying uninfeſt tranſmits a Right of Terce to his Relict. 2. Our ancient and beſt Lawyers teach that *ſi Pater Mariti eum inveſtire obligatus ſit, licet Maritus, durante vita, non ſit inveſtitus, Relicta Actionem habebit pro Tertia*; for this probable Reaſon among others, that during the Marriage there being no Action competent to the Wife for compelling her Husband to infeſt, Law preſumes his Omiſſion fraudulent. And as in moſt Caſes *lata Culpa Dolo equiparatur*: So here the Purſuer's deceaſt Husband's Deſign to defraud his Wife of the Benefit of a competent Terce was maniſeſt, by his declaring that ſhe ſhould never have any Thing by his Death, that he could keep from her. Which was as much as if he had own'd that he abſtain'd from taking Seaſin induſtriouſly to prevent her Right of Terce.

Replyed for the Defender. There is no Communion betwixt Man and Wife of Heretage during the Marriage; nor Diviſion upon Diſſolution thereof: But a Wife's Terce ſeems to be much of the ſame Nature with the Husband's Courteſie, ſhe being adopted into her Husband's Family, and thereby *Finis & Caput ſuæ Familiæ*, her Right as Relict is a Kind of Succeſſion *qua Filia familias*: As among the *Romans* we find a Succeſſion *pro Uxore* for a certain Share, even when there were Children exiſting. Which Intereſt of Relicts our Predeceſſors have wiſely qualified. The Brieve of Terce reſtricts it to Subjects *in quibus Maritus obiit ultimo veſtitus & ſaſitus*; By the Law of the *Majeſty*, *Lib*. 2. *Cap*. 16. *N*. 5, 9. a Wife had no Terce except of what her Husband poſſeſt the Time of the Marriage; and ſhe was obliged in this, as in all other Things conſiſtent with her Duty to GOD, pleaſantly to obey him, *Ibid*. *N*. 15. a baſe Infeſtment without Poſſeſſion, or an Appryſing without Infeſtment, have been found to exclude a Terce; it extends not to Tacks that are Rights more real than a Diſpoſition; nor to Burgage Lands tho' Infeſtment hath followed; nor yet to Superiorities, Patronages, or other indiviſible Rights; and the Act 1681 excludes it in the Caſe of any voluntary Proviſion. If a Terce took Place where the Husband was not actually infeſt; the ordinary Clauſes of the Third of Conqueſt would be uſeleſs: And that there are now mo perſonal Eſtates by heretable Bonds or Diſpoſitions or Adjudications not cloth'd with Infeſtment than formerly, is ſo far from being an Argument to extend the Terce to ſuch, that it pleads the contrary; Leſt ſecond Husbands reap too much of the firſt's Inheritance, while perſonal Debts run on to the Ruin of his Heirs; and the Terce by ſwelling too high, ceaſe to be *rationabilis Tertia*. 2. 'Tis a wild Imagination to advance that the Husband's ſimple Omiſſion to infeſt himſelf in a Part of his Eſtate was either *Dolus* or *Culpa*, eſpecially ſeing ſhe did not diſpone the Fie at leaſt of her own Property to the Children of the Marriage. For ſuch a negative Fraud can have no civil Effect, more than common Charity or particular Proviſions to unprovided ſecond Children, can be forced. In the civil Law there is no Remedy to Creditors when the inſolvent Debtor prejudged them by no poſitive Deed, but only by omitting to eſtabliſh in his Perſon an Heretage or Legacy fallen to him: Nor yet had they any Remedy in our Law till the old Statute concerning Charges to enter Heir in Heretage, and the late Act about Moveables. *Dolus non præſumitur, & Culpa caret qui Jure ſuo utitur, nullique facit Injuriam*. And therefore whether the Husband forbore to take Infeſtment, becauſe the Superior refuſed to receive him; or that he wanted Mony; or intended to ſell again and aſſign the Procuratories and Precepts; or thought his Wife had Sufficiency for a Terce beſides, *&c*. his Omiſſion cannot be term'd in a legal Senſe either Fraud, or Fault. Eſpecially conſidering, that a Debtor's Deed, and much more his Omiſſion falls not under the Act 1621, where a ſufficient Fund is left for the Creditors Payment. Our Lawyers (my Lord *Stair*, *P*. 278. and *Craig*, *P*. 309.) do indeed ſet down two ſpecial Caſes in which they think a Terce takes Place without Infeſtment, but theſe meet not the preſent Caſe, and only *firmant Regulam*.

The Lords found no Terce due, and aſſoilzied from the Declarator.

February 1, 1706. *Sir* William Maxwell *of* Monreith, *againſt* George Irvine *of* Stank.

IN an Action at the Inſtance of Sir *William Maxwell* againſt *Irvine* of *Stank*, the Purſuer having offered to improve a Diſcharge produced by the Defender;

fender: The Lords ordained the Defender to abide by the ſame *ſimpliciter*, and would not allow him to adject to his abiding by, this Quality, That he abides by the Diſcharge as a true Writ and Deed except as to the Deſignation of the Writer.

Eodem die. *Mr.* David Ramſay *Writer to the Signet, as Factor for the Executors of the deceaſt* John Kirkwood *Servant to the Duke of* Lauderdale, *againſt* Alexander Gibſon *of* Durie.

IN the Action at the Inſtance of Mr. *David Ramſay* as Factor foreſaid, againſt *Alexander Gibſon* of *Durie* as repreſenting the deceaſt *John Gibſon* of *Durie*, for Payment of a Bond granted by him to the ſaid *John Kirkwood* the Purſuer's Conſtituent: No Proceſs was ſuſtained; becauſe, the Summons contained only a Warrant to cite the Defender on Twenty Days for the firſt Diet, and not upon Twenty one Days. Albeit it was alledged for the Purſuer that there are more as Twenty one Days from the Date of the Execution to the firſt Diet of Compearance as marked in the Summons; ſo that the Defender can pretend no Prejudice. And a literal Miſtake of the Writer of the Summons may be helped: As the wrong filling up of the Days of Compearance is allowed to be helped at the Bar, when the Purſuer offers to abide by.

February 5, 1706. Andrew Ker *Brewer in* Edinburgh, *againſt* Alexander Dunbar *of* Thundertoun, *and other late Tackſmen of the Exciſe.*

IN an Action of Spuilzie at the Inſtance of *Andrew Ker* againſt the late Tackſmen of the Exciſe, for their unwarrantable poinding of a Copper Caldron and Stelpot: The Lords found the poinding unwarrantable, and allowed the Purſuer to give in a Condeſcendance of Damages and Expences ſuſtained thereby. But a Condeſcendance being made, they ſuſtained the ſame only as to the Goods found to be unwarrantably poinded, *viz.* The Copper Caldron and Stelpot, ſpilt Browſt and the Expence of the Purſuit: And not for the Rent of the Brewery laid waſte by the illegal Poinding; nor for the Loſs of Brewing Looms, that fell down through not uſing thereof; nor for Malt ſpilt through Want of the Caldron to brew it in; nor for the Profit the Purſuer might have had by his Trade during the Space foreſaid. Albeit he alledged that all theſe Damages reſulted as naturally from the unlawful poinding, as in Aſſythment of the Mutilation of a Man's Hand, the Loſs of his Trade thereby is modified. Becauſe, the Purſuer needed not ſuffer his Malt to corrupt for not brewing it in due Time, nor his Looms to fall in Staves through Want of Uſe, but might have otherways diſpoſed on both, ſince he had no Caldron to brew. And the foreſaid extrinſick Damages with theſe for the Loſs of the Purſuer's Trade, and the Want of Rent for his Brewery, have no Contingency with Mutilation: For a Tradeſman's Loſs through the Want of his Hand is irrecoverable; whereas the poinding of a Caldron might have been repaired by putting another in the Room on't. And Damage in the Purſuer's Imployment could no more be required upon that Head, than a Taylor could ſeek Damages for the Loſs of his Trade, through the illegal taking away of his Thimble and Cizars.

February 7, 1706. *The Town of* Stirling, *againſt* Murrays *elder and younger of* Polmais.

THE Town of *Stirling* having in the Year 1678 obtained from King *Charles* II. a Charter in their Favours, containing the ſole Power of keeping

Fairs or Markets within two Miles of the Town, excluſive of any other Heretor, and providing againſt the Erection of any new Burgh of Barony or Regality within that Diſtance; Whereupon they procured a Declarator *in Anno* 1679, againſt the neighbour Heretors, and the Laird of *Polmais* in particular; And he and his Son in the Parliament 1705, having obtained an Act for two yearly Fairs to be held within their Barony of *Balquhidrock*: Againſt this the Town proteſted, and raiſed a Declarator of their Right, againſt the Lairds of *Polmais* elder and younger.

Alledged for the Defenders. That the Privilege granted and craved to be declared, was *contra Jus & Utilitatem publicam*; in ſo far as it was not any poſitive Right, but only a Kind of Servitude introduced in Favours of the Town as *Prædium dominans*, upon the Defenders Property, without their Conſent; Whereby they are debarred from acquiring, and Queen and Parliament bound up from granting the Right of Fairs to Heretors upon their own Property; Which is the inſeparable Prerogative of the Sovereign, and common Intereſt of the People; And private Gifts, ſo far deboarding from common Rules, are preſumed to have proceeded by Subreption or Obreption. 2. If the King could have granted this excluſive Privilege for Two Miles, he might have extended it to Twenty; and in Favours of all the Royal Burrows, one after another, as well as in Favours of the Town of *Stirling*: Of the Conſequences of which Kind of Incroachment, all Noblemen and Barons would be ſadly ſenſible.

Replyed for the Purſuers. The Royal Burrows who bear a ſixth Part of the Burdens of the Nation, have been juſtly privileged in the Matters of Trade, Markets and Fairs, by Gifts and Acts of Parliament in their Favours: And the Charter to the Town of *Stirling* was granted alſo upon a particular Reaſon, *viz.* As an Incouragement to a Royal Burgh that had ſhewed great Friendſhip and Fidelity to His Majeſty, was the ordinary Reſidence of our Princes, an important Paſs, and the very Key of the Kingdom betwixt *South* and *North*. 2. If the King has Power to grant Fairs and Markets, he has alſo Power to refuſe them; And if he refuſe them to gratifie particular Burghs, as here is done in Favours of *Stirling*: Then that Burgh has certainly thereby a *Jus quæſitum* to annul all poſterior contrary Grants. Which is not a Servitude upon the Defenders, but only a Signification of the King's Pleaſure not to allow Fairs within two Miles of the Town of *Stirling*, which cannot be kept without His Majeſty's Allowance: And *qui Jure ſuo utitur nulli facit Injuriam.* So that it's an odd Notion to call ſuch a Gift an Incroachment upon Noblemen and Barons, when it takes nothing from them: More than the granting of an heretable Sheriff-ſhip can be quarrelled at the Inſtance of the Heretors over whoſe Lands it extends, becauſe it debars each of them from obtaining the like Juriſdiction. Now, if the Sovereign may ſimply refuſe Fairs or Markets to Barons, may He not *multo magis* refuſe them in Favours of ſo deſerving a Burgh as *Stirling*, within the ſmall Compaſs of two Miles? When other Royal Burghs of *Scotland* have the like or ampler Privileges indulged to them: As the Town of *Edinburgh* have ſuch excluſive Gifts extending to four Miles; and the Town of *Jedburgh* enjoy a Fair at five Miles Diſtance. Yea, What greater Myſtery is in this, than for the Proprietar of a Moſs to grant a Privilege to one Neighbour to win Fewel therein excluſive of any other? Beſides, the Defenders late Act of Parliament was but an Act of Courſe, qualified with the Act *Salvo*, and ſuch as can never prejudge the Town of *Stirling*'s prior Right.

Duplyed for the Defenders. 'Tis not to the Purpoſe, that the Royal Burrows bear a ſixth Part of the publick Burdens, that being divided with Reſpect to the burgage Lands and excluſive Privileges within the Royalty. But ſeing the Barons bear two Thirds of the Burden: 'Tis highly unreaſonable to ſubject 'em to any Servitude beyond the Privileges already granted to Burghs Royal within their Liberties. The Prerogative of granting Fairs and Markets is alſo foreign to the Caſe in Hand: For the Charter to the Town of *Stirling* contains no Conſtitution of Fairs, but only a certain Kind of irregular Interdict or Reſtriction of the Royal Power to the Prejudice of the Defenders. 2. The Town's *Jus quæſitum* is a Servitude upon the Prerogative, which the Negligence of His Majeſty's Officers in paſſing the Gift, could never eſtabliſh againſt the Prince who granted it, and far leſs againſt His Succeſſors. 3. The Objection from heretable Sheriff-ſhips not being quarrellable, is frivolous: For Regalities have frequently been erected within the Bounds of heretable Sheriffs; and it is obviouſly abſurd to compare the Privilege of applying to the Prince for obtaining any Immunity within a Man's own Lands, with the general Pretenſion to Offices: And yet even in that Caſe it would be injurious, and *contra Utilitatem publicam*, if any Burrow or great Man ſhould pretend to a Gift ſecluding any of his Neighbours within two or three Miles from the Royal Favour in all Time coming; And yet ſuch is the Imbargo laid upon the Defenders as to Fairs and Markets. 4. The Town of *Corſtorphine* keeps Fairs at this Day within two Miles of the Town of *Edinburgh*, notwithſtanding the good Town's pretended Gift. And the Caſe of the Town of *Jedburgh* is this, They have annual Fairs upon the Seat of the old ſuppreſſed Town, called *Roxburgh*.

The Lords found the King denuded by the prior Gift to the Town, and ſuch a *Jus quæſitum* thereby, that *Polmais* could hold no Fairs within the Bounds libelled.

Eodem Die. *The Lord* Belhaven *againſt Lord* David Hay *of* Beltoun.

THE Lord *Belhaven* having purſued Lord *David Hay* upon the *Act* 17. *Parl.* 1669, for adjudging a Part of the Defender's neighbouring Lands of *Beltoun* to himſelf, to make an Incloſure regular: It was alledged for the Defender, That there was Action formerly raiſed before the Juſtices of Peace upon the ſame Account, which is not yet diſcuſſed; And therefore no new Proceſs can be ſuſtained before the Lords, till the Iſh of that L*is alibi pendens*, there being no Way to bring a depending Proceſs from an inferior Judge to a more ſovereign Court, but by Advocation. 2. No Proceſs at the Purſuer's Inſtance, in Reſpect he has produced no Title in his Perſon to the Lands he is incloſing: And the Act of Parliament ordains, That in Lieu of the Lands adjudged to the Heretor making the Incloſure, an equivalent Piece of his Land be adjudged to the other Party. So that this being a petitory Action, it ought not to be ſuſtained without Production of the Purſuer's Title *in Initio Litis*, more than Actions of Moleſtation, or for dividing of Commonties or Runrig, are ſuſtained without an active Title produced with the Summons.

Anſwered for the Purſuer. There is *no Lis alibi pendens* here, ſeing the Proceſs before the Juſtices was deſerted before *Litiſconteſtation*. Beſides, there are no Juſtices of Peace in Effect now in Being in *Scotland*, ſince the old Set were exauctorated by King *William*'s Death, and the expiring of the laſt Parliament; and no new ones have been appointed ſince Her Majeſty's Acceſſion to the Throne. 2. Poſſeſſion without any more is a ſufficient Title for commencing ſuch a Proceſs, and carrying it on the Length of a Viſitation: Tho' when the Lords come to adjudge, the Defender will have Intereſt to ſee the Purſuer's Right to the equivalent Land to be adjudged. And yet even then there is no Hazard: For an Heretor afterwards emerging, could not be heard to claim upon a better Right the Lands adjudged from the Defender, without quiting his Ground incloſed; And it may fall out that of the two Alternatives provided by the Act of Parliament as a Recompence for the Ground taken off to make the Purſuer's Dike run in a ſtraight Line, *viz.* The Equivalent in

Ground, or the Value in Mony, that the Defender chooſe to have Mony: In which Caſe there will be no need for producing the Purſuer's Right to his Lands. But yet he is content to produce his Charter and Seaſin *cum Proceſſu*.

The Lords repelled the firſt dilatory Defence *ſimpliciter*, and repelled the ſecond, the Defender producing his Infeſtment *cum Proceſſu*. And appointed the Earl of *Lauderdale*, *Juſtice-Clerk*, *Fountainhall*, and *Preſtounhall*, or any two of them to viſit and perambulate the Ground, and to take Trial of the Value of what is ſought to be incloſed, and how it might be done with the leaſt Inconveniency to Lord *David Hay*, and what Compenſation ſhould be given to him in Land or Mony.

February 8, 1706. Alexander Bertram *of* Nisbet, *againſt* William Weir *of* Stonebyres.

IN the Action at the Inſtance of *Alexander Bertram* of *Nisbet*, as Aſſigny to a Bond of Proviſion of Eight thouſand Merks granted by the deceaſt *James Weir* of *Stonebyres*, to *Mary Weir* his Daughter, againſt *William Weir* now of *Stonebyres*, as having accepted from the Granter his Father, a Diſpoſition of his Eſtate, with the Burden of Proviſions made or to be made in Favours of the younger Children, and poſſeſſed Twenty four Years by Virtue thereof. Which Bond is of the ſame Date, or prior to the Diſpoſition.

Alledged for the Defender. Abſolviture; becauſe the Bond was granted by his Father *in Lecto Ægritudinis*, and he had raiſed Reduction on that Head which he repeated. And his Acceptance of the Diſpoſition with the general Burden of Proviſions to younger Children, could only be civilly underſtood to make him liable for ſuch Proviſions as were granted in *Liege Pouſtie*, which the Father could lawfully make, ſince he is not expreſly burdened with any granted *in Lecto* or *in Articulo Mortis*, which are as illegal as Obligements extorted, or wanting Writer's Name and Witneſſes.

Replyed for the Purſuer. The Bond of Proviſion taking Place againſt the Defender by Virtue of his own Right qualified therewith, is not reduceable *ex Capite Lecti*; Eſpecially conſidering, That as it was in the Defender's Power to accept or repudiate the Diſpoſition; ſo moderate Proviſions to Children are very favourable, and ſlender Grounds of Homologation have been ſuſtained to infer the Heir's Conſent, *June* 28, 1662, Dame *Margaret Hay* contra *Seton* of *Barns*, obſerved by my Lord *Stair*, and *July* 1666, *Halyburton* contra *Halyburton*, obſerved by *Dirletoun*; And the Words, *etiam in Articulo Mortis*, are but ſometimes adjected *in majorem Cautelam*.

Duplyed for the Defender. That all the Favour of, and Neceſſity for younger Childrens Proviſions, could not move the Parliament 1672 to allow Heretors to burden their Eſtates on Deathbed with three or four Years Rent for that Effect; as tending to ſubvert the ancient Families of the Nation. There is alſo a Difference betwixt a Father diſponing to his apparent Heir with the Burden of Debts to be contracted on Deathbed, and his diſponing to a Stranger, with ſuch a Burden, *viz.* That tho' the reſerved Faculty to burden might be effectual againſt a Stranger, who could aſcribe his Poſſeſſion to no other Title, it cannot be effectual againſt the Heir, who can repudiate the Diſpoſition and enter by a Service: Seing *Nemo cavere poteſt, ne Leges in ſuo Teſtamento habeant Locum.* And the Acceptance of the Diſpoſition with Poſſeſſion by Virtue thereof can be no Homologation of the Bond: Becauſe, Homologation is never extended to what the Party did not know at that Time, *July* 6, 1661, *Tailfer* contra *Maxton*. Neither doth Homologation of an Article in a Writ, homologate others of a different Nature, *November* 22, 1662, *Primroſe* contra *Dun*: Nor takes it Place where the Deed is aſcribable to other Cauſes, *December* 12, 1665, *Barns* contra *Young*: And *ita eſt*, That the Defender's

Acceptance of the Diſpoſition is aſcribable to a Deſign of poſſeſſing the Eſtate with the legal Burdens made in *Liege Pouſtie.* Which Method he could hardly omit: Seing he could not ſerve Heir to his Father who died not laſt veſt and ſeaſed. For the Defender, when an Infant, was infeſt upon the Diſpoſition by his Father before his Death: And he could not reduce an Infeſtment in Favours of himſelf who was *alioqui ſucceſſurus.*

The Lords found the Defender's accepting and bruiking by, after his Majority, a Diſpoſition with the Burden and Reſervation of Proviſions made or to be made to the younger Children was a Homologation of the Bond purſued for, and excluded the Reaſon of Deathbed: Tho' it would not hinder the Defender to found upon the Nullities of wanting Writer's Name and Witneſſes, or other Reaſons of Reduction ſuch as Force or Fear. And therefore decerned againſt him as liable to pay.

Eodem die. Griſſel Ewart, *againſt Mr.* Andrew Ewart *Miniſter at* Kells *her Father.*

MR. *Andrew Ewart* having granted Bond in the 1695, narrating that the Sum of 6000 Merks provided in his Contract of Marriage with *Mary Canon* the Purſuer's Mother for the Daughters of the Marriage failing Male Children, was not ſufficient, and therefore obliging himſelf and his Heirs ſecluding Executors, to make Payment of the Sum of 10000 Merks to the Daughter or Daughters of that Marriage in Caſe there ſhould be no Male Children to enjoy his Eſtate; and the Marriage having diſſolved by the Death of the ſaid *Mary Canon* without any Male Children; *Griſſel Ewart* the only Daughter purſued her Father for Payment of the 10000 Merks with Annualrent thereof ſince her Mother's Death.

Alledged for the Defender. That his Obligement contains no definite Term of Payment, nor any Clauſe for Annualrent, but was only to take Effect in Caſe he wanting Heirs-male of the Marriage, ſhould give away his Eſtate to other Heirs-male and ſo diſappoint the lineal Female Succeſſion which hath not yet exiſted; nor can be known till his Deceaſe.

Replyed for the Purſuer. The true Meaning of the Bond was failing Sons of the Marriage to pay 10000 Merks to the Daughters one or mo, which Caſe exiſted ſo ſoon as the Marriage diſſolved, the Diſſolution whereof muſt be the Term of Payment. For had the Payment of the Sum been induſtriouſly delay'd till after the Father's Death; ſome Clauſe had been inſert importing ſo much either expreſly, or tacitely, by obliging only the Father's Heirs and not himſelf to pay, or by reſerving his Liferent. 2. The Daughter had been very ill ſecured by the Bond, if during the Father's Lifetime ſhe could neither uplift the Mony, nor crave Annualrent nor any Portion if married. Eſpecially conſidering, that by the Conception of the Bond Heirs only and not Executors are bound, and the Father might make all his Eſtate moveable.

The Lords found the Sum payable preſently.

Eodem die. *Competition betwixt* William Hamilton *of* Wiſhaw *and the Creditors of* Cleland.

IN the Ranking of the Creditors of *Cleland*, *William Hamilton* of *Wiſhaw* craved Preference for the Sum of 721 ℔. 1 ſh. 9 d. *Sterling* and the Annualrents on't reſting by *Cleland* as Collector of Supply for the Shire of *Lanerk* to the Commiſſars of the Army, and aſſigned by them to him, upon theſe Grounds, 1. The Collector's Eſtate was really affected, and liable to quartering, at the Inſtance of the Fisk for his Intromiſſions with the Supply; a publick privileg'd Debt, as well as the Eſtates of Heretors are liable for their ſeveral Proportions: For the King's Cuſtoms was found preferable to other Creditors, *June* 10, 1631, *Peebles* againſt *Scot*, and the Supply is no leſs privileg'd. And altho the Commiſſioners of the Shire, in Obedience to the Act of Parliament name the Collector, he as well as theſe his Conſtituents is directly liable to the Fisk and its general Receivers. So the Eſtates of Lords of Erection, Sheriffs, Baillies of Regality, their Deputes and Clerks were always found liable, and quartered upon for the whole Taxation impoſed upon their Erections or Juriſdictions, however ſmall their Property was, and as Collectors had Relief from Vaſſals, Tackſmen of Teinds and others conform to their particular Proportions. Several Acts of Parliament, and Convention of Eſtates appoint quartering, and other real Diligence againſt the Collector for his Intromiſſions, particularly the *Act of Convention* 1678, ordains quartering upon his Eſtate till he give up a Liſt of Deficients, conſequently here where there are no Deficients, the quartering muſt continue till he pay his Intromiſſions. And the *Act* 3. *Par.* 3. *Ch.* 2. provides, That the Collector, retaining in his own Hands any Part of the Supply longer than a Month after his Receipt thereof, ſhall be liable in Ten for each Hundred Pound, and to quartering or other Diligence beſide. 2. As the Fisk had real and preferable Diligence againſt the Collector's Eſtate, the like is competent to *Wiſhaw*, who is come in Place of the Fisk by a Diſcharge and Aſſignation from the general Receivers upon Payment made to them. For the real Privilege and Quality muſt accompany the Debt where ever it goes; Which is kept up againſt *Cleland*, notwithſtanding the Diſcharge whereby *Wiſhaw* as Cautioner and the Commiſſioners of the Shire are liberate. And if the Privilege were perſonal to the Fisk, and not communicable to Aſſignies, the Commiſſioners who are but Aſſignies themſelves, could not have it: Now if it can go to one Aſſigny, why not further to others by Tranſlation? Yea, by the known Cuſtom of the Treaſury and Exchequer, a Sheriff or any Perſon upon making his *Æque*, and getting Diſcharge; his Relief for what is paid continues *Debitum Fundi*, as effectual to him as if he had received an Aſſignation at the fitting of the *Æque*. And the Privilege or real Quality of a Debt hath been often found tranſmitted by Aſſignation, *January* 31, 1665, *Anderſon* and *Provan* againſt the Town of *Edinburgh*, *July* 28, 1665, *Adam Rae* contra *Heretors* of *Clackmannan*. And juſtly, ſeing Law gives the Privilege to the Debt, and not to the Perſons. 3. *Wiſhaw* is preferred by a Diſpoſition to him from *Cleland*, for Payment and Relief of his Debts and Cautionries: Which Diſpoſition is ſtill valid as to the ſaid publick Debt, albeit reduced upon the late Act anent Bankrupts, in ſo far as concerns his Debts and Cautionries. For the Diſpoſition as to the ſaid publick Debt is no voluntary Preference of one Creditor to another, but in Effect a declaring of that Preference formerly given by Law. 4. *Wiſhaw* ought at leaſt to be preferred to the Rents and Duties that were in the Hands of the Tenants or Factor at the Time of pronouncing the Interloquitor, *February* 7, 1705, whereby the voluntary Diſpoſition granted by *Cleland* was reduced, and the omitted Creditors admitted to a Share of the Eſtate. In regard the Diſpoſition was a good Title to hinder Repetition as to bygone Rents preceeding the Reduction, which were *bona Fide percepti* by *Wiſhaw*. Since the Publick's Poſſeſſion by a Party of Dragoons, and the Poſſeſſion of the Factor put in upon *Wiſhaw*'s Application muſt be underſtood his Poſſeſſion, ſo long as his Title ſtood unreduced. And *Wiſhaw* deſerved this much at leaſt from the Creditors whoſe *Negotium geſſit* in keeping the Lands from being laid waſte, by removing the quartering Party upon the Faith of his Right by the Diſpoſition.

Alledged for the other Creditors. The Clauſe in the Acts, about quartering upon the Collector, inſers no more a real Burden upon his Eſtate, than Lands purchaſed from Brewers are burdened in the Perſon of the ſingular Succeſſors, with the Reſts of Exciſe due by the Diſponers to the Publick as a *Debitum Fundi* : For a Brewer is ſubject to quartering for the Exciſe, but his Heretage is not really affected therewith ; Nor is the Ceſs a real Burden upon the Land-rent beyond each Heretor's Valuation. And therefore the particular *Quota* of Ceſs impoſed on the Shire of *Lanerk* can only affect the Collector's Eſtate in that Shire, according to the Proportion of his Valuation as an ordinary Heretor. And the other Executions of quartering againſt him are only perſonal Diligence. For the Acts not being expreſs as to the Collector's Lands, muſt be ſtrictly interpreted, according to the Rule *in dubio contra Fiſcum eſt reſpondendum* ; Eſpecially where the Fisk is ſufficiently ſecured by a real Burden upon the whole Lands in the Shire for their reſpective Proportions, the perſonal Obligement of the Collector and his Cautioners, and ſummar Execution againſt them. If the Lands of Collectors be liable, theſe of Tackſmen, Commiſſars of the Army, *&c.* muſt run the ſame Fate ; And their ſingular Succeſſors ſmart by the Bargain. Yea theſe might be made liable at their Author's Pleaſure by the cunning or malicious abſtracting of Diſcharges. The Faith of our Records would ſignifie little to Purchaſers, who behov'd to be at the endleſs Trouble of expiſcating, if any of their Authors were Collectors or Tackſmen, and how their Accompts were cleared. As to the Alledgeance, That the Cuſtoms of imported Goods have been found real : That is only as to the Subject bought, which correſponds only to *Cleland*'s *Quota* as Heretor. But then again, whatever may be as to the petty Burdens of Moveables of ſmall Value, which may be diſappointed by clandeſtine Abſtractions, that is not to be extended to the ruining the Security of heretable Rights. 2. What *Wiſhaw* might have obtained if the Fisk had not got Payment upon any other Terms is not the Queſtion, but only whether by Payment ſimply made to the Fisk the Privilege is extinct : Which muſt be allowed for theſe Reaſons. Payment by whomſoever made extinguiſheth the Obligement, ſo as in the *Roman* Law, a particular Conſtitution was found neceſſary to introduce the *Beneficium cedendarum Actionum.* Far leſs can the Creditor's Privilege paſs to the Cautioner making Payment ſimply without ſecuring himſelf by a real Relief. Thus an Heretor's Hypotheck for a Year's Rent, after he diſcharged the Tenants, is not competent to an Appriſer without Infeſtment or Poſſeſſion againſt Merchants who bought the Farm for the Price, *July* 29, 1675, E. *Panmure* contra *Colliſon*. And the Shire which was principally bound to the Publick, being diſcharged upon *Wiſhaw*'s paying *eorum Nomine*, the Privilege of the Debt is extinct, tho it ſelf may ſubſiſt as a private perſonal Debt *quoad* theſe bound in Relief to the Payer. 3. The Diſpoſition being made by a notour Bankrupt, and ſo abſolutely null by the Act of Parliament 1696, doth not alter the Caſe. For it was found, *betwixt Baillie* Man *and Baillie* Reid *Creditors of* Wales *in* Dundee, That the Receiver of ſuch a Diſpoſition of Moveables could not by Virtue thereof come *in pari Paſſu* with other Creditors doing Diligence poſterior to the Diſpoſition and Poſſeſſion thereon, which was found to operate nothing. 4. *Wiſhaw* can have no Pretence to the Rents preceeding the falling of his Diſpoſition : Becauſe, that was a legal nothing ; A Diſpoſition by a Bankrupt in the Terms of the new Statute being ſimply void and null *ab Initio*, that it could not ſubſiſt as a Security. Nor is the Dragoons or Factor's Poſſeſſion to be eſteemed *Wiſhaw*'s Poſſeſſion : For quartering is Military Compulſion, and no Title of Poſſeſſion of the Rents of Lands. The Party quartered cannot uplift a Sixpence of the Rent, or poind ſo much as a Hen-chicken for Payment of the Ceſs ; All they can do is to uplift for their own Locality at the eſtabliſhed Rate of ſo much *per Diem*. Beſides, the Party could not quarter after the Debt was extinguiſhed by *Wiſhaw*'s taking a Diſcharge from the Publick; And there was a Year's Interruption betwixt the quartering and the Factor's Poſſeſſion. As to the Factor's Poſſeſſion, it was alike to all Creditors; For the Factory bears expreſly to be granted for the Behoof of ſuch as ſhould be preferred in the Ranking. And *Wiſhaw* being Cautioner for his Son in Law can have no Conſideration for his relieving the Lands of quartering: Becauſe, *qui proprium Negotium geſſit non repetit*. Nor can an Adjudger get from a Co-adjudger within Year and Day the Expence of changing the Holding from Simple to Taxward, *February* 20, 1683. 5. Any Action competent to the Commiſſars for the Ceſs againſt the Collector was preſcribed, by the elapſing of Three Years ſince the ſame fell due before the Aſſignation in Favours of *Wiſhaw*.

Anſwered for Wiſhaw. The Triennial Preſcription is only in Favours of Heretors, and cannot be ſtretched to exeem Collectors who are liable by Law, and by Bond and Caution given to the Publick. 2. The Preſcription was interrupted by *Cleland*'s Diſpoſition, and Decreets againſt him.

Replyed for the other Creditors. Tho the perſonal Obligement of Collectors and their Cautioners may endure till the long Preſcription, the *privilegiata Obligatio et Condictio ex Lege* expires after Three Years. 2. The Diſpoſition could be no Interruption of the Three Years Preſcription, becauſe the *Act* 1701, allows only of Interruption by Horning and Denunciation.

The Lords found the Diſpoſition granted by *Cleland* to *Wiſhaw*, and other Perſons therein-named null *ab Initio*, both as to the Preference thereby given for the Sum due by *Cleland*, as Collector of the Shire to the Commiſſars of the Army, and as to the other Debts therein-contained. And therefore found, That *Wiſhaw* and the other Creditors in that Diſpoſition had no Right thereby to the bygone Rents of the Eſtate preceeding the Interloquitor, *February* 3, 1705.

February 13, 1706. Gavin Plummer *contra* Archibald Houſtoun.

ARchibald *Houſtoun* being charged at the Inſtance of *Gavin Plummer*, for Payment of an accepted Bill drawn upon him by his Brother Mr. *James*, payable to the Charger; He ſuſpended upon this Reaſon, That he offered to prove by the Charger's Oath, that the Bill was granted in Payment of the Fourth Part of a Ship ſold by him to the Drawer, which Sale is not made effectual by Reaſon of prior Bottomries affecting the Ship, and therefore the Charger cannot ſeek Payment of the Bill.

The Lords thought the allowing to prove the Exception of *Cauſa data non ſecuta*, againſt a Stranger or third Party to whom a Bill is indorſed, might prove a Stop to the neceſſary Courſe of Bills. But the Queſtion here being betwixt the firſt Creditor in the Bill and the Accepter, they found it relevant for the Suſpender to prove the Cauſe on't by the Charger's Oath: And he acknowledging that it was granted for the Vendition of the Fourth Part of a Ship; allowed the Suſpender to prove he was debarred by preferable Debts affecting the ſame.

Eodem Die. Helenor Dauſon *and Eſquire* Hill *her Husband, againſt* Murray *of* Spot *and his Creditors.*

ARchibald *Douglaſs* of *Spot* having, 4 *Auguſt* 1671, diſponed his Eſtate to *William Murray* of *Dunipace* his Brother in Law, upon his giving a Back-Bond of the ſame Date for 40000 Merks, payable to the Diſponer and the

Heirs of his Body, and failing theſe to be null, and in all Events affected with the Warrandice of the Diſpoſition: In the Year 1699, *Helenor Dauſon* Relict of the ſaid *Archibald Douglaſs* and Eſquire *Hill* her Husband, purſued a Declarator of Truſt and Extinction of the ſaid Diſpoſition upon a Back-bond they had Right to, granted by the ſaid *William Murray* to the ſaid *Archibald Douglaſs*, dated 28 of *Auguſt* 1671, acknowledging his Right to the Eſtate of *Spot* to be only in Security of 40000 ℔. and that he ſhould impute the Rents exceeding the Annualrent in Payment of the principal Sum. *William Murray* raiſed Improbation of this Back-bond as falſe and forged, and obliged the Purſuers to abide by. And when they inſiſted in their Declarator, It was alleged for *Spot* and his Creditors, That the Back-bond purſued did not only ly under the violent Preſumptions of Falſhood, but was null, and incompatible with the former Back-bond, of the ſame Date with the Diſpoſition, owned and acknowledged by *Archibald Douglaſs*'s granting Diſcharges of Annualrent conform thereto during his Lifetime, who lived long after the Date of the pretended ſecond Back-bond.

Alledged for the Purſuers. 'Tis not competent to offer other Objections of Nullity and Incompatibility after Litiſconteſtation upon the Exception of Falſhood that is *omnium ultima*.

Anſwered for the Defenders. Tho *Exceptio Falſi eſt ultima* hath paſt into a Rule for preventing confuſed and ſuperfluous Debate, and that an Exception ſo grievous and troubleſom to the Party to whom it is made, might not be alledged at Random: Yet that cannot be ſo interpreted, as to exclude the Exception of a manifeſt Nullity ariſing from the Writ it ſelf, and inſtantly verified. Since ordinarily after Litiſconteſtation upon any Defence, and Probation led, clear Nullities inſtantly verified are allowed to be proponed at adviſing. All Forms of Procedure are but deſigned to ſerve Juſtice; and no material Prejudice can be alledged againſt the admitting of Exceptions inſtantly verified. 2. Falſhood was not here objected by Way of Exception but by Way of Action of Improbation, in which Caſe it might be inſiſted in without Prejudice to the Exceptions and Defences competent to the Purſuer, againſt the other Parties Declarator when inſiſted in by them. Beſides, it was *Murray* of *Spot* who raiſed the Improbation, and never inſiſted therein, and his Creditors are now defending their Rights and Diligences upon his Eſtate, to whom it is intire to object ſuch obvious and pregnant Nullities or Incompatibilities againſt the pretended Back-bond, notwithſtanding that their common Debtor thought fit to attack it firſt by an Improbation. Yea lately, In a Caſe of Falſhood inſiſted in betwixt *Drummelzier* and *Wallace*, Witneſſes having acknowledged their Subſcription, but that they ſaw not the Party ſubſcribe, the Writ was found null, tho not falſe. 3. *Eſto* the laſt Back-bond were true and formal; Yet *Archibald Douglaſs*'s receiving Payment of Annualrents, conform to the firſt Back-bond long after the granting of the ſecond, renders the ſecond Back-bond null and ineffectual as incompatible with the firſt. For by the firſt Back-bond *William Murray* is Proprietar, and *Archibald Douglaſs* only a Creditor; Whereas by the ſecond the latter Proprietar, and the former ſimply Creditor.

Replyed for the Purſuers. If *Exceptio Falſi* be *ultima* as to other Exceptions, it muſt be ſo as to Nullities, which have no greater Privilege than other Exceptions, and rather ſhould be leſs privileged 'cauſe they are obvious; and a Perſon paſſing them over and entring in Litiſconteſtation, homologates the Writ. But granting that Nullities were receivable after proponing of Falſhood; Incompatibility is no Nullity. 2. There is no Incompatibility in the Matter, for in Laws and Contracts *poſteriora derogant prioribus*, and the ſecond Back-bond regulates the firſt. 3. Incompatibility is a dangerous Topick in Matters of Truſt, *ubi aliud agitur, aliud ſimulate concipitur*, and theſe Conveyances pleaſe and ſucceed beſt, that are in Appearance moſt contradictory and myſterious.

The Lords found the Objection of Nullity and Incompatibility receivable, notwithſtanding of the Objection of Falſhood; and found the two Back-bonds to be incompatible: And that the receiving of Payments conform to the firſt Bond after the Date of the ſecond, renders the ſecond null as incompatible with the firſt.

Eodem Die. *The Dutcheſs of* Hamiltoun, *againſt* Daniel Campbell *Collector at* Portglaſgow.

IN the Action mentioned *ſupra*, *January* 18, 1706, at the Inſtance of *Daniel Campbell* Collector at *Portglaſgow*, againſt Sir *Alexander Anſtruther*; The Lords having found, That Mr. *Campbell*'s Letter did not impower Sir *Alexander* to enter into a Minute of Sale with the Dutcheſs; Compearance was made for her Grace, who claimed the Benefit of the Clauſe in her Favours in the ſaid Letter, *viz.* That ſhe might have the Bargain upon ſuch a reaſonable Conſideration as the Lords ſhould modifie.

Anſwered for Daniel Campbell. The Clauſe in his Letter imports no Conceſſion or Ground of Claim in Favours of her Grace, but only *Verba officioſa*, a fair Compliment at moſt, or Velleity to treat with her if ſhe were deſirous; Which obliged him to nothing, far leſs to diſpone an heretable Right without any Treaty or Agreement, at the Lords Arbitriment. For the Letter was not writ to the Dutcheſs, nor is it found to liberate Sir *Alexander* to whom it was directed. And her Grace not being bound to Mr. *Campbell* to accept of the Bargain; 'Tis inconceivable why he ſhould be obliged to let her have it. And her now declaring her Acceptance ſignifies nothing: For if third Parties ſhould be allowed to catch at Words paſſingly ſpoke betwixt others, all common Converſe would be dangerous and inſnaring. Yea, a Letter declaring that the Writer was not to paſs from a certain verbal Communing, was not found obligatory to cut off *Locum Penitentiæ*, *January* 28, 1663.

Replyed for the Dutcheſs. Letters are as obligatory as other Writs, to juſtifie the Receiver as to any Thing that follows in Conſequence thereof; *January* 3, 1677, E. of *Argyle* againſt L. of *M'naughtoun*. As for the Deciſion 1663, it concerns not the Caſe in Hand; for there *Brown*'s Letter did only expreſs his Reſolution to adhere to a verbal Communing, which could not deprive him of his *Locus Penitentiæ*, ſeing the Bargain was to have been perfected in Writ: Whereas no Man will ſay but Mr. *Campbell* might paſs from a perfected Minute by a Line under his Hand in Favours of a third Party. It alters not the Caſe, that the Letter is directed to Sir *Alexander*, and not to the Dutcheſs; for a Clauſe in a Writ conceived in Favours of an abſent third Party, is as much their Right as if they were preſent. And Mr. *Campbell*'s Letter doth not appear to have been ſo overly writ as he now pretends; ſeing he is careful that his yielding the Bargain to her Grace ſhould not be for nothing, but for a Conſideration, which implies ſomething of more Caution and Deliberation than his new Gloſs will admit of.

The Lords found *Daniel Campbell*'s Letter did not oblige him to let the Dutcheſs have the Bargain.

February 14, 1706. *Earl of* Leven, *againſt* James Durham *of* Largo, *and* James Nicolſon *of* Trabrown.

IN the Competition of the Creditors of *James Young* of *Kirktoun*, *Durham* of *Largo*, and *James Nicolſon* of *Trabrown*, having founded on two

Inhibitions, one in the Year 1667, and the other in the 1668, for ſupporting the Preference of their Rights: The Earl of *Leven* objected againſt theſe Inhibitions, That 1. No Reſpect could be had to the Inhibition 1667, in Regard neither the Inhibiter nor the Perſon inhibited are otherways mentioned in the Execution, than by their Names with the Quality of within deſigned, altho the Execution be a Paper apart: which is contrary to the Act of Parliament 1672, and might refer to all of the ſame Name tho not concerned in the Inhibition; and did not ſufficiently certiorate the Lieges whom they are diſcharged to bargain with. 2. The Execution at the Market-croſs wants the Words *open Proclamation*, and bears only Three Oyeſſes, open and publick reading; which is a Nullity: For Three Oyeſſes might be muttered, and open and publick reading ſignifies no more than it was read at the Market-croſs, which might have been quietly done. 3. The Inhibition 1668, is null, becauſe the Execution thereof, tho upon a ſeparate Paper inhibites only the Lieges in manner within-written, without ſpecifying what they are inhibited to do.

Anſwered for Largo. There was no Law or Cuſtom at the Time requiring the Raiſer of the Inhibition, and the Perſon againſt whom it was raiſed to be ſpecially deſigned. It matters not that the Execution is not upon the Back of the Letters; Seing it is duly regiſtred therewith, and the Act of Parliament 1672, requiring the ſpecial Deſignation of Purſuer and Defender in ordinary Summonſes, extends not to Inhibitions. Becauſe, the Executions of theſe being regiſtrate with the Letters, the Lieges cannot be impoſed upon by ſhuffling in one in Place of another. 2. Open and publick reading implies open Proclamation: And Three Oyeſſes import a loud Proclamation and Intimation to all Perſons with an audible Voice. 3. In the Executions of the Inhibition 1668, the Lieges being inhibited and diſcharged in Manner within-written, to the Effect and for the Reaſons and Cauſes within-ſpecified, *&c.* The ſame are ſufficiently formal according to the Cuſtom of that Time. And the Lieges are ſufficiently certiorated by the Meſſenger's Execution relative to the Letters bearing all the prohibitory Clauſes, and by a Copy of the Letters affixt to the Croſs, and inſert in the Regiſter. Beſides, not only Executions of Inhibitions and Charges of Horning are thus relative to the Letters, as the Warrant, which are regiſtred: But alſo the Executions of all other Summonſes not in Uſe to be regiſtred are ſo conceived.

The Lords having after Trial found the Stile of many Executions of Inhibition about the Time of theſe quarrelled to run in the ſame Strain; They repelled the Nullities, and ſuſtained the Inhibitions: Becauſe, the ſuſtaining ſuch Grounds of Nullity might open a Door to queſtion many Diligences, and the Regiſtration aſcertained the Parties, ſo as one could not be miſtaken for another.

Eodem Die. Andrew Ker *of* Moriſtoun, *againſt* Thomas Calderwood *in* Dalkeith, *and* John Hamilton *of* Elderſhaw.

IN the Ranking of the Creditors of *Eccles*, *It was alledged for Moriſtoun*, That *Thomas Calderwood* and *Elderſhaw*'s Adjudications were null, as proceeding upon Decreets *Cognitionis Cauſa* that were null. Becauſe, 1. They're pronunced by the Commiſſar of *Lauder*, who was not competent to judge in the Conſtitution of Debts againſt Repreſentatives exceeding Fourty Pounds. 2. They bear not the apparent Heir to have been cited in the Proceſs: And Citation is a Formality ſo eſſential in a Decreet, as the very Omiſſion to mention the giving thereof, tho truly given, is a Nullity intrinſick not ſuppliable; more than any Solemnity forgot out of a Seaſin could be ſupplied. So in a Caſe betwixt *David French* and Mr. *David Dewar*, a

Decreet was found null for not bearing Production of the Bond libelled on; and a ſecond Extract thereof found null in Reſpect it did not mention the Production of the Letters of general Charge to enter Heir: And theſe Nullities not ſuppliable, albeit the Bond and general Charge were actually produced.

Anſwered for Calderwood and Elderſhaw. It were hard to overturn Decreets of Cognition obtained before Commiſſars upon the Head of Incompetency: Seing many Diligences and Securities of the Nation are founded on ſuch Decreets. Beſides, the Commiſſars Juriſdiction here was prorogated by a Procurator compearing and producing a Renunciation for the Defender, and proteſting to be aſſoilzied: For *primus Actus Judicii eſt Judicis Declinatorius.* 2. It is preſumed that the apparent Heir was legally cited from his Compearance by a Procurator producing a Renunciation, and proponing no ſuch dilatory Defence. Yea the Decreet mentioning that the Commiſſars having conſidered the Libel, Bonds produced, general Charge to enter Heir, with the Executions thereof, *&c.* The Word *Executions* muſt relate to the Libel as well as to the general Charge: Seing there is but one Execution of the general Charge.

Replyed for Moriſtoun. The Production of a Renunciation by a Procurator officiouſly compearing for the apparent Heir, is of no Moment: Seing the Renunciation produced is but an Extract of a general Renunciation put in the Regiſter by the apparent Heir, and probably taken out by the Purſuer, and produced by a Procurator imployed by him. For the apparent Heir's Compearance could not be inferred from a Procurator without a ſpecial Mandat, or a principal Renunciation.

Duplyed. As the Procurator's Compearance was profitable for the Defender, in exeeming him from the paſſive Titles; ſo the Production of the Renunciation was a ſufficient Mandat. For what is more uſual than to ſee Heirs refuſing to enter, regiſtrate a general Renunciation and give Extracts thereof when required for avoiding the Multiplicity of writing and ſubſcribing Renunciations.

The Lords thought this a quite different Caſe from that betwixt *Dewar* and *French*; and therefore repelled the Objections, and ſuſtained the Decreets of Adjudication *& Cognitionis Cauſa.*

Eodem Die. ACT *of* SEDERUNT *anent the Signet.*

THE Lords of Council and Seſſion underſtanding that the Wax commonly uſed at the Signet, is ſo bad, that it is altogether unfit to receive the Impreſſion or Stamp of the Signet, and that ſometimes the making any Impreſſion or Stamp upon the Wax is neglected, which may give the Occaſion to great Inconveniencies and Abuſes: Therefore the Lords do Appoint and Ordain the Keepers of the Signet, and their Deputes for the Time, to be careful, that good and ſufficient Wax, moſt fit to receive the Impreſſion be provided, and that there be no Neglect in Time coming of ſtamping the Signet upon the Wax; And that for preſerving of the ſaid Impreſſion, there be a Ring of Paper upon the ſaid Wax, ſo large as to receive the Impreſſion within; and Appoint Intimation of this Act to be made to the ſaid Keepers, and the ſame to be recorded in their Books, and that they be careful to intimate the ſame to the Writers to the Signet.

February 15, 1706. Roſe Fincham *Relict of* James Muirhead *of* Breadiſholm *younger, againſt* James Muirhead *of* Breadiſholm *her Father in Law.*

IN the Proceſs at the Inſtance of the young Lady *Breadiſholm* againſt *James Muirhead* of *Breadiſholm* her Father in Law, for the Expence of her lying in of a *poſthumus* Child, and his Aliment ſince he was born, and for the Aliment of another Child ſince her Husband's Deceaſe, and their Aliment in Time coming: It was alledged for the Defender, That no Allowance could be given for Bygones, becauſe, *Nemo alitur de præterito*, and the Expence of bygone Aliment is already born; Nor any Modification of Aliment for the future, ſince he was content to take his Grand-children home to his own Houſe, and to keep them with his own Children till they were in Caſe to do for themſelves.

Replyed for the Purſuer. That Law gives the Cuſtody of Children to the Mother from the Preſumption of her tender Care and Affection, except in the Caſe of a ſecond Marriage, or when ſhe is to ſucceed to the Children. And tho' by the civil Law the Office of Tutory was competent to the neareſt Agnat; the Pupil's Education was committed to him, who *ex Affectione Conditioneque Perſonæ magis idoneus judicatur*, L. 2. ff. *ubi Pupillus educari debet*; but never to Perſons ſuſpected. Therefore the Purſuer's Indifference for the poor Infants, and Unkindneſs to their Parents, is good Ground to exclude him from the Cuſtody of 'em, and to oblige him to aliment them with the Mother, according to his Ability.

Duplyed for the Defender. If the Children had a Stock and Means of their own, and the Conteſt were only about the Cuſtody of them, the Purſuer might have ſome Pretence; but when ſhe craves the Grandfather to intertain them out of his own Fortune, he ſhould be preferred. It's the ſtrangeſt Confidence to pretend to force a Grandfather to give the Purſuer an Aliment to Children begot in his Son's Marriage with her, of which he was never adviſed. The Citations from the civil Law are not to the Purpoſe. For no Man denies that the Relict living in Widowity virtuouſly, is often preferred to the keeping of her own Children before the neareſt of Kin, Tutor in Law, or Tutor dative: But the Queſtion here is, where, and by whom, Children that have nothing of their own ſhould be alimented. As to the malicious Inſinuation that the Defender and his Wife are Perſons ſuſpected to have no good Deſigns againſt the Infants, he takes no Notice thereof, being confident it would have no Impreſſion upon, or Credit with any Man that knows him.

The Lords found the Purſuer muſt have Allowance for the Expence of her lying in Childbirth, and for the Maintenance of her two Children ſince her Husband's Death, and remitted the Modification to the Ordinary: But refuſed to modify any Aliment for the Children in Time coming, in Reſpect the Defender was willing to take them Home to his own Family. For tho' Infants are not to be taken from the Mother during her Widowity, if ſhe offer to keep them *gratis*; yet the Grandfather may exclude her from ſeeking Aliment for them, by accepting them into his Houſe.

Eodem Die, Griſſil Young *and her Husband againſt* Adam *and* William Craicks, *Sons to* William Craicks *late Provoſt of* Dumfries.

IN the Proceſs at the Inſtance of *Griſſil Young* and her Husband againſt Provoſt *Craicks* Sons, for redeeming a Houſe and ſome Acres of Land in *Dumfries*, diſponed by *James Young* of *Broomridge* her Father to the Defenders Father in the Year 1675, upon this Ground, That he ſtood obliged by a Back-bond to rediſpone to the Diſponer, upon his repaying the Price.

Alledged for the Defenders. That their Father's Back-bond was conditional in Caſe the Price were repayed betwixt and a preciſe Term, which was ſo far from being performed, That ten Years thereafter *James Young* purſued the Provoſt for a ſmall Remainder of the Price, and for a *Jacobus* which he alledged was promiſed to his Wife at making the Bargain: and thereby had paſt from the Reverſion, which is *ſtricti Juris*, 2. *William Craick* of *Duchrae* one of the Defenders being ignorant of any ſuch Back-bond, had accepted of a Diſpoſition to the Houſe and Acres from his Father, and *bona Fide* ſold them to a third Party: So that it is not in his Power now to rediſpone; and the Purſuer can only claim Damage and Intereſt *Loco Facti impreſtabilis*.

Replyed for the Purſuer. That even temporary Reverſions of heretable Rights may be purſued at any Time before a Declarator of Extinction, tho' conceived by Way of Irritancy, if not claimed within a certain Time. The Reverſer is ſtill allowed to purge before Decreet; And even after a Decreet of Declarator of the Irritancy, the Lords are in Uſe to ſuperſede Extract for a Time, within which the Redemption may be made. Yea, Lands were allowed to be redeemed after elapſing of the Term in the Back-bond: Altho' it bore, That the Reverſion ſhould be void and null without Declarator, if the Money was not payed within the Time prefix'd; *July* 8, 1636, *Cleghorn* contra *Ferguſon*, *February* 1, 1677, Earl of *Tullibardin* contra *Murray* of *Auchtertyre*; Such Renunciations of the Benefit of Redemption being condemned and reprobate in Law as odious, uſurious and oppreſſive, of the Nature of *Pacta Legis Commiſſoriæ*. For who would ſeek ſuch a Back-bond, if the Lands diſponed were not better than the Price paid: And if better, why ſhould an indigent Perſon be ſo taken Advantage of; when the other has no Loſs by getting his Mony? 2. A Proceſs for the Remainder of the Price was conſiſtent with the Bond of Reverſion, becauſe the Diſpoſition and Back-bond bore the Receipt of the whole Price, which might have been loſt if not purſued while Provoſt *Craick* lived. And it is uſual enough at the granting of redeemable as well as irredeemable Rights, to promiſe ſome Compliment or Gratification to a Wife or other Perſons for their interpoſing to help to make the Bargain.

Duplyed for the Defenders. The Reverſion of this Back-bond is not *Pactum Legis Commiſſoriæ*, which our Law allows to be purged at any Time before Declarator: But an Obligement to paſs from a Sale for a competent adequate Price; which is only effectual if purſued within the limited Time, *January* 17, 1679, *Beatſon* contra *Harrower*.

Triplyed for the Purſuers. The obtruded Deciſion betwixt *Beatſon* and *Harrower* doth not meet: For there a Perſon having Right from *G. Bane* by Progreſs, purſued the Redemption contrary to the Terms of the Reverſion which was perſonal to *Bane*.

The Lords found the Lands ſtill redeemable in Reſpect of the Back-bond, notwithſtanding that the Time prefix'd for the Redemption was long elapſed.

Eodem Die. Alexander Duncan *of* Strathmartin, *againſt* John Scrimzeour *of* Kirktoun.

W*intoun* of *Strathmartin* having granted Bond for 600 Merks to *William Nicol* Hammerman in *Lundie* docket thus; *I have ſubſcribed thir Preſents, written by* George Henderſon *at* Auchterhouſe *this Eleventh Day of* December 1685 *Years, before thir Witneſſes,* Abraham Nicol *Hammerman in* Auchterhouſe, Patrick Henderſon *eldeſt lawful Son to the ſaid* George Henderſon *Writer hereof, and the ſaid* George Henderſon: *Alexander Duncan* purſued Reduction thereof againſt *John Scrimzeour* upon this Ground, That the Bond is null as wanting the Writer's Deſignation; and one of the Witneſſes is only deſigned, *Patrick* being deſigned by his Father who is not deſigned.

Alledged for the Defender. Theſe Words, *At Auchterhouſe* are rather to be underſtood as the Deſignation of the Writer, than of the Place of ſubſcribing:

Seing the not mentioning of the Place is no Nullity; and Interpretation is ſo to be made *ut Actus potius valeat, quam pereat.* Unleſs we ſay that a Country Clerk did think it a Piece of Eloquence to expreſs the Place of Subſcription and his own Deſignation in one Word. 2. *Patrick Henderſon* is deſigned eldeſt lawful Son to *George Henderſon* the Writer, and the ſaid *George* is deſigned Father to *Patrick*; and both the *Henderſons* lived at *Auchterhouſe*.

Anſwered for the Purſuer. The Writer cannot be underſtood as deſigned by the Place of ſubſcribing; becauſe, the Bond bears to be written by *George Henderſon at*, and not *in Auchterhouſe.* And then the Mention of the Place of ſubſcribing is eſſential to a Writ, and reckoned *inter Subſtantialia*; *Stair, Inſtit. Lib.* 4. *Tit.* 42. §. 19. as the proper Mean to convel a falſe Writ by proving *alibi.* 2. A Witneſs in a Bond granted by Mr. *James Carnegie* as Principal, and the Earl of *Southesk* as Cautioner to two of the Clerks of Seſſion, being deſigned *James M'culloch* Inſerter of the Witneſſes Names; the Writ was found null for Want of a ſufficient Deſignation; altho' the Perſon might be thereby more eaſily known and diſtinguiſhed than by theſe Words, at ſuch a Place.

The Lords found the Deſignation ſufficient, and repelled the Nullity.

Eodem Die. *The Ladies of* Caldwel *elder and youger, and* John Fairly *Huſband to the young Lady for his Intereſt, againſt Sir* Thomas Dalziel *of* Binns.

THE deceaſt *William Muir* of *Caldwel*, having been forfeited in the Year 1667, and his Forfeiture thereafter gifted to the deceaſt General *Dalziel*, and reſcinded both by the general Act Reſciſſory, and a ſpecial Act in the Year 1690, *per Modum Juſtitiæ*; The young Lady *Caldwel* as Heir and Executor to her Father, and the old Lady for her Liferent Right and Intereſt, purſued Sir *Thomas Dalziel* of *Binns*, Grandchild to the Donatar, as having accepted a Diſpoſition from him, with the Burden of all his Debts contracted, or to be contracted, as if he were his Heir, for Payment of the Rents of the Eſtate of *Caldwel*, intrometted with by the ſaid Donatar, or his gratuitous Aſſignies during the Forfeiture.

Alledged for the Defender. That *eſto* he were liable to all his Grandfather's Debts, they muſt be Debts of the Defunct before they can affect him. That is, they muſt either be ſuch as were conſtitute againſt the Defunct in his own Lifetime, or againſt his Heir. 2. The Defender's Acceptation of a Diſpoſition with the Burden of all Debts that ſhould be owing by the General the Time of his Deceaſe, cannot make him liable for this Debt, which did not then exiſt, nor at the Time of the Acceptance of the Diſpoſition was thought to be a Debt: *Et Actus agentium non operantur ultra eorum Intentionem.* 3. The Defender cannot be liable in Repetition of Bygones intrometted with by ſuch a colourable Title as the Act of Parliament 1669, ratifying *Caldwel*'s Forfeiture, with the Sovereign's Gift thereof: Seing *Poſſeſſor bona Fide facit Fructus conſumptos ſuos.* 4. The ſpecial Act reſcinding *Caldwel*'s Forfeiture, does not bear an Exception from the Act *Salvo* paſt in that ſame Seſſion of Parliament, which excepts only ſuch Acts, as by an expreſs Clauſe therein are excepted from the Act *Salvo.* So that *Caldwel* is only reſtored by the general Act which appoints not Repetition of Rents intrometted with before the 1688, ſimply to Perſons thereby reſtored, but upon the Condition of their obtaining ſpecial Acts. Now the Purſuers ſpecial Act is null, as falling under the Act *Salvo.*

Replyed for the Purſuer. The Defender having taken upon him the Burden f Debts muſt defend againſt their Conſtitution, or ſuccumb without any Neceſſity upon the Purſuer to call the General's Heir: More than a Creditor would be obliged to call Executors before he could purſue for a moveable Debt. . This was truly a Debt the Time of the General's Death, tho' then *peti non poterat*, 'cauſe of the Forfeiture, in ſo far as the ſame had its Riſe from the General's Intromiſſions without a juſtifiable Title, and affects *retro.* That the General and the Defender never dream'd this Debt would have been effectual againſt them, is a frivolous Alledgeance: For what is more ordinary, than to ſee Debtors and Heirs ſurprized with Debts they little thought of? 3. To pretend a colourable Title and Poſſeſſion *bona Fide* of a Forfeiture reſcinded *funditus per Modum Juſtitiæ*, is contrary to, and would defeat the Deſign of the Law: For then no Repetition of Bygones preceeding the Act reſciſſory could be obtained. Beſides, Forfeitures in the Perſon of Donatars are at beſt but odious, and he who intromets by Virtue of a Gift of Forfeiture ſubjects himſelf to all the Hazards and Repetition, and can never pretend to a *Titulus coloratus*, or *bona Fides*: Which alſo holds in many other Caſes of the Law, where Reductions are decerned *ab Initio.* 4. The ſpecial Act, reſtoring the Repreſentatives of the Laird of *Caldwel*, needed not to be excepted from the Act *Salvo*: Becauſe, that Act includes no ſtatutory Laws, but only Ratifications and Acts in Favours of particular Perſons; Whereas the ſpecial Act in Favours of *Caldwel* is plainly ſtatutory, reſcinding the Act of Parliament *1669*, and all Proceſſes of Forfeiture before the Juſtice Court in Abſence, as contrary to the *Act 90. Parl. 11. Ja. 6.* The general Act reſcinding Fines and Forfeitures is expreſly excepted from the Act *Salvo*, and by this general Act, Perſons reſtored are allowed to bring in ſpecial Acts of Parliament in their Favours, in Order to Reſtitution *per Modum Juſtitiæ.* So that *Caldwel*'s ſpecial Act, if it could have been included in the Act *Salvo*, is alſo expreſly excepted as a Part of the general Act.

The Lords found, That Sir *Thomas*, having accepted a Diſpoſition from his Grandfather, with the Burden of all his Debts, was liable to the Debt his Grandfather had contracted by his Intromiſſions with the Eſtate of *Caldwel*, either by himſelf or his gratuitous Aſſignies; and that the Purſuers were founded in a ſpecial Act of Reſtitution giving them Right to the Bygones preceeding *Martimaſs* 1688; and that this ſpecial Act, being ſtatutory, needed not to be excepted in the Act *Salvo*; And if there had been Neceſſity for any ſuch Exception, it was ſufficiently provided by the general Act reſciſſory, the Foundation of the ſpecial Act. The Defender's Alledgeance upon Poſſeſſion *bona Fide*, by Virtue of a *Titulus coloratus* was repelled, as incompetent againſt a Reſtitution *per Modum Juſtitiæ, & tanquam ab Initio.* Neither did the Lords regard his other Alledgeance, That the Grandfather's Intromiſſions could not be reckoned a Debt to burden him by the Quality of the Diſpoſition, unleſs the ſame had firſt been conſtituted againſt the Grandfather's Heir of Line.

February 20, 1706. *Competition betwixt* Alexander Stewart *of* Torrence, *and the other Creditors of* George Dundas.

IN the Competition betwixt *Alexander Stewart* of *Torrence*, and *Walter Stewart* of *Pardovan*, as Creditors to *Bonhard*, and *George Dundas*, The Lords 26 of *June* 1705, having found *Pardovan*'s Adjudication of an heretable Bond granted by *Walter Cornwal* of *Bonhard*, to *George Dundas* Merchant in *Leith*, preferable to *Torrence*'s Arreſtment thereof; in Reſpect the Citation in the Adjudication was prior to the Arreſtment, tho the Decreet was poſterior: *Torrence* did thereafter inſiſt for Preference upon the Priority of his Arreſtment againſt the other Adjudgers, who could not plead the Circumſtance of an anterior Citation.

Alledged for the Adjudgers. *Torrence*'s Arreſtment was not to be reſpected, becauſe Infeftment had followed upon the heretable Bond, which rendred the Subject not arreſtable.

Anſwered for Torrence. That the Inſtrument of Seaſin was null as to him a third Party, through not being regiſtrated conform to the Act of Parliament 1617.

Replyed for the other Creditors. That an unregiſtrate Infeftment is not ſimply null, but valid as to ſome Effects, and is good againſt the Granter and his Repreſentatives; and therefore the Subject was thereby rendred incapable of Arreſtment. Yea, the heretable Bond not being arreſtable the Time of the Arreſtment, by Reaſon of the Seaſin; The inhabile Diligence could not thereafter revive through the Neglect of regiſtrating the Seaſin within Sixty Days, which were but half run the Time of uſing Arreſtment. Nay further, That the Sum was heretable and not arreſtable, appears from hence, That it could not have been tranſmitted by *George Dundas* the Creditor's Death to his Heirs, without a ſpecial Service, or Precept of *Clare conſtat.* Nor can the Nullity of an Infeftment in Lands be objected by any who have not a real Right themſelves, *March* 24, 1626.

Duplyed for Torrence. The Seaſin is as much null *quoad* him, as if declared null to all Intents and Purpoſes: He not being in the Caſe of theſe againſt whom it can be effectual. And there is no Neceſſity for *Torrence* to plead, That his Arreſtment reviv'd by Neglect of the Regiſtration within Sixty Days: For his Arreſtment was certainly good *ab Initio.* True, The due Regiſtration o the Seaſin, within Sixty Days after Arreſtment was uſed, would have evacuated the Arreſtment: But the Seaſin unregiſtrate was never a legal compleat Deed whereupon to compete with a third Party. 2. 'Tis own'd that the Sum null as the Seaſin is, is heretable, and would not have paſs'd to the Heirs o *George Dundas*, without a Service; but then the ſame is ſtill arreſtable *quoa* *Torrence* a third Party: For a null Seaſin, and no Seaſin are much the ſame And ſince the Act of Parliament 1617, declares an unregiſtrate Seaſin to make no Faith in Judgment; this is as ſtrong as any Certification in an Improbation would be. To pretend that the Seaſin is good againſt the Arreſtment, becauſe it was valid when the Arreſtment was uſed, and might have been regiſtred at any Time within a Month after the Arreſtment, is but to cavil: For we are not to regard what might have been done, and was not done.

The Lords found the Bond arreſtable, and preferred the Arreſter.

Eodem Die. William Haliday *Burgeſs of* Edinburgh, *and* Arthur Temple, *againſt* Adam Gardine *of* Greenhill.

IN the Action at the Inſtance of *William Haliday* Aſſigny by *Arthur Temple* Liferenter of a Tenement of Houſes in *Edinburgh*, againſt *Adam Gardine* the Fiar, for declaring the ſaid Tenement affected with, and adjudged for Payment of the Expence wared out by the Cedent, in repairing and rebuilding thereof, after it was demoliſhed by Occaſion of Fire.

Alledged for the Defender. No Law obligeth any Fiar of Houſes demoliſhed by a publick Calamity to rebuild or repair the ſame for the Uſe of a Liferenter, who ought to ſuffer Loſs by the Misfortune as well as the Fiar: And therefore the whole Expence of Rebuilding and Repairing cannot affect the Property. For Liferenters of Houſes are bound to preſerve them in the Condition they receive them; and no Fiar *tenetur ob Caſum fortuitum.* If the Tenement were affected with this bygone Reparation, and ſhould happen again to be burnt in the Liferenter's Time; the Sum affecting the *Area*, would exhauſt the he Value before the Fiar ſucceed, and ſo the Liferenter get the Property by the Reparation. Yea, the very Reparation will fail in Time, and perhaps be of no reat Value to the Fiar at the Liferenter's Death. 2. *Eſto* the Fie of liferented Tenements demoliſhed by Fire were affectable by the Expence of Rebuilding and Reparation laid out by the Liferenter: This could only be extended to what was neceſſary to put them in as good Caſe as they were in before the Burning. 3. By the *Act* 10. *Article* 5. *Parl.* 4. *Q. M.* A Liferenter making neceſſary and profitable Reparations, his Executors get only a third Part thereof, and for ſo much only can affect the Tenement.

Anſwered for the Purſuer. The Neceſſity and Quantity of the Expences of the Reparation being cognoſced and proved by the Dean of Gild's Warrant and Decreet, the ſame ought to affect the Ground Right and Property, as *in Rem verſum* to the Fiar: And the Liferenter's Caſe is as favourable as that of any *Negotiorum Geſtor*.

The Lords found the Fie of the Tenement is affected with the Sum imploy'd for Reparation thereof: But ordained the Parties to be heard whether the Liferenter or Fiar ſhould be liable for the Annualrent of that Sum, during the former's Lifetime.

February 21, 1706. Elizabeth Henderſon *Relict of* James Roſs *Stabler in* Edinburgh, *againſt Mr.* Archibald Dunbar *of* Thundertoun.

MR. *Archibald Dunbar* of *Thundertoun* having obtained a Decreet of Forthcoming before the Sheriffs of *Edinburgh*, againſt a Perſon under the general Deſignation of Mrs. *Roſs* Indweller in *Edinburgh*; and thereupon having poinded from *Elizabeth Henderſon* Relict of *James Roſs* Stabler there, as being a *Miſtreſs Roſs*, her Peuther Veſſel, and other Kitchin Furniture; ſhe raiſed a Summons of Reduction of the ſaid Decreet, containing a Concluſion of Spuilzie and Damages againſt *Thundertoun*. And the Decreet being reduced as null upon this Head, That it was pronounced againſt a Perſon not particularly deſigned by Name or Sirname, or any relative Deſignation of Parent, Husband, or the like, that could demonſtrate the Party: But only deſigned Mrs. *Roſs* Indweller in *Edinburgh*, and others fell under that general Deſignation. The Purſuer inſiſted in her Concluſion of Spuilzie, which ſhe offered to prove, and craved her Oath *in Litem* might be taken as to the Quantities and Prices of the Goods ſpuilzied.

The Lords allowed to the Purſuer the Benefit of her Oath *in Litem*, not ſo much for violent Profits, the Goods taken away, by their Nature, yielding no Product, as for Damages in her Imployment of affording Entertainment, and Stabling to Strangers, which was prejudged by the Spuilzie of her Houſhold Furniture.

February 27, 1706. *The Earl of* Roxburgh, *againſt Sir* Walter Riddel *of that Ilk, and other Heretors of the Pariſh of* Lillieſleaf.

THE Earl of *Roxburgh*, as Titular of the Teinds of the Pariſh of *Lillieſleaf*, having purſued the Heretors for their reſpective Teind Duties of ſeveral Years bygone: It was alledged for the Defenders, That they had a depending Action againſt the Earl before the Commiſſion for Valuation and Sale of their Teinds, and had procured a Warrant to draw them, upon finding Caution to make the valued Teind-duty furthcoming at the Event of the Valuation; And therefore till a Decreet is therein obtained, no Proceſs for the Duty formerly in Uſe to be paid; Becauſe, *non conſtat* but the ſame is higher than the valued Duty will be.

Anſwered for the Purſuer. There is no Commiſſion of Teinds now in Being, and therefore no Valuation can be depending before them. However the Purſuer does not hinder the Defenders to draw their own Teinds, they paying the accuſtomed Teind-duty: But they muſt not keep both the Teind and Teind-duty, without acknowledging him who pays publick Burdens for the Teind, of which after a Valuation and Sale they are bound to relieve him. And ſince the Earl cannot get a Suſpenſion of the Ceſs for the Defenders having a Warrant to draw their own Teinds: Why ſhould they have a Suſpenſion of the Teind-duty out of which the Ceſs ſhould be paid?

The Lords found the Defenders liable for the Teind-duties in Uſe to be paid for all Terms preceeding theſe for which Caution is found ſimply: And for the ſaid Teind-duties for Terms ſubſequent to the finding Caution, with this Quality, that the Earl before extracting find Caution to the Defenders, to refound or allow in the firſt End of the valued Duties to be decerned by the high Commiſſion whatever Superplus the ſaid accuſtomed Teind-duties ſhall extend to by and attour the valued Duties.

June 18, 1706. Iſobel Birrel, *againſt* Mary Fergus.

IN an Action of Reduction at the Inſtance of *Iſobel Birrel*, as Heir to *Agnes Birrel*, of a Diſpoſition granted by the ſaid *Agnes* to *William Fergus* her Husband *ſtante Matrimonio*, upon the Granter's Revocation, againſt *Mary Fergus* Heir to the ſaid *William*: The Lords refuſed to admit before anſwer, ſeveral Women (who as Creditors to the Wife, or as repreſenting her Creditors, had received Payment of their Debt from the Husband) to depone as Witneſſes for inſtructing the onerous Cauſe of the Diſpoſition. Seing Women are inhabile Witneſſes in all civil Cauſes; except where, *ob Penuriam Teſtium*, they are neceſſary, as about the Birth of a Child.

June 19, 1706. John Binning *of* Drumcorſe, *againſt the Woollen Manufactory of* Newmills, *and the Procurator-fiſcal of the Sheriff-Court of* Linlithgow.

IN the Proceſs at the Inſtance of *John Binning* of *Drumcorſe*, againſt the Woollen Manufactory of *Newmills*, for reducing the Sheriff-depute of *Linlithgow*'s Decreet, confiſcating ſome Packs of Wool belonging to *John Binning*, becauſe of pregnant Preſumptions of a deſigned Exportation, and his being holden as confeſt for declining to purge himſelf by Oath; The Lords reponed him to his Oath, and upon his Deponing that he had no form'd Deſign to export the Wool, reduced the Sheriff's Decreet. Whereupon the Purſuer urged for Reſtitution of the Wool confiſcated, and Damages, from the Maſters of the Manufactory who ſeized the Wool, and the Sheriff's Procurator-fiſcal who rouped and diſpoſed thereof.

Anſwered for the Defenders. All Perſons by the Act of Parliament being incouraged to diſcover Exporters of Wool, and to purſue the Confiſcation; and to have the Two Part for their Reward, and the Procurator-fiſcal the Third; and the Defenders having upon the Faith of the Sentence of Confiſcation *bona Fide* conſum'd what they acquired thereby: They cannot be liable in Repetition of the Wool confiſcated, as being the Fruits and Perquiſites of their Office *bona Fide percepti et conſumpti*; And at the furtheſt could be only liable *in quantum locupletiores facti*, for the Price they truly got for the Wool deducing the Charges of the Roup, and all their other Expences.

Replyed for the Purſuer. The Sentence of Confiſcation being reduced, Reſtitution follows as a natural Conſequence. And tho in ſome Caſes it may be contended, That *Fructus lucrantur* by being *bona Fide conſumpti*, it was never imagined that the Stock ſhould follow the ſame Fate.

The Lords found the Defenders liable in Repetition of the Wool at the prime Coſt, deducing the Expences of the Roup, and aſſoilzied from Damages.

June 21, 1706. *Captain* William Preſton, *Lieutenants* James Urquhart, John Marſhall, Matthew Stewart *and* Francis Scot, *againſt the Lady* Semple.

IN the Purſuit againſt the Lady *Semple* as repreſenting the deceaſt Brigadier *Richard Cuninghame* her Husband, at the Inſtance of Captain *Preſton*, and the other Officers Lieutenants who ſerved under the ſaid Brigadier for their Shares, conform to the Eſtabliſhment of 1200 Pound *Sterling*, appointed to be paid to his Regiment by the late King's Letter, for their Equipage when called to *Flanders* in the Year 1694, and intrometted with by the Brigadier.

Alledged for the Defender. That the Purſuers having raiſed no Proceſs for their Shares of the ſaid Mony during the Space of Ten Years, they ought not to be heard to inſiſt now after the Brigadier's Death: Unleſs they offer to prove *Scripto* that they never received Payment, *January* 11, 1678, Captain *Dundas* contra *Holburn*. For in the Caſes of Levy-mony and extraordinary Advances made to any Regiment, Receipts are ſeldom or never taken from ſubaltern Officers for their Proportions: And ſome Actions founded on Writ preſcribe in Five Years, as Arreſtments upon Bonds or Decreets, Actions of Mails and Duties, and for Miniſters Stipends. Yea, Law has confined the Neceſſity of producing Diſcharges of Ceſs and Exciſe to much ſhorter Time. Which ſhort Preſcriptions are founded on the Preſumption, That theſe Parties, *viz.* A Maſter who lives by his Rent, a Miniſter who lives by his Stipend, and a Collector who muſt pay in to the Receiver, will not calmly lie out too long of their Mony. Now is it to be imagined, that ſubaltern Officers would fail to claim and receive what belong'd to them at the Time when it was neceſſary to equip them, and the ſuperior Officers received their Due? 2. A Diviſion of the foreſaid 1200 ℔. was made by the Brigadier Lieutenant Colonel and Captains, the ſuperior Officers and only proper Perſons that could make it; which had partly taken Effect; and the Defender was content to fulfil the ſame in ſo far as it was not already implemented. The Eſtabliſhment could not be the Rule for dividing that Mony which was not advanced for Subſiſtence and Clearances, but for defraying the extraordinary Exigences of the Regiment ariſing from their Tranſportation to *Flanders*, *viz.* Arrears unequally due to them, and their Equipage and rigging out which was to ſome more and ſome leſs expenſive: But the foreſaid Caſt was duly made according to the Cuſtom of War. 3. The ſuperior Officers have got their Shares according to the Caſt made by themſelves: And although a new Caſt ſhould be made according to the Eſtabliſhment, The Defender as repreſenting her Husband could only be liable for what he received by the former Caſt more than his Proportion, and not for the Overplus of the Shares received by the other Officers.

Anſwered for the Purſuers. The Deciſion betwixt *Dundas* and *Holburn* doth not meet the Caſe; And it expreſly notices that then in the 1648, it was not uſual, as now, for Officers to give written Receipts: Nor is there any Law for a ſhort Preſcription here. 2. The Caſt made by the Brigadier and the ſuperior Officers was arbitrary, colluſive, unequal and moſt injurious to the Subalterns. And to ſhew that no Rule of Juſtice was therein obſerved, ten Times more was allotted to a Captain than to a Lieutenant: Whereas the former's ordinary Pay is but about a half more than that of a Lieutenant. Nor was the ſame Proportion allowed to all Captains, but to ſome more and to ſome leſs according to their Influence. 3. It is abſurd for the Defender to fancy that ſhe as repreſenting her Husband could not be liable for his Intromiſſion with the Purſuers Mony, upon Pretence that he gave ſome Part of it away to others: For by the ſame Rule of reaſoning a Robber or a Depoſitar might plead Exoneration as to what they gave away to their Aſſociates.

The Lords found the Purſuers might ſtill claim their Shares of the 1200 ℔. conform to the Eſtabliſhment, as the true and only Rule of Diviſion; and that the Brigadier was *in mala Fide* to make any Payments conform to the other Caſt.

June 22, 1706. John Watſon *Governour of* Heriot'*s Hoſpital, againſt the Repreſentatives of the deceaſt* William Forreſter *Writer to the Signet.*

JOhn *Watſon* as Debtor to the deceaſt *William Forreſter* having aſſigned him to ſeveral Debts for his furder Security, got a Backbond from him to hold Compt. And he, *William Forreſter*, having given Allowance to one of theſe Debtors of 19 ℔. *Sterling* that *John Watſon* was reſting him, borrowed up his Backbond in Order to grant a new one with the Deduction of the ſaid 19 ℔. but died before he renewed the Backbond. Which obliged *John Watſon* to raiſe an Exhibition againſt *William Forreſter*'s Children and their Tutors; wherein they deponed and exhibited the retired Backbond cancelled with Notes written on the Back and Margin thereof, bearing, *That* William *was to grant a new Backbond in ſuch Terms. John Watſon* then craved a Diligence to cite Witneſſes for proving that the Notes on the Backbond are *William Forreſter*'s Hand-writ.

Alledged for the Defenders. That it ſeem'd an unprecedented Piece of Form of dangerous Conſequence, to make up a Writ in ſuch a Manner. Since an uncancelled *Chirographum penes Debitorem repertum præſumitur ſolutum:* And far leſs could a cancelled Bond with Notes thereon found in Mr. *Forreſter*'s Cuſtody the Time of his Deceaſe, tho' never ſo well atteſted to be his Hand Writ, import an Obligement upon him to grant a Backbond in theſe Terms; or fix a Truſt upon his Heirs? *Et fruſtra probatur quod non relevat.*

Anſwered for the Purſuer. Extraordinary Caſes muſt have extraordinary Remedies. And yet the Remedy propoſed is moſt natural and rational here, where no Writ is ſought to be made up but what Mr. *Forreſter*'s Notes afford Ground for, and nothing to be proved but that he writ theſe Notes. 2. Tho' the retiring of a Bond by the Granter preſumes Liberation, that *Præſumptio Juris* is elided and taken off by the Notes upon the retired Paper, if proved to have been written by Mr. *Forreſter* himſelf.

The Lords granted Diligence to cite Witneſſes for proving the Notes to be Mr. *Forreſter*'s Hand-writ.

June 26, 1706. Charles Anderſon *Son to* Anderſon *of* Midhouſe, *and* Jean Anderſon *his Siſter, againſt* James Gordon *Merchant in* Elgin.

JAmes *Gordon* Merchant in *Elgin* being charged by Virtue of a Decreet obtained before the Commiſſar of *Murray*, at the Inſtance of *Charles Anderſon*

Factor for *Jean Anderſon* his Siſter, for the Sum of 100 Merks and two Bolls of Victual promiſed by *James Gordon* to *Grant* of *Arrindully*, in Name of the ſaid *Jean* for her paſſing from a Promiſe of Marriage made by him to her. He ſuſpended upon this Reaſon, That the Commiſſar committed Iniquity by admitting, 1. The foreſaid Promiſe to be proved by Witneſſes; altho' our Law doth not allow their Teſtimonies as probative of ſuch a *nuda Emiſſio Verborum* even as to Sums below 100 ℔. *March* 25, 1629, *Ruſſel* contra *Paterſon*; *February* 13, 1664, *Cheyn* contra *Keith*. It imports nothing that nuncupative Legacies and Bargains of Victual under 100 Pound are probable by Witneſſes. For that is indulged *Favore ultimæ Voluntatis, & Commercii*. Becauſe the former are generally more liſtened to than other naked Promiſes; and in Bargains of Victual or the like, *Interventus Rei*, the giving and receiving fixes the Minds of Witneſſes. 2. The Commiſſar committed Iniquity by admitting *Grant* of *Arrindully* to whom the Promiſe was made for *Jean Anderſon*'s Behoof, as a Witneſs for proving thereof, altho' he was in Effect a Party: And could not probably purge himſelf of partial Counſel, when the Matter could never be brought to a Proceſs without his Information.

Anſwered for the Charger. 1. This was not ſimply a Promiſe, but a mutual Bargain and Agreement which is probable by Witneſſes. So that the Deciſions adduced by the Suſpender relating to ſimple Promiſes do not meet the Caſe. That betwixt *Cheyn* and *Keith* proceeds upon a Speciality, that the Perſon, to whom the Promiſe was ſaid to have been made, lived Ten Years with the Promiſer without requiring Implement; and the Promiſe being 17 or 18 Years old was offered to be proved by the Teſtimony of Witneſſes: Whereas here the Agreement was recent. The Witneſſes again in the Decreet were received without Objection, which *per ſe* exeems the ſame from a Review upon that Ground, *February* 9, 1672, *Wood* contra *Robiſon*. 2. *Arrindully* was a moſt habile Witneſs, being in Effect a Communer, and no Ways intereſſed in that private Affair. Beſides, he was admitted in common Form without any Objection.

The Lords repelled the Reaſons of Suſpenſion, and found the Letters orderly proceeded.

Eodem Die. *Sir* William Sharp *of* Stoniehill, *againſt the late Archbiſhop of* Glaſgow.

SIR *William Sharp* having charged the late Archbiſhop of *Glaſgow*, to make Payment of 33 Pound 6 Shil. 8 Pence *Sterling* contained in a Bond granted by Mr. *Robert Mortimer* as Principal, and him as Cautioner to *John Beddel* Merchant in *London* the Charger's Cedent: The Biſhop ſuſpended upon this Ground, That the Bond charged on is a relative Writ bearing *in Gremio* this Clauſe, That if Payment be made of the foreſaid Sum of Mony by Virtue of a Bond *Engliſh* Form ſigned and ſeal'd by me the principal Party of the Date of my Subſcription, then this Obligation ſhall be null. Which Clauſe liberates the Cautioner unleſs the Charger could produce the principal Bond to which the *Scottiſh* Bond relates. For when a Bond cannot be produced, *Inſtrumentum penes Debitorem*, or which cannot be ſhown, *præſumitur ſolutum*; unleſs there be a clear Evidence that it could not be ſatisfied, as the Term of Payment was not come, or ſome *Caſus Amiſſionis*, viz. *Incendii*, *Rapinæ* or the like libelled and proved: And the Charger was *in mala Fide* to accept of an Aſſignation to the Bond after the *Scottiſh* Form, without getting up the principal *Engliſh* Bond with a Conveyance thereto. For as the principal Debtor, had he been charged upon the *Scottiſh* Bond, might have required up that which he ſigned after the *Engliſh* Form, unleſs it were loſt, and the *Caſus Amiſſionis* condeſcended on and proved, in which Caſe the principal Debtor would have been ſecured by

Caution: So this is much more competent to the Suſpender his Cautioner, who, for Want of the principal Bond, wants a Part of the Security he ſhould be aſſigned to for his Relief. Seing the *Engliſh* Bond would afford ſummar Diligence and Execution in *England*, which is not allowed on a *Scottiſh* Bond. But then again the Aſſigny could not diſcharge the principal *Engliſh* Bond; in Reſpect he had no Right to it.

Anſwered for the Charger. The Bond charged on is valid and obligatory of it ſelf, without the Support of any other Writ. 2. The moſt that in Law or Reaſon can be inſerred from the abovementioned Clauſe, is, That if the firſt *Engliſh* Bond was paid, the Bond charged on is null; which Payment muſt be proved by the Suſpender, who founds upon it. For to preſume that the *Engliſh* Bond is paid, becauſe not produc'd by the Charger, is *ſine Lege loqui.* And why might not he take Aſſignation to the one, without enquiring after the other; or whether it was extant or not at the Time: Seing the Bond wherein the Suſpender is bound, is an abſolute, complete and valid Right? As well as Indorſations uſe to be taken upon One of Two Bills of Exchange for the ſame Sum, without calling for the other.

The Lords repelled the Reaſons of Suſpenſion; unleſs the Suſpender would offer to prove Payment of the Bond granted by the Principal after the *Engliſh* Form.

Eodem Die. John *and* Andrew Mullikens *and their Maſters Supplicants, againſt* John Sharp *of* Hoddam, *and* William Coupland *of* Coliſtoun, *and* John M‘Naught *Baillie of the Regality of* Terregles.

JOhn and *Andrew Mullikens* gave in a Petition complaining againſt *Sharp* of *Hoddam*, and *Coupland* of *Coliſtoun*, for proceeding to crave a Decreet, and *John M‘Naught* Baillie of the Regality of *Terregles*, for decerning in a Removing againſt the Complainers 12 *January* 1706, notwithſtanding of an Advocation at their Inſtance, with a ſubſcribed Signature upon the Margin, bearing that the ſame was upon the 19 of *May* 1705, produced and admitted by the Clerk.

Anſwered. No Regard to the marginal Signature, which bears not that the Advocation was judicially produc'd; and tho' it did, could only prejudge the Clerk, as being but his own Aſſertion, and not the Judge, or any other Body who knew nothing of it. Nor was there any depending Proceſs the Time the Advocation is alledged to have been produced and admitted.

Replyed. The marginal Signature ſubſcribed by the Clerk, is *Probatio probata*, that the Advocation was judicially produced in a depending Proceſs: Seing ſuch Signatures uſe not to be ſubſcribed by the Judge, but only by the Clerk. And if he has malvers'd, the Judge may purſue him as accords: But being a Perſon of publick Truſt, his judicial Signature muſt make Faith, and be probative. Beſides, it were dangerous to oblige the Complainer in ſuch a Caſe, to inſtruct either that there was a depending Proceſs, or that it was a Court-Day when the Advocation was produced. For the Purſuers might deſtroy and abſtract their Proceſſes; and it would be hard to recover the Diets of Court from a Clerk, where the Judge of the Court is concerned, that the Thing ſhould not be proved.

The Lords found *Hoddam* and *Coliſtoun* guilty of Contempt of their Lordſhips Authority, and decerned them to pay 100 Merks of Fine.

June 27, 1706. Gilbert M‘micken *of* Glenwhilly, *againſt* Alexander Kennedy *of* Glenoure.

IN the Charge at the Inſtance of *Gilbert M‘micken* of *Glenwhilly*, againſt *Alexander Kennedy* of *Glenoure*: The Lords found, That a diſtreſſed Cautio-

ner

er paying Annualrents, had Right by the Clauſe of Relief, to require Annualrent of theſe Annualrents from the Time of Payment. 2. That Acts of Uſury anterior to the Queen's Indemnity were thereby diſcharg'd, and the Informer could have no Share or Benefit, upon the Account of Information given after the Proclamation. 3. That the Writer of a Bond being deſigned Notar, the Deſignation was ſufficient. For that is not like the general Deſignation of Writer, which every Body aſſumes at Pleaſure: A Notary having a publick Office, that requires a previous Trial and Admiſſion by the Lords of Seſſion, and an Act to be extracted thereon by a Clerk appointed for that Effect, who keeps a particular Record of the Name, Diary, and Manner of Subſcription of the Perſon admitted. 4. That a Creditor taking Aſſignation from his Debtor to Mails and Duties not expreſly in Satisfaction, and intimating the ſame to the Tenants, is not obliged to impute the Rents in his Payment, or inſtruct exact Diligence; unleſs he had debarred either the Debtor or his Creditors from intrometting.

June 28, 1706. *Sir* John Swinton, *againſt the Lady* Craigmillar.

IN the Action at the Inſtance of Sir *John Swinton*, againſt the old Lady *Craigmillar*, for Payment of a Bill drawn by her upon Sir *Alexander Gilmore* of *Craigmillar* her Son, payable to *John Inglis* Writer to the Signet, as the Purſuer's Truſtee for Value reſting to the Purſuer by the Laird of *Langtoun* the Drawer's Brother: In regard the Bill was refuſed by Sir *Alexander*, and proteſted for not Acceptance.

Alledged for the Defender. That ſhe having drawn the Bill for ſupporting her Brother's Credit upon his Promiſe to relieve her, the Poſſeſſor of the Bill was bound to negotiate the ſame, not only by a Proteſt for not Acceptance, but alſo by Intimation thereof to her the Drawer, that ſhe might timeouſly have operated her Relief againſt *Langtoun* in his Lifetime; which ſhe could effectually have done, he having till the Day of his Death betwixt two and three thouſand Merks yearly paid him out of the Eſtate. And the Want of Advertiſement from the Creditor, of the Bill's being diſhonoured, made her ſlip the Opportunity.

Anſwered for the Purſuer. Tho' foreign Bills *Favore Commercii* in Reſpect of the great Diſtance of Places muſt be duly negotiated, by certiorating the Drawer of the not Acceptance thereof; Leſt he might loſe his Effects in the Hands of the Perſon drawn upon, by his breaking before the Drawer get Notice of the proteſting of his Bill for not Acceptance: No Body can require this in the Caſe of inland Bills, where the foreſaid Reaſon takes no Place; And we have no Statute to determine us therein. For the Act *1696* provides only the ſame Execution upon inland Bills as by the Act 1681 is allowed to paſs upon foreign Bills: In the which Act no Time is prefixt to the negotiating Bills, or Intimation to Drawers in Caſe of not Acceptance. 2. Tho' the Bill in Controverſie were a foreign Bill, the Neglect to adviſe the Drawer concerning its being proteſted for not Acceptance, would not cut off the Poſſeſſor from his Recourſe againſt her: Unleſs the Perſon drawn upon were broken with her Effects, which ſhe did not recover out of his Hands for Want of Intelligence that her Bill was refuſed: Which cannot be alledged, ſince he is abundantly ſolvent and reſponſal. 3. *Langtoun* being none of the Parties concerned in the Bill, the Poſſeſſor who got it for an onerous Cauſe was not obliged in the negotiating thereof to regard the Drawer's Buſineſs with her Brother, or what mov'd her to draw the Bill upon his Account. But the Truth is, this Bill has been given either for Debt due by her to him, or elſe freely to ſave his Credit and Perſon at the Time; for he was notourly inſolvent.

The Lords repelled the Defence.

Eodem Die. Jean Hay *Relict of* James Skeen *Merchant in* Aberdeen, *againſt* Robert Cuming *of* Birneſs.

JEan Hay having ſubſcribed Conſenter to her Husband's Diſpoſition of a Tenement in *Aberdeen*, wherein ſhe ſtood infeſt in Liferent; Which Diſpoſition came by Progreſs in the Perſon of *Robert Cuming* of *Birneſs*: She revoked that Conſent, and raiſed Reduction of the Diſpoſition againſt him, upon this Ground, That ſhe did ſimply aſſent thereto, not as conjunct Diſponer with her Husband, and thereby, *ſtante Matrimonio*, denuded her ſelf of her whole Liferent Right in Favours of her Husband, without a judicial Ratification; And a Wife's Deeds with Conſent of her Husband in Prejudice of her Liferent, tho' to a third Party for onerous Cauſes, is reduceable if not judicially ratified, *January* 9, 1623, *Marſhal* contra *Marſhal*, *February* 4, 1623, *Guild* contra *Guild*, *June* 19, 1629, *Gray* contra , *July* 17, 1677, *Paterſon* contra *M'lean*. Which Privilege was introduced by our Law in Favours of Wives, to ſave them from the Importunity of their Husbands, and from being impoſed on through their Ignorance of Buſineſs. And as our Cuſtom agrees with the *Roman* Law, in allowing the Reduction of Deeds done by married Perſons in Favours of each other, or to others for their Behoof, *ne mutuo Amore ſe ſpolient*: So much rather ought our Law to remedy a Wife renouncing the only Fund of her Livelyhood to her Husband's Behoof, as in the preſent Caſe. Nor needeth this to ſeem hard upon Purchaſers, who rely upon the Security and Warrandice of their Authors, and take them with all the Defects, and have themſelves to blame for not adhibiting a judicial Ratification. Yea, a Wife having for onerous Cauſes diſponed her Lands to a third Perſon for her Husband's Behoof, was allowed to revoke, notwithſtanding that ſhe had ratified judicially, and ſworn never to come in the contrary. Is not a Wife perpetually Minor *ſtante Matrimonio*, and *ſub Curatela Mariti*; and conſequently allowed as other Minors to reduce Deeds to her Prejudice, where ſhe has not either judicially ratified, or taken her ſelf to another Fund?

Anſwered for the Defender. A Wife's Deed, either directly to, or indirectly for the Behoof of her Husband, is indeed revokable, as a Donation. And if in Favours of the Father or other Perſon bound on her Husband's Side in her Contract of Marriage, without Concourſe of her Friends who relyed on the Faith thereof upon her Part, (ſuch a Deed being preſumed gratuitous *inter conjunctas*) is quarrellable as *contra Fidem Tabularum nuptialium*. Beſides, there is a vaſt Difference betwixt a Wife's Conſent to the Diſpoſition of a particular Subject where the Purchaſer is not bound to know, but ſhe is or may be provided *aliunde*, which is the preſent Caſe; And her Conſent to ſuch a Deed as the Purchaſer knows or is bound to know, leaves nothing behind for her Subſiſtence. Again, according to *Craig*, *Lib*. 1. *Dieg*. 15. *P*. 105. *Antiquitus coram Judice extra Præſentiam Mariti interponebatur Uxoris Conſenſus in Alienatione per Maritum facta illius Prædii cujus Uſumfructum Mulier habebat. Hodie, ſi ſubſcripſerit Inſtrumento Alienationis, ſufficit coram Teſtibus; niſi poſt ſe coactam Vi & Metu probaverit*, &c. Which is repeated by *Spotſwood*, *Tit. Husband and Wife*, *P*. 157, and is beyond all Doubt our preſent Law and Cuſtom. Among the Deciſions, that betwixt *Marſhal* and *Marſhal*, is the only one that hath any Appearance of Weight in it. And yet it doth not meet the Caſe in Hand; Becauſe, there a Wife with Conſent of her Husband diſcharged *per Univerſitatem* his Father's Obligement in her Contract of Marriage for her Liferent, without any viſible onerous Cauſe, while they all lived together, which was repudiate upon theſe Grounds. 1. The Deed was preſumed to have been to the Husband's Behoof, eſpecially conſidering that he would reap the Benefit of it by ſucceeding as Heir to his Father. 2. The Husband was in *peſſima Fide* to conſent to his Wife's renouncing her Liferent by that Contract in which himſelf was a Contracter: And the Father was as unjuſt to accept thereof without any onerous Cauſe, when he could not but know that his Daughter in Law had nothing elſe. None of which Specialities are to be obſerved in this Caſe, where at firſt the Diſpoſition was made to Strangers, and that of a particular Subject irredeemably for onerous Cauſes, upon the Faith whereof the ſubſequent Purchaſers did rely, and it hath taken Effect by many Years Poſſeſſion.

Replyed for the Purſuer. With all Reſpect to the learned *Craig*, the former Cuſtom is moſt reaſonable. And if it be not adhered to, the Womens Privilege will be eluded: For how eaſie is it for a Husband to order Matters ſo, as the Wife can have no Mean of proving Force or Fear? Beſides, 'tis known that ſoft Inſinuations and frequent Importunities prevail as much with well tempered Wives, as Force or Fear doth influence ſuch as are ſtubborn and ill-natured; And our Law ought not to be leſs indulgent and favourable to the former, than to the latter. Whereas the adhibiting the judicial Ratification, publiſhes to the Wife's Friends the Danger ſhe is in, that they may interpoſe to prevent it. Therefore the Principle advanced by *Craig*, is to be underſtood where a Wife conſenting to the Alienation of her Liferent, gets an equivalent Fund from her Husband. But where the Husband is known to have no other Fund to compenſe the Wife's Deed, a Purchaſer ought to adhibite all the requiſite Solemnities of Law, otherways he partakes of the Husband's Fraud. And a Wife *Fraude inducta* ſhould not be denied the Protection of Law, more than ſhe who is *Vi coacta*.

The Lords repelled the Reaſon of Reduction of the Diſpoſition, that it was not judicially ratified: Seing neither Force nor Ferocity in the Husband were alledged.

July 2, 1706. Hugh Somervel *Writer to the Signet, againſt* James Smith *of* Camno.

JAmes Smith *of Camno* having granted Bond to *Hugh Somervel* Writer to the Signet, for 1000 Merks, narrating the ſame to be the Remainder of the Price of ſome Lands bought by the Granter from *John Murray* of *Arthurſtane*: And declaring that in Caſe two Inhibitions affecting the ſaid Purchaſe were not purged before the Term of Payment in the Bond, *Camno* ſhould have Retention of the 1000 Merks for the Space of five Years after the Date thereof, at leaſt ſo long as theſe Incumbrances ſhould continue unpurged, to the Effect allennerly, that he might have Deduction of any Expences he might be put to in Defence of Actions of Eviction upon them within the five Years. *Camno* being charged upon the ſaid Bond at the Inſtance of *Hugh Somervel*, he ſuſpended upon this Ground, That the Bond being granted for a Part of the Price of Land, he ought to have Retention thereof till the Inhibitions therein mentioned be purged, which is not yet done.

Anſwered for the Charger. The Bond is granted to him a third Party, qualified only with Retention for five Years for Payment, of Expences allennerly: Which five Years being elapſed, and no Expence laid out, the Mony is now ſimply payable without Objection.

Replyed for the Suſpender. The Sum in the Bond, being the Price of Land, is according to the Diſpoſition of Law ſtill retainable till Incumbrances be purged: Altho' the five Years be elapſed, which was the conventional Term for Retention *quoad* Expences, and neceſſary to be qualified by expreſs Paction, becauſe Law allows no Expence of a Proceſs of Eviction, if Eviction do not actually follow. So that the legal Retention remains, tho' the conventional took no Effect, and is expired. Since the Limitation of a Cauſe to a Time does not hinder its taking Effect thereafter: *Cum per Debitorem ſtetit*, that

Performance was not made ſooner; *December* 2, 1628, *Zair* contra *Ramſay*. And as *Nemo præſumitur ſuum jactare:* So *Novatio Juris alicui competentis nunquam præſumitur*. 2. There are two notable Deciſions, *December* 22, 1674, Marqueſs of *Douglaſs* contra *Somervels*, and *February* 1, 1676, *Veach* contra *Pallat* and *Ker*. In the firſt whereof the Lords found that a Right to a Son might be reduced upon a Debt due by the Father to him who granted that Right upon the Act of Parliament 1621: Since at the Time of granting the Right to the Son, he might not have known fully the Father's Circumſtances. And in the ſecond Deciſion, the granting of a Right by a Debtor to two of his Creditors jointly, and their Acceptance thereof, did not ſo homologate, as to hinder one of theſe Creditors to reduce againſt the other.

Duplyed for the Charger. The Charger was not the Seller of the Land, and therefore noways concerned in the legal Retention, but has a *Jus quæſitum* by the Bond upon the Conditions therein, which are purified by elapſing of the five Years without Expence in defending againſt Inhibitions. *Nec per eum ſtetit*, that the Inhibitions were not purged; but the Suſpender has himſelf to blame, who did not ſee to it within the Time. 2. The Bond charged on is the Suſpender's own Deed granted on Conditions agreed to by himſelf, which are now purified. So that he is not in the Caſe of the cited Deciſions, and is moſt unreaſonable to contradict his own Deed.

The Lords found that by the Quality of the Bond the Suſpender could not retain the 1000 Merks, the five Years being elapſed: And therefore found the Letters orderly proceeded.

Eodem Die. Iſobel Scot *Relict of* Andrew Angus *Town-clerk in* Selkirk, *againſt* Adam Bryden, *Tenant in* Henderland.

JAmes *Menzies* Writer to the Signet, being Debtor by Bond to *Iſobel* Scot in the Sum of 370 Pound *Scots*, ſhe raiſed Horning thereon in the Year 1690, and arreſted in the Hands of *Adam Bryden*, as Debtor to Mr. *Menzies*, and obtained Decreet of Furthcoming in the ſame Year, before the Commiſſar of *Peebles*. Which Decreet being ſuſpended, and at diſcuſſing of the Suſpenſion turned into a Libel: It was then alledged for the Defender, That the Purſuer's Arreſtment was preſcribed by the *Act* 9. *Parl*. 2. *Ch*. 2. and ſo no Decreet of Furthcoming could proceed upon it.

The Lords found that Preſcription was interrupted by the Commiſſar's Decreet. Albeit it was alledged for the Defender, That the Commiſſar's Decreet was found null: And a null Decreet could no more interrupt Preſcription, than a null Execution.

July 5, 1706. *Colonel* John Cuninghame *againſt the Lady* Semple.

COlonel *John Cuninghame* having raiſed Reduction and Improbation againſt the Lady *Semple*, of a Diſpoſition granted by the deceaſt Brigadier *Cuninghame* his Brother, in Favours of the Defender, and alſo the Contract of Marriage paſt betwixt theſe Parties, upon this Ground: That long before granting the ſaid Diſpoſition, or entring into the Contract, mutual Indentures were paſt and perfected betwixt the Purſuer and the Brigadier, whereby they mutually bound themſelves, That the Surviver ſhould ſucceed to the other's Eſtate, failing Heirs of his own Body; Reſerving Power to the firſt deceaſing Party to provide his Wife in the Property of a Third of his moveable Eſtate, and the Liferent of a Third of the Heritage; To which Indentures the foreſaid Rights in Favours of the Defender are prejudicial.

Alledged for the Defender. The Indentures are not formal according to the Laws of *Scotland*, and therefore can be no Title to claim Succeſſion to Heretage or real Rights here, or to quarrel and impugn the Conveyance thereof. For our Practice ſuſtains Writs ſolemn after the Form of other Countries only as to Moveables, *quæ ſequuntur Perſonam*, and perſonal Contracts that are *Juris Gentium*; but not as to Teſtaments or the Conveyance of Heretage, *January* 19, 1665, *Schaw* contra *Leuings*, *February* 18, 1631, *Houſtoun* contra *Houſtoun*, *December* 25, 1623, the Children of Colonel *Henderſon* contra *Debtors*, *March* 11, 1624, *Lamb* contra *Heth*, *July* 3, 1634, *Melvill* contra *Drummond*. 2. The Indentures being entred into in *England*, produced and founded on by the Purſuer before the Chancery there, and quarrelled by the Defender, cannot be inſiſted on here, until they be ſuſtained and approved in the ſaid Court of Chancery, where they were impugned and rendred litigious.

Replyed for the Purſuer. The Indentures are formal according to the Law of *England*, where they were entred into: And the Form and Stile of *Engliſh* Writs are now frequent and probative, and afford Action in *Scotland*. Yea, the Granters of Bonds after the *Engliſh* Form, have been thereon ſummarly ſecured until they found Caution, *Judicio ſiſti & Judicatum ſolvi*: As was done to *Andrew Crawford* at the Inſtance of *Carruthers*. So a Bond granted by my Lord *Saltoun* to a *French* Man, after the *French* Form, was ſuſtained as a Title to adjudge the Granter's Eſtate, *July* 5, 1673. Mr. of *Saltoun* contra Lord *Saltoun*, *December* 11, 1627, *Falconer* contra Heirs of *Beatie*. The Diſtinction betwixt *Mobilia* and *Immobilia*, uſed by the Defender's Lawyers, takes no Place where the Queſtion is only in Relation to the Solemnities of a Writ and Conveyance habile to convey the Subject diſponed, if it were made conform to the Laws of the Place where it is to be cognoſced and the Subject lies, by a Perſon having Power to convey; And not about Deeds which of their own Nature are ſimply inhabile by our Law to transfer Heretage. *V. G.* As none with us can alienate Heretage upon Death-bed, even by a Deed *inter Vivos*; nor tranſmit it by Teſtament in *Liege Pouſtie*: Neither can a *Scottiſh* Man in *England* diſpoſe upon his Death-bed of Heretage in *Scotland*; or convey it by Teſtament. Becauſe, theſe Deeds are not quarrelled upon the Score of local Solemnity different from ours, but becauſe utterly inept by our Cuſtom to tranſmit Heretage. This is conſonant to the Opinion of Lawyers and Practice Abroad, *Vinn. Select. Quæſt. Lib.* 2. *Cap.* 19. *Sande Deciſ. Lib.* 4. *Tit.* 1. *Def.* 14. and may be confirmed from the Revocation made by King *James* the V. at *Rowan* after the *French* Form; by King *William*'s Teſtament at the *Hague*, wherein he legated the Territories belonging to him as Prince of *Orange*; and by the mutual Tailzies of Succeſſion betwixt the great Families in *Germany*: Deeds ſolemn according to the Cuſtom of the Country where they were made, and ſuſtained even as to Feus and *Bona immobilia*. As to the Deciſion betwixt *Schaw* and *Leuings*, the Reaſon why the Lords did not ſuſtain a nuncupative Teſtament in *England*, as valid to convey even Moveables in *Scotland*, was not becauſe the Solemnity thereof differed from what is obſerved in Teſtaments in *Scotland*: But becauſe our Law allows not of Probation by Witneſſes where Writ uſes and ought to be adhibited; and particularly rejects their Teſtimony of a Legacy above an Hundred Pound. Mean Time the Purſuer does not pretend, that his Indentures are ſuch as give him immediate Right to infeft upon in the Brigadier's Lands; but only that they are a ſufficient Title to purſue the Brigadier's Heirs to implement and denude in his Favours. Beſides, there is ſomething ſpecial in the Purſuer's Caſe: That he and his Brother, tho' come of *Scottiſh* Parents, had never been in *Scotland* before the making of the Deed; and it did not concern any *Scottiſh* Heretage acquired at the Time, but only the Expectation of uncertain Conqueſt in the wide World. Now, if the Defender's Reaſoning were good, the Brethren could not predetermine the

Succeſſion to their Conqueſt, without making as many Contracts as there were Nations wherein they had a Proſpect of puſhing their Fortunes. 2. In the Caſe of Sir *John Cochran* againſt the Earl of *Buchan*, both Dependance before the Chancery of *England*, and a Decree thereof tho inſtantly verified, was not ſuſtained to exclude Proceſs here. 'Tis in vain to pretend that this was becauſe the Earl's Bond bore a Conſent to Regiſtration in *Scotland*: For the Clauſe of Regiſtration did only afford the Creditor his Election, which might have ſeem'd cut off by his purſuing in *England*.

Duplyed for the Defender. The Lords never ſuſtained ſuch a Title as this of the Purſuer's, to reduce real Rights of Heretage, or to regulate and convey them: All the Deciſions hitherto have been in the Matter of perſonal Contracts, and about Moveables; except only perſonal Contracts of Marriage which are *Juris Gentium* and favourable. As to the Inſtance of the *Maſter* of *Saltoun*, it doth not meet the Caſe in Hand: For it was founded on an Obligement to pay a liquid Sum of Mony, and did not principally and immediately concern Heretage; was purſued againſt my Lord *Saltoun* in his own Lifetime; and proceeded upon ſome onerous and common Cauſe of the Regiment, not without ſome previous Trial concerning the Verity of the Bond. As to the Opinions of *Vinnius* and *Sande*, the ſame are overruled by *Cujacius*, *Donellus*, the Lawyers at *Altorf*, *Oldradus*, *Car. Molinæus*, *Tuldenus*, *Buzius*, and eſpecially *Nicolaus Burgundus* in his *Conſuetudines Flandriæ*, and *P. Chriſtinæus* in the 2. Vol. of his Deciſions *Curiæ Belgiæ*, and in his Book *ad Leges Mechlinenſes Tit.* 17. *N.* 10. nor is there any Ground for the Diſtinction uſed by *Vinnius* and *Sande*; for why ſhould the Law of Death-bed requiring the Circumſtance of *Liegie Pouſtie*, be more binding than the Statute requiring the Writer's Name with his and the Witneſſes Deſignations and Subſcriptions. The Inſtances of K. *James* the 5*th*'s Revocation, K. *William*'s Teſtament, and the mutual Tailzies in *Germany*, are nothing to the Purpoſe. For K. *James*'s Revocation was made long before the Act of Parliament requiring the Name and Deſignation of Writer and Witneſſes, when our Laws and the *French* were the ſame as to the Solemnities of Writs, and the mutual Intails among the *German* Princes are of the Nature of Treaties of Peace, and Alliance. His late Majeſty's Teſtament can afford as little Argument: Becauſe, the Teſtaments of Princes having ſomething of legal Authority, are rul'd after another Manner than thoſe of private Men; and the Solemnities uſed at the *Hague* are the ſame with thoſe obſerved in moſt of the Places where His Majeſty's Territories lay. Upon the whole, it's abſurd to impugn a Contract of Marriage or rational Deeds in Favours of a Wife, upon Pretence of latent Indentures, fram'd as it were by Prophecy, to evacuate the juſt Effect of ſuch Settlements.

The Lords found the Indentures, tho not made according to the Forms and Laws of this Kingdom, may be the Title and Foundation of a Proceſs for claiming a Succeſſion of Heretage or real Rights here, and to quarrel and impugn Deeds in Prejudice thereof: And repelled the ſecond Defence of *Lis pendens* before the Chancery of *England*.

July 10, 1706. *Sir* Alexander Brand *of* Brandsfield, *againſt* Edward Yorſtoun *Tenant in* Balbertoun.

A*lexander Brand* of *Reidhall* as Principal, and *Edward Yorſtoun* as Cautioner, having granted Bond to Sir *Alexander Brand* for the Sum of 1944 Pound 18 ſh. Sir *Alexander* thereafter obtained a Precept from *Reidhall* upon *Riccartoun* for 2536 ℔. 6 *ſh.* whereby *Riccartoun* was to retire his Bonds, Tickets and Aſſignations by *John Brand* to his Uncle, with all

Diligences done againſt him, and to take a general Diſcharge from Sir *Alexander* of all he could ask or crave of *Reidhall* preceeding the Date; which ſhould oblige him to allow the ſame to *Riccartoun* in Part of Payment of his Bond for the Price of the Lands of *Weſterhails*. Sir *Alexander* in *December* 1700, about 13 Months after the Term of Payment of the Precept, which *Riccartoun* accepted, received from him 1000 Merks in Part of Payment: And the firſt of *March* 1701, took from him a Bond of Corroboration for the remaining Sum, ſuperſeding Payment till a certain Term after the Date on't. *Riccartoun*'s Affairs falling in Diſorder, and thereby failing in Payment, Sir *Alexander* charged *Edward Torſtoun* upon the Bond wherein he was Cautioner; who ſuſpended upon theſe Reaſons. 1. The Charger had innovated the Debt by not only accepting the Precept upon *Riccartoun*, and receiving partial Payment thereof: but alſo by taking his Bond of Corroboration thereof more than a Year after the Term of Payment, and by prorogating the Term of Payment without the Drawer's Conſent, and adjudging *Riccartoun*'s Eſtate upon the ſaid Bond. 2. The Charger did not duly negotiate the Precept, by proteſting for not Payment againſt the Accepter *debito Tempore*, but ſuffered him to break without timeouſly certiorating the Drawer as he ought to have done: ſince by the Act 1696, inland Precepts are equivalent to foreign Bills, which muſt be ſo negotiated, otherways the Poſſeſſor can have no Recourſe againſt the Drawer, and conſequently *Reidhall* and the Suſpender his Cautioner are free.

Anſwered for the Charger. The taking a Precept upon *Riccartoun* can never be underſtood an Innovation: Becauſe Innovation is never preſumed, unleſs expreſt; The Sum in the Bond is leſs than that in the Precept, and the Bond was not diſcharged at the giving of the Precept, but was only to have been retired upon Payment. And if the accepting *Riccartoun*'s Precept be no Innovation, it muſt only be underſtood a Right in further Security which obliges to no Diligence. 2. By the Practice of all trading Nations, inland Precepts, or (as they are termed in *England* and *Holland*) Aſſignations are tied to no ſuch Rules of preciſe Negotiation as are required in foreign Bills, by reaſon of the Diſtance of Places. In reſpect all Perſons concerned in inland Bills do ordinarly live not far from one another: And here the Drawer, Accepter and Poſſeſſor reſide within the Compaſs of a Mile. Nor have we any Statute that determines a fix'd Time for negotiating Bills; And the Act 1696, gives inland Bills no other Privilege than is allowed to foreign Bills by the Act 1681, which is only that they ſhould have ſummar Execution and bear Annualrent. But ſuppoſe inland and foreign Bills were equiparate in all things, this Precept is not a ſimple inland Bill, but a clogged and qualified Note or Order: And the Charger hath *habili Modo* exonered himſelf of any Truſt he had thereby, which was principally *Mandantis Gratia*; In ſo far as no ordinary Diligence for making the Payment effectual was neglected.

Replyed for the Suſpender. There is the ſame Reaſon for punctually negotiating inland and foreign Bills; neither of them being deſigned for lying Securities but to be preſently paid: And the nearer that Parties live together, they can be the more eaſily proteſted and returned, that the Drawer may take Courſe with the Perſon who diſhonoured his Bill. So that there is a great Difference betwixt a Precept that is to be negotiated and returned upon not Acceptance or not Payment, and an Aſſignation in Security, which the Aſſigny may keep by him as long as he thinks fit. Nor hath the Charger any Ways exonered himſelf of his Truſt, which was given both *Mandatarii et Mandantis Gratia*: In ſo far as he never proteſted for not Payment, indulged the Accepter of the Precept Thirteen Months Delay after it fell due, and prorogated the Term of Payment ſeveral Months longer by accepting

ing of a corroborative Security, during which Time he broke; and any Diligence the Charger uſed againſt him was not upon the Precept, or when *Res* was *integra*, but only upon the Corroboration Right after *Riccartoun*'s Affairs had gone in Diſorder.

The Lords found, That the Bond charged on was not innovated by the taking of a Precept upon *Riccartoun*, obtaining the ſame accepted, receiving partial Payment, and a Bond of Corroboration for the Remainder payable at a certain Term. But found it relevant to liberate the Debtor in the Bond charged on and his Cautioner, that the Charger did not proteſt for not Payment of the Precept, nor did Diligence for Payment of the ſame, againſt *Riccartoun* till his Circumſtances were altered.

Eodem Die. Walter Young, *againſt* George Young *Merchant in* Edinburgh.

W*alter Young* having Charg'd his Brother *George* upon his Back-bond to denude of ſome Bonds that were in Truſt in his Perſon, he ſuſpended, and at diſcuſſing of the Suſpenſion, the Charger being debarred *ab agendo* by a regiſtred Horning, he then aſſigned his Charge to *James Dundas* of *Breiſtmill*. When the Aſſigny inſiſted, it was alledged for the Suſpender, That the Horning againſt the Cedent muſt debar his Aſſigny *quia pendente Lite nihil innovandum*, and the *Jus quæſitum* to the Suſpender by the ſuſtaining his Defence upon the Cedent's not having *Perſonam ſtandi* could only be taken away by a Relaxation: Eſpecially conſidering, That the Aſſignation to *Breiſtmill* is gratuitous for the Cedent's Behoof.

Anſwered for the Charger. The debarring *ab agendo* by a regiſtred Horning, being odious and meerly a perſonal Objection, affording no Advantage to the Proponer, cannot meet the Aſſigny who has *Perſonam ſtandi*. Nor has the Suſpender any Prejudice by admitting the Aſſigny to ſupply the fictitious legal Incapacity of the Cedent: Since the Suſpender is not excluded from any Defence or Manner of Probation competent againſt the Cedent; And ſo *nihil innovatur* by the Aſſignation to the Suſpender's Diſadvantage, as he could pretend no *Jus quæſitum* by debarring of the Cedent except a Delay.

The Lords repelled the Objection againſt *Breiſtmill*, That his Cedent was debarred, and ſuſtained Proceſs at his Inſtance, tho the Aſſignation was for the Cedent's Behoof.

July 11, 1706. James Dundas *of* Breiſtmill, *againſt* Henry Sinclair *of* Carloury.

IN the Declarator of Thirlage at the Inſtance of *James Dundas* of *Breiſtmill*, againſt *Henry Sinclair* of *Carloury*, for declaring his Lands of *Over-carloury* aſtricted to the Purſuer's Mill, which is the Mill of the Barony of *Old-liſtoun*, whereof *Over-carloury* is a Part.

Alledged for the Defender. That the Lord *Torphichen* granted a Charter in *Anno* 1543, to *Kincaid* of theſe Lands of *Over-carloury*, *cum molendinis et Multuris* prior to the Purſuer's Charter of Aſtriction, which muſt infer an Immunity from Thirlage in Favours of the Defender the preſent Heretor.

Replyed for the Purſuer. The Defender can have no Benefit of Immunity by the Charter granted to *Kincaid*, unleſs he can inſtruct a connected Right from him. For as there may be different Progreſſes to the ſame Land with different Holdings, Reddendos and Immunities; as oft falls out in the Caſe of ſeveral Adjudgers from a Ward Vaſſal, whereof one procures

Charter taxing the Ward and other Caſualities, while another's Charter continues in the Terms of ſimple Ward: So the latter could not claim the Privileges granted to the former, without deriving Right from him.

Duplyed for the Defender. Tho' none can plead Right to the Lands by Virtue of any Charter granted to a Perſon he do's not ſucceed to: The Freedom and Immunity of Lands from Thirlage or any other Servitude may be conveyed without a connected Progreſs. Becauſe, Liberty is preſumed, and Servitude muſt be proved, and cannot be inferr'd without a poſitive Deed conſtituting the ſame; yea even when conſtitute is taken off and extinguiſhed by any Diſcharge or Renunciation without further Solemnity; *Stair, Inſtit. Tit. Servitudes Real*, §. 24. So that the Lands becoming free thereby, are tranſmitted with that Freedom to any ſucceeding Heretor, without Neceſſity of an expreſs Proviſion thereanent in his Right. Nor can they ever be brought under the Servitude again but by the Deed of the Proprietar for the Time. The parallel adduced of a Superior's taxing Ward-duties in Favours of one of ſeveral competing Vaſſals, is no Ways applicable to this Caſe: For the Caſualities of Superiority remain with the Superior, whoſe granting a taxing Charter, can only be profitable to the Perſon who has Right to that Charter; whereas a Servitude being renounced or extinguiſhed by the Superior's Deed, nothing remains with him to be given to any Perſon by a ſubſequent Grant; and the Lands become and remain free for ever, unleſs a new Servitude be impoſed by the Proprietar.

The Lords found that the Defender had the Benefit of Immunity from the Thirlage by the Charter granted to *Kincaid* of the Lands of *Overcarloury*, albeit he inſtructed not a Connection of his Title from *Kincaid*; and therefore declared theſe Lands free of the Aſtriction.

Eodem Die. **Robert Brown** *of* **Carſluith**, *againſt* **Thomas Maxwell** *of* **Cuill.**

THE deceaſt *Hugh Maxwell* of *Cuill* having in *Anno* 1660 married *Anna Boyd* Relict of *Robert Brown* of *Carſluith*, whom he found in Poſſeſſion of the whole Eſtate; he continued the ſaid univerſal Poſſeſſion altho' his Wiſe had only Right to a yearly Liferent of 1400 Merks. In the Year 1667 he acquired an Appriſing of the Eſtate from one *James M'gowan*, and in *Anno* 1680 transferred the ſame in Favours of *Robert Brown* now of *Carſluith* his Stepſon for advancing his Marriage with *Crawfordſtoun*'s Siſter. Which Tranſlation, after narrating the Appriſing at *M'gowan*'s Inſtance and his Diſpoſition to *Cuill*, bears, *That* Cuill *for certain Sums of Mony transfers and diſpones the ſaid heretable Right by Virtue of the foreſaid Diſpoſition and Aſſignation*, &c. *Together with the haill Sums of Mony, Principal, Annualrents and Expences and Sheriff Fie contained in the foreſaid Appriſing aſſigned by* M'gowan *to him, and all Right, Title, Intereſt which* Cuill *had, has, or may have thereto in Time coming*, &c. *with Power to call for the Maills and Duties thereof, as alſo the haill Sums of Mony, Principal, Annualrents and Expences above transferred, which were diſponed to him by* M'gowan, &c. *Whilk* Cuill *obliges him to warrand from his own proper Fact and Deed allennerly, that is, that he had not done, nor yet ſhould thereafter make any other Aſſignation, Tranſlation, Diſpoſition, Renunciation, or any other Security of the Premiſſes to no other Perſon or Perſons*, &c. Upon this Tranſlation the ſaid *Robert Brown* purſued *Thomas Maxwell* of *Cuill* as repreſenting his Father Granter thereof, for his Father's Intromiſſions with the Rents of the Lands appriſed preceeding his Conveyance of the foreſaid Appriſing in Favours of the Purſuer, in ſo far as they exceeded his Wiſe's Liferent.

Alledged for the Defender. He cannot be liable for any of his Father's Intromiſſions before Tranſlation of the Appriſing: Becauſe any Intromiſſion he had was allennerly by Virtue of his Wife's Liferent Right, and not by Virtue of the Appriſing which he never made Uſe of, but after it had lyen long dormant beſide him, diſponed it to the Purſuer *talis qualis* as it was. 2. The Warrandice in the Tranſlation from Fact and Deed is expreſly qualified and reſtricted to Diſpoſitions, Renunciations, or Tranſlations of the Right and obliges not againſt Intromiſſions.

Replyed for the Purſuer. This Tranſlation not being a Diſpoſition of Lands but of the Appriſing it ſelf *tanquam optimam maximam* and haill Sums therein contained, Principal, Annualrents and Penalties; if the Diſponer by his Intromiſſion hath got Payment of any Part thereof, the Defender muſt make the ſame good to the Purſuer, who has Maills and Duties aſſigned to him without Reſtriction, and all that was aſſigned by *M'gowan.* Now *M'gowan* had Right to the Rents craved, and therefore the Warrandice muſt extend thereto. The Superintromiſſions not liferented cannot be aſcribed to *Cuill's* Title by his Wife, but to the Appriſing which was the only Title exiſting in his Perſon at the Time. 2. Aſſignations, Tranſlations, Diſpoſitions and Renunciations in the Warrandice comprehend all the Writs the Cedent could have made to the principal Debtor, or to any third Party except Tenants: And the ſubſequent Words, *Or any other Security of the Premiſſes, to no Perſon or Perſons,* plainly include his own Superintromiſſions, the ſame Way as in the Caſe of his Tranſlation of an Infeſtment of Annualrent or any Infeſtment in Security of a Sum in the ſame Terms, his bygone Intromiſſions that might have extinguiſhed the Subject aſſigned would have fallen under the Warrandice.

Duplyed for the Defender. The diſponing of the Appriſing by the Defender's Father, with all Right which he had or might have by Virtue of the Aſſignation from *M'gowan,* implies that he intended only to diſpone what Right he had ſo acquired, ſuch as it was. And ſince he never intrometted by Virtue of the ſaid Appriſing, the Warrandice in his Aſſignation thereof can never make him liable for any Intromiſſions he had, which his Wife's Poſſeſſion and his own *bona Fides* do abundantly legitimate.

The Lords found the Warrandice was incurred by the Defender's Father's Superintromiſſions with the Rents of the Eſtate above his Wife's Joynture, preceeding the Conveyance of the Appriſing to his Stepſon. And remitted to the Ordinary to hear Parties as to how far the Defender is liable.

Eodem Die. Grant *of* Dalahaple, *againſt Major* Alexander Anderſon.

MAjor *Alexander Anderſon* having granted *Dalahaple* a Bond of Corroboration of a Debt for which his Father was in the Meſſengers Hands under Caption at the Time, with this Quality, That the Creditor ſhould ſuperſede Payment for two or three Years, and uſe all legal Diligence to affect his Father's Eſtate by Adjudication and Inhibition; and after uſing of the Diligence againſt the Father, and elapſing of the *Superſedere,* being charged upon the ſaid Bond at the Inſtance of *Dalahaple:* He raiſed Suſpenſion and Reduction *ex Capite Vis & Metus,* upon this Ground, That he had granted the ſaid Bond of Corroboration to the Charger in Order to relieve his Father, who was carried Priſoner through the Hills from Place to Place in his Night gown and Slippers, while ſick and not able to put on his Clothes, with the Hazard of his Life.

Anſwered for the Charger. 1. That the Bond of Corroboration was a plain Tranſaction; in ſo far as the Suſpender got thereby more Terms of Payment than were contained in his Father's original Bond, and the Charger obliged to adjudge his Father's Eſtate and tranſmit the ſame to him. 2. The Bond charged on was homologated by the Suſpender, in that he had gotten from the principal Debtor an Aſſignation for his Relief to a greater Debt, and conveyed the ſame in Favours of a third Party. Upon which two Grounds the Bond of Corroboration could not be quarrelled upon the Head of Force or Fear.

Replyed for the Suſpender. That no Tranſaction could be inferred from the *Superſedere* and other Quality in the Bond charged on; theſe being *in Gremio* of the Right extorted, and Terms arbitrarly impoſed by the Charger. 2. Tranſaction doth not exclude Reduction upon the Head of Force and Fear of Death; *Stair, Inſtit. P.* 138 *&* 77. *L.* 13. *C. de Tranſact. December* 8, 1671, *M'intoſh* contra *Spaldings*. 3. The Suſpender's accepting the foreſaid Aſſignation from his Father was no more an Homologation, than if he had got Mony from him to pay the Debt, and upon Payment had received a Diſcharge, which the Lords in parallel Caſes, *February* 11, 1668, *Mackenzie* againſt *Fairholm*; *February* 20, 1668, *Farquharſon* againſt *Gordon*, found not to infer Homologation againſt a Cautioner.

Duplyed for the Charger. A Tranſaction is underſtood in Law to be interpoſed, where *aliquid eſt datum, promiſſum, vel retentum:* And the Suſpender in the Bond of Corroboration got an Eaſe of the Debt by a long Term of Payment. For *qui tardus ſolvit quam ſolvere debebat, minus ſolvere intelligitur.* Beſides, the Charger was bound by his Acceptance of the ſaid Bond to lead ſeveral Diligences againſt the Father's Eſtate. Which Terms and Conditions being profitable to the Granter of the Bond, and burdenſom to the Charger, cannot be look'd upon as the Effect of Force and Fear, but of a free Treaty and Agreement. 2. If this Caſe were to be determined by the civil Law, the Suſpender could never be reſtored againſt his Bond: For there was no Force uſed againſt him, but he voluntarly offered the ſame; and there was no Leſion, for he corroborated a juſt and true Debt; and by the Edict *quod Metus Cauſa, non datur Actio ſi nihil abſit, & ſolum ſuccurritur captis & læſis*, vid. *L.* 12. §. 2. & *L.* 14. *ff. Quod Metus Cauſa.* My Lord *Stair* in the Place cited ſays, *Neither will a Tranſaction be convelled upon ſuch Grounds of Force or Fear as could convel other Contracts, but ſuch Fear as imports imminent Hazard of Death or Torture:* And however in this Caſe there might have been uſed ſome Indiſcretion in executing the Caption, when the Debtor was valetudinary and guttiſh; he was in no Hazard of his Life. The Deciſion betwixt *M'intoſh* and *Spalding* is not to the Purpoſe: For *M'intoſh* was apprehended upon a Caption after Intimation of a Suſpcuſion thereof. 3. The Grounds urged by the Suſpender do no Ways take off the Homologation: For the Suſpender became Debtor to his Father, by transferring the Debt aſſign'd, and conſequently obliged to pay the Debt corroborated. Altho' the ſimple taking of an Aſſignation for his Relief would not import Homologation: Becauſe ſuch a Thing is only intended to be effectual in Caſe the Aſſigny were put to pay the Debt. The Deciſions meet not the Caſe, for the Suſpender was not Cautioner, but the only Perſon obliged in the Bond of Corroboration: And certainly had he got Payment of the Mony aſſigned and therewith ſatisfied the Debt corroborated, that would have inferred Homologation. The Caſe of the laſt Deciſion is, where a Minor Cautioner did obtain only a Decreet of Relief againſt the principal Debtor but no Payment, which if he had recovered, the Lords would never have reponed him againſt his Bond, ſeing he could not pretend Leſion.

The Lords found the Suſpender had tranſacted the Debt for which his Father was Priſoner, and had homologated his own Bond of Corroboration, ſo as he could not quarrel or reduce the ſame *ex Capite Vis & Metus:* And therefore found the Letters orderly proceeded.

July 17, 1706. *The Town Treaſurer of* Dumbar, *againſt* Jean Pringle *Relict of* George Rutherford *Merchant there.*

JEan *Pringle* Relict of *George Rutherford* raiſed Advocation of a Proceſs commenced before the Baillies of *Dumbar*, at the Inſtance of their Treaſurer againſt her as repreſenting her Husband, for Payment of a Debt due by him *per* Bond to the Purſuer, upon this Ground: That the Action was for a Debt reſting to the Town Treaſurer upon the Town's Account, and the Magiſtrates, who are Adminiſtrators of the publick Stock of the Burgh, could not judge in a Cauſe concerning the Subject of their Adminiſtration, for which they are accountable; no more than a Tutor can be Judge in his Pupil's Cauſe.

The Lords repelled the Reaſon of Advocation, and remitted the Cauſe. There being an expreſs Act of Parliament allowing Deputes to be Judges in the Principal's Cauſes: And the Baillies are but the Town's Deputies, and may competently judge upon Debts due to the Town. Nor doth the Caſe of a Tutor or Curator meet: Theſe being reputed as Parties themſelves, whereas Magiſtrates of a Burgh are not ſo conſidered in the Concerns of the Community.

Eodem Die. *Sir* Hugh Campbell *of* Calder, *againſt the Creditors of* Park Hay.

IN the Ranking of the Creditors of *Park Hay*, Sir *Hugh Campbell* of *Calder* founded upon an heretable Bond of Relief for ſeveral Cautionries he ſtood ingaged in for *Park*, whereupon he had taken the firſt Infeſtment: And craved Preference not only for the principal Sums, Annualrents and Expences paid by him to the common Debtor's Creditors, and theſe Annualrents and Deburſements ſtated as a principal Sum bearing Annualrent from the Time of Payment; but alſo ſought to be preferred for the Expences of expeding his Infeſtment and making it effectual againſt the other competing Creditors. Becauſe, his Bond of Relief doth expreſly provide that his Infeſtment ſhall not be redeemable till he be reimburſed not only of all Charges and Damages in general, but alſo of the Expence of his Infeſtment. And his Charter under the Great Seal repetes theſe Obligements; and both it and his Seaſin expreſly relate to the Reverſion in the Way and Manner as the ſame is contained in the Bond of Relief regiſtred and made publick.

Anſwered for the other Creditors. However the Expence of Sir *Hugh Campbell*'s Infeſtment might be the Foundation of an Action againſt *Park Hay*, 'tis inconceiveable upon what Ground it can be real againſt the Eſtate, to the Excluſion of other Creditors: Seing there is no ſuch Proviſion in the Infeſtment, which is only granted for Relief of Debts particularly therein enumerated. Nor doth it alter the Caſe, that the Infeſtment relates to the Charter: Seing ſingular Succeſſors are only obliged to notice what is expreſly and fully contained in the Seaſin; And the Words of the Charter, *To be relieved of all Coſt, Skaith or Damage* can only relate to the Debts he ſtood ingaged for. 2. Whatever might be pled as to the Expence of expeding his Infeſtment, it is abſurd to pretend that the Deburſements in maintaining his Right againſt the competing Creditors ought to be ſuſtained: Seing in Competitions every Creditor muſt bear his own Burden of Expences for their own Security.

The Lords ſuſtained Preference upon the Infeſtment of Relief for the principal Sums, Annualrents and Expences paid by Sir *Hugh Campbell* to *Park*'s Creditors, and allowed the ſame to be ſtated as a principal Sum at the Time of Payment: But refuſed to ſuſtain his Claim of Expences for expeding his Infeſtment and making it effectual againſt the other competing Creditors.

July 18, 1706. James Lees *Merchant in* Glaſgow, *againſt* Robert Dinwidie *Merchant there.*

JAmes Lees Merchant in *Glaſgow*, as Executor Creditor to *Ninian Glaſs* in *Crawford's-dike*, having intented a Proceſs againſt *Robert Dinwidie* Merchant in *Glaſgow*, and *Elizabeth Kelburn* Relict of the ſaid *Ninian Glaſs*; for Reſtitution and Delivery to him of ſome Barrels and a Boat belonging to the Defunct, and confirmed by the Purſuer.

Alledged for the Defender. That before the Purſuer's Confirmation, the ſaid *Elizabeth Kelburn* was confirmed Executrix dative to the Defunct, and had obtained the Goods purſued for eiked to her confirmed Teſtament; and *Robert Dinwidie* was aſſoilzied in a Proceſs at her Inſtance for them, before the Commiſſars of *Glaſgow*, upon a Ground of Compenſation by an equivalent Debt the Defunct was owing to him. So that the Purſuer's Confirmation is null, as being poſterior to another's Confirmation as principal Executrix dative: Since there cannot be two principal Executors to the ſame Defunct; as was found betwixt *Kennedy* and *Cuming*, and the Creditors of *Kinfauns*.

Replyed for the Purſuer. Albeit the Relict's Confirmation was prior to his, yet his Confirmation was expede before ſhe did eik the Goods now purſued to her firſt confirmed Teſtament: And the making the ſaid Eik could be of no Import, ſince the Goods therein mentioned had been formerly confirmed by the Purſuer as Executor Creditor, who therefore ought to be preferred to them, as if he had been confirmed *ad omiſſa*. 2. It is *Jus Tertii* to *Dinwidie* to found upon the Relict's Confirmation: Since he derives no Right from her.

Duplyed for the Defender. The Purſuer's Confirmation cannot ſubſiſt as a Dative *ad omiſſa*, becauſe it bears not to be ſuch: Nor was the principal Executor called thereto, which is neceſſary to the obtaining a Dative *ad omiſſa*; Becauſe the principal Executor has the Privilege to eik, and may object againſt the Ground of the Executorſhip. 2. Its *Jus Proprium* and not *Jus Tertii* for the Defender to found upon the Relict's Teſtament, becauſe he ſtands aſſoilzied in an Action at her Inſtance as Executor, and ſo has Intereſt to maintain that Abſolviture.

Triplyed for the Purſuer. That he could not call the Executrix dative to his Confirmation, becauſe tho her Confirmation was prior to his, yet it was after the taking out and executing of his Edict. 2. The Abſolviture obtained by *Dinwidie* againſt the Relict cannot be obtruded to the Purſuer, being *Res inter alios acta*, wherein he is not concerned.

The Lords found the confirmed Teſtament at the Purſuer's Inſtance null; in Reſpect that before the Date thereof, the Defunct's Relict was confirmed Executrix dative, and the Purſuer is alſo confirmed a principal Executor, and not *ad omiſſa*, without calling of the firſt Executor dative.

Eodem Die. Archibald Fleming *of* Ferm, *and Sir* George Hamilton *his Cedent, againſt Sir* James Calder *of* Muirtoun.

SIR *George Hamilton* Aſſigny by the reſt of the Tackſmen of the foreign Cuſtoms and Exciſe, having obtained a Decreet againſt the Repreſentatives of *John Murray* (who had been their Caſh-keeper and general Receiver) for a Matter of Twenty thouſand Merks of Ballance due by the Defunct; And having charged Sir *James Calder* of *Muirtoun* his Cautioner, for Payment of the ſaid Sum, he ſuſpended upon this Ground, That the ſaid Decreet of Liquidation was altogether in Abſence *quoad* him, who was never cited to the obtaining thereof. And the Lords for that Reaſon turned the ſaid Decreet into a Libel; and found that the Charger behoved to prove his Libel, as if the Suſpender were only newly cited.

July 19, 1706. Katharine Edmondſtoun, *and Mr.* Stephen Olipher *her Huſband, againſt* James Edmondſtoun.

James *Edmondſtoun* having granted a Bond of Proviſion to his younger Children, and the Portions of the deceaſing to accreſce to the Survivers; *Katharine Edmondſtoun* one of theſe Children, with the Concourſe of Mr. *Stephen Olipher* her Husband, purſued *James Edmondſtoun* her eldeſt Brother as Heir to his Father, for Payment of her own Proviſion of Five thouſand Merks, and a Proportion of her younger Brother's, falling to her through his Deceaſe.

Alledeged for the Defender. Abſolviture; Becauſe the Bond of Proviſion was granted on Death-bed, and he had raiſed Reduction *ex eo Capite*, which he repeted by way of Defence.

Replyed for the Purſuer. That the Father was bound by his Contract of Marriage to imploy Twenty thouſand Merks in Favours of himſelf and his future Spouſe in conjunct Fie and Liferent; and of the Heirs and Bairns one or more to be procreated betwixt them in Fie: And the Bond of Proviſion was nothing in Effect but a Diviſion, which the Father has always the Power of even *in Articulo Mortis*.

Duplyed for the Defender. Vtcunque the Death-bed Deed, had it related to the Obligement in the Contract as its antecedent onerous Cauſe, might have ſubſiſted; Yet not having any Relation thereto, but being in the Terms of a ſeparate Proviſion, and made on Death-bed, it cannot ſtand in Prejudice of the Heir. Nor is it enough for the Purſuer to reſtrict the Import of it to what might fall to her Share of the Twenty thouſand Merks by her Mother's Contract of Marriage: Becauſe, the Death-bed Deed being null in Law, can have no Effect at all, by the Rule *quod nullum eſt*, &c. Beſides, there was no Faculty of Diviſion of the Twenty thouſand Merks reſerved to the Defunct, nor did he exerce any ſuch Faculty; On the contrary *hoc non voluit*, but only that the Death-bed Bond of Proviſion ſhould be binding, *quod facere non potuit*.

The Lords ſuſtained the Bond, and repelled the Defence of Death-bed; in Reſpect of the anterior onerous Cauſe by the Contract of Marriage.

Eodem Die. George Turnbul *Writer to the Signet, againſt* David Anderſon *Merchant in* Montroſe.

George *Turnbul* Writer to the Signet, having, as Creditor to Mr. *Arbuthnet* Merchant in *Stonehive* by two Bills, arreſted on a Dependence before the Admiral, in the Hands of *John Heriot* Merchant in *Dirletoun* as Debtor to *Arbuthnet*, and after Sentence purſued a Furthcoming: Compearance was made for *David Anderſon* Merchant in *Montroſe*, who claimed Right to what *Heriot* was reſting to *Arbuthnet*, by Virtue of a Precept drawn by *Arbuthnet* in his Favours upon *Heriot*, *Ordering him to compt and pay to Mr.* Anderſon *for 190 Bolls of Meal received from the Drawer, and for 51 Stone of Iron at 58 ſh.* per *Stone, and to take his Receipt*, &c.

Alledged for Mr. Turnbul. That he ought to be preferred, becauſe his Arreſtment was prior to any Intimation of Mr. *Anderſon*'s Right.

Anſwered for Mr. Anderſon. That Preference was due to him for that his Precept was prior to the others Arreſtment; and needed no Intimation, being a complete Right and Conveyance from the *Date*: As all Orders and Precepts betwixt Merchants *in re Mercatoria* are, *Stair* Lib. 3. Tit. 1. N. 12. Forbes *Treatiſe of Bills*, *P.* 166. 2. *Et ſeparatim*, the Arreſtment is null, as being on a *Dependance* not maritime before the Admiral.

Replyed for Mr. Turnbul. Mr. *Anderſon*'s Precept from *Arbuthnet* is not ſuch an Order and *Bill* as is meant by my Lord *Stair*, and Mr. *Forbes* in the Places cited, and which by our Practice requires no Intimation: It not being for a liquid Sum, but only an Order to *Heriot* to fit and clear Accompts anent the Price of Victual, and other Merchant Goods with *Anderſon*; who, albeit the *Ballance* was to be paid to him, could not pretend that the Right thereto was formally ſtated in his Perſon by Virtue of the Precept, without completing his Right by Intimation. Otherwiſe all manner of Conveyances among Merchants might be pretended as privileg'd from the Neceſſity of Intimation, which would tend to unſecure Arreſtment by latent Rights. Again, this Precept cannot partake of the Privilege of *Bills*: *Becauſe* ſummar *Diligence* by Horning could not proceed thereon, in that it requires a previous Compting for liquidating the *Debt*, which can only be proſecuted by an ordinary Action. 2. There is nothing more ordinary than to purſue Payment of Bills of Exchange before the Admirality, and it was never heard that the Admiral's *Decreet* was reduced on that Account: And if it were otherwiſe, many would ſuffer in their Rights and Property.

Duplyed for Mr. Anderſon. Tho Horning were not competent on his Precept, that could not exclude him from the other Privileges of a Merchant-writ: For Bills of Exchange after Six Months are not the Subject of ſummar Diligence; And Notes of Merchants are valid without the ordinary Solemnities of common Writs, tho at no Time Horning could be raiſed on them. 2. The Admiral's Juriſdiction is limited to maritime Cauſes, and a Bill of Exchange is no more a maritime Subject, than a Bond granted by one Perſon to another: nor can there be any ſingle Inſtance given where the Admiral's Incompetency to judge concerning Bills of Exchange being proponed, was repelled by the Lords of Seſſion.

The Lords found Mr. *Anderſon*'s Precept could not carry a Right to the Subject without Intimation: And preferred Mr. *Turnbul* the Arreſter, albeit his Arreſtment proceeded on an Admiral Precept.

Eodem Die. William Black *and other Tenants of* Gogar's, *againſt* Hugh Mᶜgill *of* Grange, *Baillie of the Regality of* Culroſs.

IN the Action of Reduction and Declarator at the Inſtance of *William Black* and the other Tenants of *Gogar*'s, againſt *Hugh M'gill* Baillie of the Regality of *Culroſs* for Damages the Purſuers were put to by a Poinding, that followed on an unjuſt Decreet of Poinding the Ground pronounced by the Defender, wherein he repelled this Defence, That the Heretor was not call'd; The Purſuer founded his Libel on ſeveral Acts of Parliament concerning Judges Adminiſtration of Juſtice, particularly the *Act* 12. *Par.* 6. *Ja.* 2. whereby any Officiar wilfully treſpaſſing in the Miniſtration of his Office of the Law, and the ſame proved againſt him, ſhall tine his Office Year and Day, and Aſſyth the Party as effeirs; And by all Law a Judge, *qui facit Litem ſuam* by doing Injuſtice, is liable to the Parties Damage thereby ſuſtained.

Anſwered for the Defender. That ſuch Proceſſes againſt inferior Judges for determining wrongouſly in a Point of Form are unpreſidented, and cannot be ſuſtained: For it is well known that their Decreets are daily reduced by the Lords, not only for Eſcapes in ſome Formalities, but alſo for material Iniquity. And the Acts of Parliament concerning the Puniſhment of unjuſt Judges, as the *Act* 45. *Par.* 2. *J.* 1. *Act* 17. *Ibid. Act* 76. *P.* 14. *J.* 2. *Act* 26. *Par.* 5. *J.* 3. and *Act* 104. *Par.* 7. *J.* 5. relate only to ſuch as treſpaſs wilfully and deceitfully, or by refuſing to adminiſtrate Juſtice *Animo protelandi Litem*, or by giving partial Counſel: none of which can be applyed to the Defender who is a Man of known Probity and Integrity; and therefore ſhould not be brought upon the Stage for an innocent Miſtake in ſuch a Point of Form as is libelled againſt him.

The Lords Aſſoilzied the Judge.

Eodem Die. *Competition betwixt Sir* James Elphinſton *and the other Creditors of* Strichan.

IN the Competition betwixt the Creditors of *Fraſer* of *Strichan*, who all raiſed Summonſes upon the paſſive Titles, againſt *Thomas* and *Alexander Fraſers* his younger Children, and thereupon arreſted in the Hands of the Earl of *Murray* his Debtor, and thereafter obtained Decreets of Conſtitution: The Lords found, That a libelled and ſigneted Summons before it was executed, did not make a depending Action; and therefore did not ſuſtain Arreſtments raiſed and executed thereon.

Albeit it was alledged, That tho an Action is not ſaid to be depending before an Ordinary till the Libel be executed, tabled and called; and a Summons till it be executed doth not render a Matter litigious, or interrupt Preſcription: Yet a ſigneted libelled Summons is an inchoate Action, and was always held to be a Dependance whereupon Arreſtment might be uſed. For vouching whereof, a Declaration ſubſcribed by Thirty five Writers was produced, teſtifying that they were in Uſe to raiſe Letters of Arreſtment upon a libelled ſigneted Summons tho not executed: And *credendum Artifici in ſua arte*.

In reſpect it was anſwered, That the Declaration of the gathered Hands is not to be regarded, moſt of them being young Writers, and the old experienced Maſters of Stile declare that the Practice of raiſing Inhibitions or Arreſtments upon unexecuted Summonſes is contrary to Senſe, Law and Stile: The Unwarrantableneſs whereof doth appear from theſe Words in the Bill and Letters; *As the Summons duly executed bears.* And whatever might be ſaid for the raiſing of Letters of Arreſtment before Execution of the Summons, the anterior executing of the Arreſtment cannot be accounted for. As tho a general Charge and Summons on the paſſive Titles be ordinarly raiſed together, the Summons is never executed before the general Charge.

July 24, 1706. John Donaldſon *Factor for the Earl of* Panmure, *againſt the Magiſtrates and Town of* Brechin.

JOhn Donaldſon Factor for the Earl of *Panmure*, having Charged the Magiſtrates of *Brechin* for 1200 Merks due to him by the Town *per* Bond, They ſuſpended upon this Reaſon, That the Charger is guilty of Uſury for exacting more Annualrent than is allowed by Law: And therefore the half of the Sum belongs to the Magiſtrates as Diſcoverers; For which they repeted a Declarator; And for inſtructing the Reaſon of Suſpenſion and Declarator, produced a Diſcharge granted by the Charger for 45 lb. *Scots* as one Year's Intereſt of the Debt. And to evince, That the undue Exaction was not through Miſtake, but of Deſign, they pointed at a Note written by the Charger on the Back of the Diſcharge, bearing, *That he allowed Three Quarters Retention only.*

Anſwered for the Charger. That he opponed the Diſcharge which bore, That Retention was allowed conform to Act of Parliament, and the *Superplus* more than the due Annualrent was only 20 ſhil. *Scots*, an inconſiderable Fourty fifth Part of what was truly due: And the Lords are not to cognoſce *de minimis.* And the taking thereof can only be imputed to an Error or Miſtake in the Calcul: For if he had had an uſurary Deſign, he would never have made his Diſcharge ſo particular as to Principal and Annualrent, but would have worded it ſo as the Uſury behov'd to be otherways proved than by the Writ it ſelf. Again what is minuted on the *Back* of the Diſcharge is ſo far from inferring a Preſumption of Uſury, that it evinceth the contrary, *viz.* That how ſoon the Charger was ſenſible of his Miſtake, he minuted on the *Back* of the Diſcharge that Three Quarters Retention was only allowed, to the End the Suſpender's might be redreſſed at the next Payment.

Replyed for the Suſpenders. In Crimes of this Sort the *Animus delinquendi* is to be noticed, which is certainly as great in ſmall Matters as in Affairs of higher Importance, if not greater. As it is the Sign of the greater *Baſe*neſs and Depravedneſs of Spirit to commit Uſury for a ſmall Matter, than for a conſiderable Sum, where the Power of the Temptation might in ſome Meaſure alleviate the Crime. *But* then *majus et minus non variant Speciem*: And our Law ſuſtained a criminal Dittay of Uſury for taking the *Martinmas* Intereſt of Fifty Merks upon the Eighteenth of *July* in the Caſe of *Purdie Anno* 1666, and the like *November* 28, 1668, in the Caſe of *Hugh Roxburgh*, as appears from the Books of Adjournal.

Duplyed for the Charger. The two Caſes urg'd from the Books of Adjournal do not meet: For there Annualrent due at *Martinmas* was exacted in the preceeding *July*, which could not receive a favourable Conſtruction, or be imputed to the Creditor's Miſtake; Whereas to infer Uſury from ſuch a minute Eſcape *in Calculo* as the Charger's is, might pave the Way for catching the moſt exact and honeſteſt Men.

The Lords found the Charger not guilty of Uſury, and that there was only Error *in Calculo.*

Eodem Die. Jean Weems *and* David White *her Husband,* contra Anna Murray.

ISobel Forbes* Daughter to the deceaſt Mr. *Arthur Forbes*, being Creditor to Sir *Patrick Murray* in 1000 Merks *per* Bond, granted an Obligement to *Anna* and *Martha Murrays* her two Aunts, by the Mother-ſide, for Payment of 40 Pound yearly: And thereafter, having married the deceaſt *James Hamilton* Goodman of the *Cannongate-Tolbooth*, ſhe made a Diſpoſition to him *omnium Bonorum*, and particularly aſſigned him to the ſaid 1000 Merks Bond; But by a poſterior Diſpoſition, ſhe aſſigned to the ſaid *Anna Murray* her wearing Clothes. *James Hamilton* transferred the ſaid Bond to *Jean Weems* his ſecond Wife in Implement of the Minute of Contract paſt betwixt them *pro tanto*, who with the Concourſe of *David White* her preſent Husband purſued for the ſame. Compearance is made for *Anna Murray* who claimed Preference to the Sum upon this Ground, That ſhe was Executrix *qua Creditrix* decerned to *Iſobel Forbes*, and had confirmed the ſame as *in Bonis* of the Defunct; Whereas *Jean Weems*'s Right depended upon the Validity of the Diſpoſition made by *Iſobel Forbes* to *James Hamilton*, which was null and reduceable upon the Act of Parliament 1621, as being a Diſpoſition *omnium Bonorum* by a Wife to her Husband in Defraud of Creditors.

Alledged for Jean Weems. That *Anna Murray* as Executrix Creditrix to *Iſobel Forbes* can have no Right to the Sum; becauſe the Defunct was denuded in her own Lifetime. Nor is a Diſpoſition by a Wife to her Huſband reduceable upon the Act of Parliament 1621 as gratuitous, and to the Prejudice of lawful Creditors; ſeing a Husband is liable *in quantum lucratus.* Yea, *Iſobel Forbes* after granting of the foreſaid Diſpoſition to her Husband had a ſufficient Fund to anſwer all her Debt, and particularly the Debt acclaimed by *Anna Murray:* In ſo far as by a ſubſequent Diſpoſition, ſhe diſponed to her her wearing Apparel which was more than ſufficient for her Payment; And muſt be imputed in Satisfaction of the Debt due by the Diſponer, ſince *Debitor non præſumitur donare.* And *Anna Murray* cannot reduce *Iſobel Forbes*'s Diſpoſition to *James Hamilton Jean Weems*'s Cedent, becauſe ſhe *Anna Murray* granted a general Diſcharge to him of all ſhe could ask or crave, and conſequently of this Obligement.

Anſwered for Anna Murray. The Diſpoſition to *James Hamilton* being gratuitous and *omnium Bonorum*, is plainly fraudulent and null by Exception, in Competition with *Anna Murray* an anterior lawful Creditor. Nor doth the Brocard *Debitor non præſumitur donare* hold in many Caſes; as where the Writ bears to be a Donation; or the Thing diſponed is not a liquid Debt of the ſame Kind; or is Remuneratory; Or where the Preſumption of a Gift is ſtronger than that of Payment, *November* 23, 1679, *Anderſon* contra *Anderſon*, *June* 16, 1665, *Cruickſhank* contra *Cruickſhank.* All which Exceptions concur in this Caſe: In ſo far as the Diſpoſition to *Anna Murray* expreſſeth a Donation in theſe Words, *She leaves, gives and bequeaths*; The Subject diſponed is wearing Apparel which is not a liquid Debt; And 'tis a remuneratory Donation *Mortis Cauſa* to an Aunt who attended the Diſponer the Time of her Sickneſs, and at the bearing of all her Children, and who had ſuffer'd Loſs by her Father. The Diſcharge granted by *Anna Murray* to *James Hamilton* cannot include the Obligement in her Favours for the Fourty Pound of Annuity: Becauſe, the general Clauſe is not to be extended beyond the Subject antecedently therein-narrated, *viz.* The Decreet recovered againſt him for the wearing Clothes diſponed, and Value thereof. Nor does *Anna Murray* pretend this to be a Debt due by *James Hamilton*, but only by *Iſobel Forbes.*

Replyed for Jean Weems. The Diſpoſition by *Iſobel Forbes* to *James Hamilton* bears not only for Love and Favour, but alſo for diverſe onerous Cauſes: And the true onerous Cauſe thereof was, That he had ſuſtained the *Onera Matrimonii*; and *Jean Weems* hath the Sum tranſmitted to her for a moſt onerous Cauſe, *viz.* In Satisfaction of the Proviſion in her Contract of Marriage with him. The cited Deciſions are not to the Purpoſe: For in that of *Anderſon* contra *Anderſon*, The Quality of the Parties Oath by which the Debt was conſtitute, the Smallneſs of the Sum, and the Circumſtances of Parties were the Rule. And the Deciſion betwixt the *Cruickſhanks* was founded on theſe Specialities, The Defunct was rich and had no Children, and the Purſuer was poor and his neareſt of Kin; and the Diſpoſition reſerved a Faculty to alter. The Diſpoſition again was burdened with the Payment of Sums to ſome other Friends, and bore expreſly in Satisfaction of Debts due to them, but did not declare ſo as to the Debt due to the Purſuers.

The Lords ſuſtained the Obligement in Favours of *Anna Murray*, and found, That *Iſobel Forbes*'s Diſpoſition to her Husband cannot compete with her Right. And found the Diſcharge by *Anna Murray* to *James Hamilton* doth not concern this Caſe, but only the Decreet therein-narrated; Becauſe theſe were Debts of a different Kind. And found, That the Aſſignation by *Iſobel*

Forbes of ſome Body-clothes to *Anna Murray* is not to be conſidered as Payment or Satisfaction, but a mere Donation. And therefore preferred *Anna Murray* to the Annualrents.

Eodem Die. Janet Carruthers *and* James Maxwell *of* Barncleugh *her Husband*, *againſt* John Carruthers *of* Dormount.

S*Uſanna Maxwell* Daughter to *John Maxwell* of *Colignaw* having diſponed her Eſtate to *John Carruthers* of *Dormount* her ſecond Husband, upon his granting a Backbond to provide and ſecure her in the Liferent of the whole, and the Children to be procreate betwixt them in the Fie of the equal Half thereof: *Janet Carruthers* only Child of the Marriage and *James Maxwell* of *Barncleugh* her preſent Husband purſued *Dormount* for Implement of the Backbond.

Alledged for the Defender. That he could not be obliged to implement, in Regard the Right made to him by his Wife was ineffectual, ſhe with Conſent of her firſt Husband, having formerly diſponed the ſame Lands to *John Maxwell* elder of *Caſtlemilk* her firſt Husband's Father, which excluded the Right made by her to the Defender, and rendred the ſame altogether ineffectual, which obliged him to buy in *Caſtlemilk*'s Right.

Replyed for the Purſuer. The Defender having entred to the peaceable Poſſeſſion of the Lands diſponed, and continued long therein by Virtue of the Right from his Wife, he was *in mala Fide* to acquire *Caſtlemilk*'s Right in Prejudice of the Purſuer, whoſe Right he might have completed and rendred preferable to *Caſtlemilk*, by infeſting or adjudging: Which by his Backbond he was bound, as Truſtee for the Purſuer, to have done; and hath induſtriouſly omitted to furniſh him with a Defence againſt this Purſuit.

Duplyed for the Defender. It was impoſſible to make the Defender's Right from his Wife preferable to her prior Right in Favours of *Caſtlemilk*: Seing the Purſuer, as Heir to her Mother, would have been obliged to implement the Diſpoſition to *Caſtlemilk*, and the Inhibition thereon would for ever excluded the poſterior Diſpoſition to the Defender; whatever Diligence had been done to complete it. So that the Defender was *in optima Fide* to acquire *Caſtlemilk*'s Right, his own Right being reduceable *ex Capite Inhibitionis*; and Neceſſity has no Law. 2. The main Cauſe of *Dormount*'s obliging himſelf for one Half of the Lands diſponed to the Heirs of the Marriage, was his getting the other Half to himſelf; and *ita eſt*, the Inhibition upon *Caſtlemilk*'s Diſpoſition did wholly evacuate *Dormount*'s own Half: Therefore the Obligement of the Backbond falls *ex Cauſa data non ſecuta*, *Arg. Deciſ. December* 23, 1684, *The Dutcheſs of Lauderdale contra the Earl*. 3. *Et ſeparatim*, The Purſuer cannot inſiſt againſt the Defender for her Half of the Eſtate: Becauſe ſhe may be repelled *perſonali Objectione* as Heir to her Mother, who was obliged to warrand *Dormount*'s Half from Fact and Deed; and the one meets the other by Compenſation. For tho' *regulariter* Compenſation is only *in Quantitatibus*, yet *ubi mutuæ Obligationes ſunt ejuſdem Speciei* (as the Obligations for the two equal Halfs are) they meet one another. And where a Perſon is neceſſitate to buy in a preferable Right, which would evict a former Right in his Perſon, he who is liable in Warrandice of that former Right, can never claim the purchaſed Right, without giving what was paid for it, and all Expences.

Duplyed for the Purſuer. *Caſtlemilk*'s Son as the Mother's Heir of Line is liable *primo Loco* to make good her Warrandice, and the Purſuer being only Heir of Proviſion, is liable in Warrandice but according to the Value of the Succeſſion, and not in that, till the Heir of Line be diſcuſs'd.

The Lords found, That the Defender could not make Uſe of the ſupervenient Right acquired from *Caſtlemilk* to exclude the Purſuer from the Benefit of his Backbond, and that the neceſſary Expences muſt come off the whole Eſtate, and not off the Purſuer's Half only.

July 27, 1706. Thomas Bairdiner *of* Cultmill, *againſt* William Dryſdale *Tenant there.*

T*Homas Bairdiner* having acquired the Lands of *Cultmill* by an Adjudication againſt the Heretor, did enter inta a Contract with *William Dryſdale* the Tenant, who had married one of the Heretor's two Daughters and Heirs Portioners: Whereby the ſaid *Thomas Bairdiner* was obliged to renew the Tack for the Space of 19 Years upon Payment of the former Tack-duty, and to grant him a Diſcharge of a Year's Rent then due; and *William Dryſdale* obliged himſelf to grant a Diſpoſition with Conſent of his Wife, of all Pretence or Claim that ſhe had to the Lands; and to cauſe her Siſter do the like betwixt and a certain Day under the Penalty of 100 Merks in Caſe of Failzie. *William Dryſdale* being charged to implement his Obligement, he ſuſpended upon this Reaſon: That to procure his Siſter in Law's Conſent to the Diſpoſition, was *Factum impreſtabile*, for ſhe would by no Means conſent; and therefore the Charger could only ſeek Damage and Intereſt, which is liquidated in the Obligement to 100 Merks of Penalty. Upon Payment whereof the Suſpender is free; ſeing the Clauſe, *By and attour the Implement of the Premiſſes* was not adjected.

Anſwered for the Charger. As the Sanction of a Law is only to inforce the Obſervation of it, by ſubjecting Tranſgreſſors to the Penalty: So the adjecting of a Penalty to an Obligation is only deſigned as a Compulſatory upon the Debtor to fulfil, and to render the Obligation effectual: The Words, *By and attour Implement of the Premiſſes*, being only added ordinarly *ob majorem Cautelam.* And if it had been intended that the Suſpender ſhould be liberated upon Payment of the Penalty, that would have been expreſt, as alſo that all Things done in Contemplation of the foreſaid Obligation ſhould be reſtored. It is of no Moment that the Suſpender pretends, he cannot procure his Siſter in Law to conſent to the Diſpoſition: For he ought to have foreſeen that Difficulty before his Ingagement. And Perſons obliged to procure the Conſent of third Parties, were not liberated from the principal Obligation: Even where no Penalty was adjected, but found liable to fulfil *in Forma ſpecifica*; *Gilmore, Deciſ. N.* 43. *&* 156. Far leſs can it be conceived how the adjecting of a ſmall Penalty (which is only done for defraying the Charges of Diligence in Caſe of not Performance) ſhould render it arbitrary to the Debtor to perform or not as he pleaſes; when the principal Obligation may be Ten Times more valuable than the Penalty. *Vid. Stair*, *Inſtit. Lib.* 1. *Tit.* 17. §. 20. *in Fin.*

Replyed for the Suſpender. The cited Deciſions do not meet the Caſe in Hand, where the Penalty is not conceived by and attour Performance: But adjected in Place of fulfilling the Obligement.

The Lords found the Letters orderly proceeded for the Penalty: But ſuſpended them as to the principal Obligation.

Eodem Die. *The Marqueſs of* Montroſe, *againſt* John Walkingſhaw *of that Ilk, and* Walter *Lord* Blantyre *his Aſſigny.*

THE Marqueſs of *Montroſe*, as infeft in the Dukedom of *Lennox*, having raiſed Reduction and Improbation of a Tack of the Lands of *Darnely*, *&c.* (which are a Part of the ſaid Dukedom) ſet by the Dutcheſs to *John*

Walkingſhaw of that Ilk, and aſſigned by him to the Lord *Blantyre*; and having produced an Extract of the Side of the Tack ſigned by *Walkingſhaw*, obliging him in Payment of the Tack-duty, for ſatisfying the Production: The Defender contended that the Purſuer could not ſatisfie the Production with ſuch an Extract which is not the Writ called for in the Summons, *viz.* A Tack betwixt the Dutcheſs of *Lennox* and *Walkingſhaw*, but only the Extract of the Tack ſubſcribed by *Walkingſhaw*; more than the Defender by producing thereof could have hindred Certification to go out againſt him at the Purſuer's Inſtance.

Replyed for the Purſuer. This is one of the Sides or Doubles of the Tack mutually interchang'd according to the *Engliſh* Cuſtom, where it is ſufficient that either Party ſign a Double. And ſeing the Defender cannot deny upon his Oath of Calumny that it is one of the Sides of the Tack which are literally the ſame, and that himſelf hath that ſigned by the Dutcheſs: The Marqueſs may hold the Production ſatisfied with the Extract of the Side ſigned by *Walkingſhaw*; eſpecially conſidering that he do's not inſiſt *ex Capite Falſi*, or to have the Tack annulled becauſe not ſigned by the Dutcheſs, but upon this ſpecial Ground, That the ſame is ſet in Diminution of the Rental, which the Dutcheſs had not Power to do.

Duplyed for the Defender. That his Oath of Calumny in ſuch a Caſe could not be duly required, ſince Law allows the ordinary *Induciæ* for Production of the Double ſigned by the Dutcheſs: And if it were otherwiſe, the Purſuer of a Reduction needed only to produce a Copy of any Paper called for, and crave the Defender's Oath of Calumny if he has Reaſon to deny the ſame to be a true Copy, which would overturn all Form. But in ſhort, the Defender can never be bound to anſwer to that Writ which could not defend his Poſſeſſion, not being ſigned by the Dutcheſs: And Law allows him Terms for producing any Double in his own Cuſtody.

Triplyed for the Purſuer. If a Copy had been produced by the Marqueſs, and he had craved any Principal of ſuch a Tenor to be reduced, no Ground in Law or Reaſon could hinder it. Beſides, the Extract produced differs vaſtly from a Copy: For by *Walkingſhaw*'s ſigning his Side, he obliges himſelf to the Tack-duty, and acknowledges the other Double to be ſign'd by the Dutcheſs, ſince the Extract produced bears, *That both Parties have ſigned thir Preſents.* And as it would have afforded Diligence to the Dutcheſs for the Tack-duty; ſo it ought to ſatisfie the Production in Order to Reduction at the Marqueſs's Inſtance. Nor again is it a Novelty, to reduce and even improve Writs upon Production of Copies; *July 6, 1669, Barclay* contra Captain *Barclay*: For if the Principal differ from the Copy produced, the principal Writ continues ſafe, and the Reducer gets his Labour for his Pains.

The Lords found that the Extract ſatisfied the Production.

Nota, The Seſſion, becauſe of the Parliament's ſitting, was adjourn'd to the Fourth Day of *February* 1707; and the Time and Space betwixt the Firſt Day of *November* 1706, and the ſaid Fourth Day of *February* declared not to be reckoned in any annual Preſcriptions. But in Reſpect of the Adjournment aforeſaid, the Month of *March* 1707 was added to the ſitting of the Seſſion, Acts 1, 4, and 5. Seſſ. 4. Par. 1. Q. *A*.

February 20, 1707. John Callender *of* Craigforth, *againſt the Laird of* Lundin.

JOhn *Callender* having purſued the Earl of *Melfort* to pay a Debt, which he referred to his Oath, for taking whereof a Commiſſion was granted to the

Engliſh Conſul at *Genoa*, where the Earl reſided at the Time, to be reported the firſt Day of *July* 1695; the Earl was forfeited on the ſecond Day of the ſaid Month of *July*, and in *February* thereafter *John Callender* obtained the Term to be circumduced for not reporting the Commiſſion.

The Lords found, That the Decreet of Circumduction in *February* 1696, holding the late Earl of *Melfort* as confeſt after he had been forfeited, cannot conſtitute a Debt to prejudge the Laird of *Lundin* Donatar to the Forfeiture. Becauſe a Circumduction after the Forfeiture could no more infer a Debt againſt the King or his Donatar, than the Rebel's Confeſſion, or giving Bond could do.

Eodem Die. Hugh Wallace *of* Ingliſtoun *and* John Baillie *Chirurgeon, againſt Miſtreſs* Margaret *and* Elizabeth Lauders, *and Mr.* John Fairholm *of* Babertoun *Advocate, and* John Cuninghame *of* Woodhall *their Husbands.*

HUgh *Wallace* and *John Baillie* Aſſignies by the late Tackſmen and Managers of the Cuſtoms, to a Bond granted to them by *Kenneth Urquhart* late Collector of *Aitoun* as Principal, *Archibald Murray* of *Spot* and Sir *George Lauder* of *Idingtoun* as Cautioners; that the ſaid *Kenneth* ſhould make juſt Compt, Reckoning and Payment to them of his Intromiſſions with the Cuſtoms, Exciſe, and Bullion, and do all exact Diligence for bringing in thereof monthly, quarterly or oftner as he ſhould be required; purſued Miſtreſs *Margaret* and *Elizabeth Lauders* and their Husbands for their Intereſts as repreſenting the ſaid Sir *George Lauder*, for Payment of the equal Half of 3301 Pound *Scots* and Annualrents thereof wherein the ſaid Collector fell ſhort in his Accompts.

Alledged for the Defenders. That the Tackſmen not having done monthly or quarterly Diligence againſt *Kenneth Urquhart* the Principal in the Terms of the Obligement, the Cautioners were free: As was decided betwixt *Sir James Dick and the Cautioners for the Clerk of his Brewery, Anno* 1697. For the Defenders having ingaged for the Fidelity of a Perſon in Office, are like *Fidejuſſores Indemnitatis*, free if the Creditor permit the principal Debtor to become inſolvent by his Neglect. So the Cautioners for a Factor at *Camp-vere* were not found liable for Effects ſent to him after he was known to be inſolvent.

Replyed for the Purſuers. The Obligement by *Kenneth Urquhart* and his Cautioners conjunctly and ſeverally, was in Favours of the Tackſmen, whereby they might have compelled him and his Cautioners to compt and pay monthly, quarterly and oftner if required; But did not oblige the Tackſmen to that Diligence, or free the Cautioners for Omiſſion thereof; more than Cautioners are free after the Term of Payment. There is no Parity betwixt this, and Sir *James Dick*'s Caſe: For his Clerk was preciſely obliged to compt to him quarterly, and he was obliged to take the Clerk's Accompts quarterly off his Hand; Which the Cautioner required Sir *James* to do, and proteſted to be free for his not compting.

The Lords repelled the Defence in Reſpect of the Reply.

February 22, 1707. *The Adminiſtrators of* Heriot'*s Hoſpital, and* John Angus *their Tackſman of the* Canonmills, *againſt* William Alves, Adam Thomſon, George Frazer *and* Thomas Caldwalls *Brewers in the* Canongate.

IN the Proceſs for abſtracted Multures and Declarator of Aſtriction, at the Inſtance of the Adminiſtrators of *Heriot*'s Hoſpital and their Tackſman of the *Canonmills*, againſt the Brewers in the *Canongate*: The Purſuers claimed as the Subject thereof all Malt brewed within the Thirl, tho' made and grinded elſe-where, by Virtue of a Clauſe in the Defender's Charters, viz. *Quod omnia Grana ſua quæ Aquam & Ignem patiantur infra Terras, adportabunt ad dicta Molendina, ibidem terenda ſeu molienda, pro Solutione*, &c.

Alledged for the Defenders. That the ſaid Clauſe in the Charters doth not extend to Malt made or grinded without the Thirl, tho' brewed there. Becauſe, 1. Malt grinded without the Thirl cannot be properly termed *Grana ſua infra dictas Terras*: And the Clauſe imports the Aſtriction of ſuch Grain as after tholing Fire and Water is to be carried to a Mill, which agrees not to Malt brew'd; unleſs one could fancy that Draff were to be grinded over again. Beſides, this preternatural Servitude upon the Product of another's Ground, is to be ſtrictly interpreted: And the Lord *Stair* aſſerts that tholing Fire and Water doth not extend to Baking or Brewing, *Inſtit. Lib.* 2. *Tit.* 7. *N.* 20. where poſitive Preſcription has not over-ruled the Caſe. It was alſo ſo decided *November* 24, 1680, *Ramſay* againſt the Town of *Kirkaldie*: Tho' Baking be a tholing Fire and Water with a Witneſs. 2. If theſe Words were to be underſtood in the rigorous literal Acceptation, all Meal and Flower, Rice, *French* Barley, knocked Bear and Muſtard brought into this populous Place, behoved to pay Multure; which were abſurd and intolerable.

Replyed for the Purſuers. Proprietars may aſtrict their Tenants to their own Mill, and where Thirlage is expreſly reſerved in a Feu-Charter, (which is but *perpetua Locatio*) that Reſervation is to be moſt amply interpreted in Favours of the Maſter. For albeit Thirlage acquired by long Poſſeſſion and Acts of Court againſt Perſons who are not Vaſſals to the Proprietar of the Mill, are ſtrictly to be interpreted, as being a Reſtriction of Property: Yet when the *pleno Jure Dominus* gives off the *Dominium utile* to his Vaſſal, reſerving to himſelf his ancient Right, that Reſervation ſhould admit of a more large Interpretation; the Superior being preſumed in Conſideration thereof to have gotten a leſs Price. As a reſerved Liferent is in the Conſtruction of Law, a frank Tenement; Whereas a conſtitute Liferent is a Servitude, that ſuffers a ſtrict Interpretation. Beſides, the Preſervation of Mills (which Thirlage is the great Mean of) is carefully provided for in our Law: Whereby a Perſon is not allowed to build a Mill even upon his own Ground, ſo as to make the Water of an upper Mill reſtagnate. As to the Clauſe of tholing Fire and Water, the ſame doth certainly comprehend Brewing, whereby the Grain tholes Fire and Water to an eminent Degree. And this is the Opinion of *Spotſwood*, under Word *Mills* and *Multures*, and of *Craig*: Tho' my Lord *Stair* ſeem to ſay the contrary. So that our Lawyers are divided in their Sentiments about the Import of this Clauſe. 2. If in any Caſe the Words may admit this extenſive Signification, it muſt be here, where Brewing is the very Subject of the Thirlage: And if that were excepted, the Defenders might eaſily evacuate the Servitude by Steeping and Kilning their Bear in hired Malt-kilns without the Barony, which would ſink the Hoſpital's Rent Two thouſand Pound *Scots per Annum*, and ſo neceſſarly diminiſh the Number of the poor Children that are entertained there. 3. By Acts of the Baron Court of the *Canongate*, and of the Town Court of *Edinburgh* who are Barons of the *Canongate*, this Aſtriction hath been aſſerted, and all within the Bounds have been diſcharged to buy any grinded Malt but what is grinded at the *Canonmills*. Nor was the Matter ever called in Queſtion before. And 'tis a Miſtake to think that Thirlage is ſo odious, when it is ſo natural and inherent to the Mill of the Barony, eſpecially of Kirklands, or to the King's Mills: And has been found by Deciſions to extend further than was expreſt, *June* 26, 1635, Laird of *Waughtoun* contra *Hume* of *Ford*.

Duplyed for the Defenders. We are not to carry Servitude ſo high, as to defeat Liberty and Property. And tho' what is only brewed within the Thirl be found free, the *Canonmills* will have an effectual Thirl off the Landwart Barony of *Broughtoun*, and ſuch as can be more conveniently ſerved there than elſe where, and of Grain ſteeped within the Thirl. Nor are we to give Charity by way of Injuſtice: For the Divine Law forbids even to favour the poor Man in his Cauſe. 2. 'Tis abſurd to ſay that any Superior can by his Acts of Court ſubject his Vaſſal to an extravagant Servitude not provided in his Charter. And as to the Authority of *Craig*, and of *Spotſwood* (who expreſſes his Opinion ſomething obſcurely) it cannot be ſufficient to take away the Defenders Intereſt: Seing my Lord *Stair* and Sir *George Mackenzie* (who wrote after theſe Gentlemen when the Matter was better underſtood, and the Principles of Liberty and Property againſt the ancient Longobardick Servitudes more aſſerted) lay it down as a Principle, That tholing Fire and Water imports only ſteeping and kilning.

The Lords found that the Clauſe thirling all that tholes Fire and Water, doth not import that all Malt that is brewed within the Thirl ſhould pay Multure, but only that which is kilned and cobled within the Thirl.

Eodem Die. John Jolly *Merchant in* Edinburgh, *againſt* Thomas Bethune *of* Tarvit, *Mr.* Alexander Bruce, *and others.*

JOhn *Jolly* Merchant in *Edinburgh*, having by Virtue of a general Diſpoſition from *James Reid* Merchant there, not intimated in the Granter's Lifetime, raiſed Horning upon a Bond granted to the ſaid *James Reid* by Sir *William Preſton* of *Valleyfield* as Principal, and the Earl of *Kincardine* as Cautioner, without confirming the Debt; and arreſted in the Hands of *Thomas Bethune* of *Tarvit*, Mr. *Alexander Bruce*, and other Debtors to the Earl, and purſued a Furthcoming: The Lords found the Horning null and unwarrantable, and that the Arreſtments thereon could not ſubſiſt to have the Effect of an Arreſtment upon a depending Action; albeit the Arreſter ſhould now confirm the Debt. Tho' the general Aſſignation would have been a good Foundation for a Summons, whereupon Mr. *Jolly* might have uſed Arreſtment.

February 26, 1707. Janet Cowie *eldeſt Heir Portioner to the deceaſt* John Cowie *of* Bothkenner, *againſt the younger Heirs.*

JOhn *Cowie*'s Heretage falling to his five Daughters as Heirs Portioners, the younger Heirs raiſed a Brieve of Diviſion for dividing the Lands, Houſe and Yards by the Sheriff of *Stirling*, which was advocated by the eldeſt Siſter. For whom it was alledged at the diſcuſſing of the Advocation, That the Houſe and Yards ſhould belong to her as a *Præcipuum*, and a diſtinct indiviſible Right.

Anſwered for the younger Heirs. The Dwelling-houſe ought to be divided equally among them all; Becauſe, albeit the principal Manſe being Tower, Fortalice, *&c.* falls to the eldeſt Heir Portioner, *Stair Inſtit. Lib.* 3 *Tit.* 5. §. 11: Yet this doth not hold as to ordinary Country Houſes, which paſs as Pertinents of the Land. And *ita eſt*, the Houſe in Queſtion is ſuch, being about two Story high, having a Thatch Roof, and a Roundabout Fireſide for the Conveniency of Servants, and the boiling of Beaſts Meat, *&c.* It was built by the Parties Predeceſſors after their acquiring of the Lands, and they were only deſigned *Goodman* and *Goodwife*; And the whole Eſtate is but a Matter of five

Chalders of Victual : So the original Deſign of preſerving a chief Repreſentative of a Family, cannot take Place here.

Replyed for the eldeſt Heir. Many great Heretors in old Time went under the Name of *Goodman* and *Goodwife* : And the principal Manſe or *Meſſuagium*, comprehends all ordinary Dwelling-houſes for Accommodation of Heretors, larger than Farmers ordinary Country Houſes. For Houſes of late are not built by way of Tower or Fortalice as in old Time, but for Conveniency ; And yet muſt remain indiviſible Rights for the Accommodation of the Heir and Repreſentative of the Family. Now, this Houſe was never in Uſe to be ſet for Rent, and is much larger than an ordinary Farmer's Houſe, being three Story high, containing about Twenty two Glaſs Windows in nine Rooms, with a Cloſs, Office-houſes, and a Stone Pend above the Entry : Therefore it cannot be reputed as Part and Pertinent of the Ground it ſtands on. Again, the Reaſon for preferring the chief Repreſentative of a Family, holds without Reſpect to the Greatneſs or Smalneſs thereof: And tho' the Houſe in Queſtion was built by the Parties Predeceſſors after their acquiring of the Lands, there was a Manſion-houſe upon the Heretage before.

The Lords conſidering that the Houſe in Queſtion was the only Houſe for the Heretor's Dwelling, and that there were ſeveral Houſes beſides for the Tenants on the Ground ; They found that the ſaid principal Meſſuage belongs to the eldeſt Heir Portioner.

March 5, 1707. Eadem *contra* Eaſdem.

IN the Cauſe aforeſaid betwixt *Janet Cowie* and her younger Siſters, mentioned *February* 26, it was alledged for theſe younger Heirs Portioners ; That they ſhould get ſome Satisfaction or Equivalent from the eldeſt in Lieu of the principal Dwelling-houſe adjudged to her ; Becauſe, 1. The ſaid Manſion-houſe being originally *Prædium Ruſticum, Fructuum colligendarum Cauſa paratum*, built and uſed by the Heretors for labouring their own Ground before any Tenants were put upon it ; The ſubſequent building of a Tenant's Houſe, cannot alter the Right and Nature thereof, ſo as to hinder it to belong eqnally to the Heirs Portioners. For in determining the Right and Nature of Things of this kind, *Initium eſt inſpiciendum* : And if it be adjudged to the eldeſt, the reſt muſt have their Proportion of the Value. 2. By our Law and Cuſtom, where the eldeſt Heir Portioner gets the principal Dwelling-houſe, or any other indiviſible Right, ſhe muſt pay the Value for the *ipſum Corpus*, *Reg. Maj. L.* 2. *C.* 28. *N.* 3 *junct. Cap.* 27. *N.* 10. *Craig Feud. Lib.* 2. *Dieg.* 14. *P.* 238. *Mackenzie*'s Inſtitutions printed with Notes, *Page* 249 *:* In the ſame way as the firſt effectual Adjudger, in the Diviſion of a Bankrupt's Eſtate, would have his Option of the Dwelling-houſe or largeſt Share, but upon Payment of the *Superplus* Value. And if it were otherwiſe, the eldeſt might come to have vaſtly more in Proportion than any one, yea, than all the reſt ; which neither Law nor the Defunct deſigned.

Anſwered for Janet Cowie *the eldeſt Heir Portioner.* That ſhe, by the Right of Primogeniture, ought to have the Houſe as her *Præcipuum* : And if ſhe ſhould be obliged to give a Price for it, the Privilege would be ineffectual and overturned. For what Heir would not rather chuſe to ſell a Share of an old and perhaps ill contrived Houſe, than to purchaſe it from five or ſix, and ſo the Family would become deſpicable or extinct ? Beſides, many Things that fall under Diviſion are adjudged to one of the Heirs Portioners for the Value, for the more convenient expediting of the Brieve : So that if a Price were given for the Manſion-houſe, it could not be called an Exception in Favours of the eldeſt. Again, no Inſtance can be given in our Cuſtom, where an eldeſt Heir Portioner gave any Allowance to the reſt for the Houſe: On the contrary, the eldeſt Heir Portioner of *Carnock* bruikes the Houſe and Yards without any Controverſie, or Compenſation to the reſt. And if any ſuch Compenſation ſhould now be found due by the eldeſt, What Pleas might it create among thoſe who have hitherto acquieſced in the common Practice of the Nation? As to the Objections that are made againſt the eldeſt Heir's Pretenſions, they are eaſily Anſwered. For, 1. Tho' the Houſe in Queſtion be not a Tower or Fortalice in the ſtrict Acceptation, which imports a *Turris pinnata*, or Houſe of Strength with Walls and Ditches; it is ſuch in a legal Acceptation, which includes all Dwelling-houſes that has Lofting and Jeſting: And therefore cannot paſs for a Country Houſe, deſigned only for the Accommodation of Labourers of the Ground. 2. As to the Opinion of old Lawyers, who aſſert that Satisfaction is to be made for the principal Manſion-houſe, that is overballanced by the Opinion of our later Lawyers, ſupported by the conſtant Cuſtom of the Nation in ſuch Caſes, and more agreeable to the Feudal Law. And among theſe my Lord *Stair* is poſitive, *P.* 457 *§.* 11. that the indiviſible Rights fall to the eldeſt alone, without any Thing in Lieu thereof to the reſt.

The Lords found that the principal Houſe did belong to the eldeſt Siſter, without any Compenſation to the reſt.

Eodem Die. James Purdie *Merchant in* Edinburgh, *againſt* David Roſs *Merchant there.*

IT being provided by Contract of Marriage betwixt the deceaſt *David Young* Merchant in *Edinburgh*, and *Katharine Mitchel*, That all Lands, Heretages, Annualrents, Sums of Money, and others to be conqueſt during the Marriage, ſhould accreſce and pertain to them and the longeſt Liver, and the Bairns to be procreated betwixt them; And failing theſe, the juſt and equal Half ſhould pertain to the ſaid *David Young* his Heirs, Executors and Aſſignies, and the other Half to the Wife's Heirs, Executors and Aſſignies; And the ſaid *David* being obliged to take the Securities of the foreſaid Conqueſt in the Terms above written: *Katharine Mitchel*, after her Husband's Deceaſe without Heirs of the Marriage, obtained a Decreet before the Baillies of *Edinburgh* againſt *David Roſs* Merchant there, as Heir to the ſaid *David Young*; Decerning him to infeft himſelf in the Lands therein mentioned, and to diſpone the equal Half, with Warrandice from Fact and Deed, to the ſaid *Katharine Mitchel* her Heirs and Aſſignies, in the Terms of her Contract of Marriage. This Decreet, with the whole Clauſes in the Contract in her Favours, being diſponed by her in the Eightieth Year of her Age, to *James Purdie* Merchant in *Edinburgh*, for Love and Favour, and, as was alledged, in Contemplation of Marriage: He thereupon charged *David Roſs* with Horning, who ſuſpended upon this Ground, That *Katharine Mitchel* by the Conception of the Clauſe of Conqueſt had only a Liferent Right, and the Husband was Fiar: Seing the Proviſion, that failing Children of the Marriage, the one Half of the Conqueſt ſhould belong to the Husband's Heirs, and the other to the Wife's, did only make her Heirs of Line Heirs of Proviſion to the Husband in the one Half; *January* 29, 1639, *Grahame* contra *Jarden*, *December* 1 and 21, 1680, Baillie *Anderſon* againſt Baillie *Bruce*.

Anſwered for the Charger. The Husband being Fiar, the Suſpender is liable as repreſenting him, to perform his Obligement in Favours of the Wife, her Heirs and Aſſignies, which was not performed by himſelf. For had the Husband, in the Terms of the Contract, taken the Rights of the Conqueſt o him and her in conjunct Fie, and the Heirs betwixt them; which failing, the one Half to his own Heirs, and the other Half to hers: She ſurviving would have been Liferenter of the Whole, and a conditional ſubſtitute Fiar in he Half; In which Half ſhe and her Heirs might be ſerved Heir of Proviſion to he Husband. But ſince the Rights of the Conqueſt were not ſo taken by the Husband, the Clauſe in the Contract, in Favours of the Wife, her Heirs and Aſſignies, remained in the Terms of a perſonal Obligement, which the Suſpender his Heir is obliged to perform.

The Lords found the Letters orderly proceeded.

March 7, 1707. *Doctor* Chriſtopher Irvine, *contra* John Skeen *of* Halyards.

Elizabeth Ker the pretended ſecond Wife of the deceaſt Doctor *Chriſtopher Irvine* Doctor of Phyſick, having diſponed to *John Irvine* her Son procreated betwixt the Doctor and her, all Goods and Gear belonging to her he Time of her Deceaſe, reſerving her own Liferent; with a Faculty to diſpone otherways *etiam in Articulo Mortis*, and diſpenſing with the not Delivery: This general Diſpoſition he transferred to Doctor *Chriſtopher Irvine* his Father's eldeſt Son, who, having procured a Gift of *John*'s Baſtardy, and *ultimus Hæres*, raiſed a Proceſs of Declarator of Baſtardy and Payment, againſt *Elizabeth Ker*'s Debtors. Compearance was made for *John Skeen* of *Halyards*, her Executor *qua* neareſt of Kin, who claimed to be preferred to the ſaid Debts; in Reſpect the Aſſignation granted by *Elizabeth Ker* to her Son was *Donatio Mortis Cauſa*, and void by her ſurviving the Donatar, and conſequently the Goods and Gear diſponed belonged to her Executor.

Alledged for Doctor Irvine. That *Elizabeth Ker*'s Aſſignation to her Son could not be *Donatio Mortis Cauſa*, ſeing it was not conceived after a teſtamentary Nature, but as a Deed *inter vivos*: And *Donatio Mortis Cauſa* is never preſumed; unleſs it clearly appear from the teſtamentary Conception of he Writ, or be granted in Contemplation of immediate Death, or ſome eminent Danger feared by the Diſponer.

Anſwered for Halyards. The Diſpoſition in Queſtion carries the plaineſt Characters of *Donatio Mortis Cauſa*, as deſcribed *l.* 1. & *l.* 27. *ff. de Mortis Cauſa Donationibus*: For here *Elizabeth Ker* preferred her ſelf to the Aſſigny, and him to her Repreſentative. And as an irrevocable *Donatio Mortis Cauſa* is reputed *Donatio inter vivos*: So *a contrario*, a revocable *Donatio omnium Bonorum* belonging to the Diſponer the Time of her Deceaſe, muſt be looked on as *Donatio Mortis Cauſa*. Again, in the general Opinion of Lawyers, when a Donation is expreſly to take Effect at the Diſponer's Death, *in dubio Mortis Cauſa præſumitur*: Becauſe, *Nemo præſumitur velle Rem ſuam jactare.*

The Lords found the Aſſignation granted by *Elizabeth Ker* to *John Irvine* her Son, being *omnium Bonorum* which ſhould belong to her the Time of her Deceaſe, was *Donatio Mortis Cauſa*, and ſo void by the Cedent's ſurviving the Aſſigny. And the Subject was found to belong to the Cedent's Executor, tho' the Faculty *to alter* was never exerced by the Deſunct.

Thereafter it was alledged for Halyards. That the foreſaid Aſſignation granted by *Elizabeth Ker* to *John Irvine* her Son, is null by the common Law, *Authent. ex Complexu Cod. de Inceſt. Nuptiis*; And our Law, *July* 20, 1622, *Weir* of *Blackwood* contra *Durham*; And *Act* 117. *Parl.* 12. *Ja.* 6. as being granted by an Adultereſs to her adulterous Child. And the Adultery is proved by the Declarator of Baſtardy in Proceſs, obtained by the Doctor before the Commiſſars of *Edinburgh*, finding the Marriage betwixt the deceaſt Doctor *Irvine* his Father and *Elizabeth Ker* to have been unlawful, and the Children ſpurious and adulterous, and uncapable to ſucceed to their Parents.

Anſwered for Doctor Irvine. Reſtrictions in the common Law of the natural Faculty of alienating and diſpoſing of Property takes little Place with us, who walk therein by our own Statutes and Cuſtoms. Beſides, the *Authentick ex Complexu* ſpeaks of Children born in Inceſt. Nor does the cited Deciſion meet the Caſe, for there the Lords refuſed to ſuſtain a Bond granted to the Mother of an adulterous Child, becauſe given as a *Præmium Adulterii & Turpitudinis*, which cannot be pretended here where the Mother received no *Præmium* from the Adulterer, either to her ſelf or her Son, but diſponed after the Adulterer's Death her own Effects, in which there could be no *Turpitudo*, either *ex Parte Dantis*, or *Accipientis*. And the Act of Parliament 117. annuls only *D*iſpoſitions made by a Woman who (divorced from her lawful Husband for her own Fault of Adultery) marries the Adulterer, or keeps Company with him at Bed and Board: Which cannot be ſaid of *Elizabeth Ker* who was never married. Beſides, the ſaid Act prohibites only the Alienation of Lands, Heretages, Tacks, Rooms, or Poſſeſſions, which can never be extended to moveable Sums, the preſent Subject of Debate.

The Lords repelled this Nullity.

March 11, 1707. *Lieutenant Colonel* John Erskine *of* Carnock, *againſt Lady* Bettie Boſuell *and* L. Auchinleck *her Husband.*

A Poinding of the Ground of *Kincardin* at the Inſtance of Lady *Bettie Boſuell* and her Husband, for ſome bygone Arrears of an Annuity aſſigned to Lady *Bettie* by the deceaſt Counteſs her Mother, was quarrelled by Colonel *Erskine* the Heretor as unwarrantable, Becauſe, 1. The Execution bears, That the Meſſenger, after he had poinded and received from the particular Tenants therein-named, ſeveral Quantities of Victual, proceeding to complete the poinding of other Corns, refuſed to give to the Colonel an Execution of the Poinding, upon Pretence that as yet he knew not the Quantity that would be delivered: Which was an abſurd Excuſe, conſidering that there were different Poindings from different Baronies and Tenements, upon different Days; And *Stair Inſtit. Lib.* 4. *Tit.* 47. *N.* 33. aſſerts, That the Executer of Poinding is bound to offer to the Party a Copy of the Letters and ſigned Executions, that the ſame may be a ſufficient Inſtruction of Payment *pro tanto.* 2. There was no ſworn Metſter or Caſter choſen by the Meſſenger as ought to have been done, *December* 13, 1679, *Hay* contra *Hay.*

Anſwered for Lady Bettie and her Husband. The Poinding was moſt regular in ſo far as, 1. The Meſſenger promiſed to give the Colonel an Execution when ever the Poinding was completed, which he offered when the Poinding was over, and till then he could not give it: for how could he condeſcend on the Quantity, before he received it from the Tenants. 2. There was no Neceſſity for a ſworn Metſter or Caſter in this Caſe: Becauſe, the Meſſenger having poinded the Corns by Rips, and the Meal by Samples, the Tenants did thereafter threſh out their own Victual, and willingly brought the *Species* of Bear and Meal, and met the ſame to the Meſſenger; and they could expect no Metſter more favourable than themſelves.

The Lords found, That the proceeding to poind was warrantable, tho an Execution was refuſed till the Poinding was completed; And that the taking of the Corns delivered and meaſured by the Tenants without a ſworn Metſter or Caſter was legal.

Eodem Die. *Miſtres* Griſſel Bruce *Lady* Reidheugh, *againſt* Rebecca Forſyth *and* Hugh Wilſon *her Husband for his Intereſt.*

MAſter *James Forſyth* Miniſter of the Goſpel, having tailzied his Lands of *Taylourtoun*, to *James Bruce* of *Garvel* his Nephew, and the Heirs ſubſtitute to him, with this Proviſion; “That it ſhould not be leiſum to the ſaid *James Bruce*, and his Heirs of Tailzie and Proviſion foreſaid, to do any Act or Deed that might fruſtrate or prejudice the Tailzie and Courſe of Succeſſion above-written; And any Thing done in the contrary ſhould be void and null, and reduceable at the Inſtance of the next apparent Heir of Tailzie: Upon Mr. *James Forſyth*'s Death, the ſaid *James Bruce* then called *James Forſyth*, was by Virtue of the Tailzie ſerved Heir in ſpecial to him in the Lands of *Taylourtoun* and infeſt; And thereafter became Tutor to Miſtreſs *Griſſel Bruce* Heireſs of *Reidheugh*, who having after her Minority obtained Decreet againſt him for 15900 Pound, purſued his Daughter *Rebecca Forſyth* for Payment as being Heir ſerved and retoured to him in the foreſaid tailzied Eſtate, and *Hugh Wilſon* her Husband for his Intereſt.

Alledged for the Defenders. That ſhe *Rebecca Forſyth* could not be liable for her Father's Debt: In reſpect he was bound up by the Tailzie from doing any Deed that might fruſtrate or prejudice it; Which neceſſarly includes a Prohibition to contract Debt, ſeing otherwiſe the Defenders Succeſſion would be fruſtrated, the Debt being near equal to the Value of the Lands. And ſhe as Heir of Tailzie may lawfully queſtion any Deed of her Predeceſſors contrary to the Proviſion in the Tailzie, by Virtue whereof both he and ſhe ſucceeded.

Replyed for the Purſuer. There being no prohibitory Clauſe to contract Debt, or to alienate the Eſtate, but only to do no Deed to fruſtrate and prejudice the Tailzie or Courſe of Succeſſion, that is in plain *Scots*, to change the Deſtination of Heirs; The Defender's Father was at Liberty to diſpoſe of the Property for onerous Cauſes, or to affect it by Debts. Eſpecially conſidering, That the Clauſe irritant makes the Deed of Contravention void and reduceable, without irritating the Contraveener's own Right. For whatever might be as to Deeds in Favours of an Heir or Repreſentative; It is impoſſible to conceive a Tailzie ſo as the Debt of a lawful Creditor may be prejudiced, and yet the Contraveener, or Contracter of the Debt enjoy the full Benefit of his Eſtate: Which would choke the Principles of common Juſtice. Therefore by the new common Stile of Tailzies the Contraveener's Right becomes null *ipſo Facto*, and the Creditor cannot have Acceſs to the Eſtate, which returns to the next Heir of Tailzie as if the Contraveener were naturally dead. 2. 'Tis in vain for the Defender to deny the paſſive Title, being an Heir by Service who muſt repreſent ſimply: For *Aditio Hæreditatis eſt Actus legitimus, qui nec Diem nec Conditionem recipit.* Again, the Irritancy is provided to take Effect by Reduction at the Inſtance of the apparent Heir: So that *eſto* the Clauſe founded on did prohibite the contracting of Debt, the Irritancy not being declared, or the Deed of Contravention reduced by the Defender before her Service, ſhe can have no Benefit thereby.

Duplyed for the Defender. The irritating or annulling of an Heir of Tailzie's Right is neither a neceſſary nor a proper Clauſe, nor can the Want of it make the next Heir of Tailzie liable to that Heir's Debts: For if the Heir's own Right were to be null by ſuch an Act of Contravention, no Body would truſt him tho never ſo virtuous, even to the Value of his yearly Rent which he may ſpend. 2. As voluntary Interdictions are effectual in Favours of the interdicted Perſon's Heir, to ſecure him againſt all poſterior Debts: So this perpetual prohibitory Clauſe being publiſhed and repeated in the ſeveral Services, Precepts and Seaſins following thereupon, ſhould annul the Debts contracted by theſe Heirs, as prejudicial to the Tailzie and Courſe of Succeſſion.

Duplyed for the Purſuer. There is no other Way to reſtrain the common Liberty inherent in the Tranſmiſſion of Property, but by an Irritancy of the Proprietar's Right: For to give Laws, and to fix Irritancies upon the Rights of third Parties, who are not concerned in the making of the Tailzie, without any Danger to the Right of the contraveening Heir of Tailzie, is abſurd and ridiculous; And an Heir of Tailzie's Credit would be much the ſame, whether the Debt or Succeſſion were irritated. 2. There is a great Diſparity betwixt Tailzies with ſuch prohibitory Clauſes, and voluntary Interdictions which require Publication and Execution, and have their Force by particular publick Acts.

The Lords found the Clauſe in the Tailzie, whereby it was not leiſum to *James Bruce* and the Heirs of Tailzie or Proviſion to do any Act or Deed which might prejudice the Tailzie and Courſe of Succeſſion, altho inſert in the Seaſin following thereon and in the Retour, is not ſufficient to annul the Debts contracted, or to liberate the Defender from the paſſive Title: Seing the ſaid Clauſe contains no Irritancy of the Heir of Tailzie's Right.

March 12, 1707. Andrew Knox *Tenant in* Harley, *contra* George Hume of Kaims.

GEorge *Hume* of *Kaims* being charged at the Inſtance of *Andrew Knox* Tenant in *Harley*, to pay a certain Sum contained in a Decreet-arbitral as the Price of ſome Corns ſubmitted by them to two Arbiters, he ſuſpended upon theſe Grounds. 1. That the Decreet was *ipſo Jure* null, becauſe the Blank on the Back of the Submiſſion in which it was filled up, was not ſubſcribed by the Parties Submitters; Which, according to conſtant Cuſtom, is eſſential to a Decreet-arbitral, as an Evidence that they ſubmit implicitly to the Arbiters Determination whatever it be. 2. Tho the Decreet ſhould not be found null for Want of the Parties Subſcription to the Blank it was filled up in; it could not be a Warrant for a ſummar Charge of Horning. Becauſe, albeit the Submiſſion bears a Clauſe for regiſtrating thereof, it bears no Conſent to the Regiſtration of the Decreet-arbitral, to follow thereupon; but only the Arbiters do moſt irregularly in their Decreet conſent to the Regiſtration thereof in any competent Judges Books: And their Conſent to Regiſtration can be no Ground to raiſe Horning againſt the Parties who ſubſcribed not the Blank in which the Decreet was filled up.

Anſwered for Andrew Knox. Albeit ordinarly Submiſſions bear the Blank on the Back on which the Decreet-arbitral is to be filled up, to be ſubſcribed by the Submitters, and they actually do ſubſcribe the ſame: Yet that is not eſſential to the Validity of a Decreet-arbitral, more than the Clauſe *renouncing the Exception of not numerate Mony*, and the Clauſe *but prejudice of ſuiting Execution hereupon*, &c. are neceſſary Clauſes in Bonds. The Decreet is indeed moſt frequently written upon the Back of the Submiſſion, that it may be inſert in the ſame Regiſter with the Submiſſion: But *nihil impedit*, why a Decreet-arbitral may not be on a Paper apart. Since a verbal Decreet-arbitral proceeding upon a verbal Submiſſion hath been ſuſtained, *February* 7, 1671, *Hume* contra *Scot*. And as a Teſtament may be validly made up of three Words, *Lucius Hæres eſto*; Any Words tho never ſo few, importing

mporting the Acquieſcence of Parties in what ſhall be determined by Arbiters, are infallibly binding, as if they ſhould ſubmit thus, *Lucius Arbiter ſto.*

The Lords found the Decreet-arbitral was no Warrant for ſummar Diligence: Reſerving the Conſideration of the other Point anent the annulling of he Decreet, becauſe the Blank on the Back thereof was not ſubſcribed by he Parties. But they were generally of Opinion that the Want of the Parties Subſcription to the Blank, was not a Nullity in the Decreet filled up herein.

Eodem Die. Thomas Nicol *Writer in* Edinburgh, *againſt* John Park *of* Fulfoordlies.

T*Homas Hamilton* Son to *Alexander Hamilton* of *Ballencrieff*, having Wadſet to Mr. *John Paip*, the Lands of *Nether-moninet* for the Sum of 000 Merks, affected with a Back-tack for Payment of 180 Merks of yearly ack-duty; With this Proviſion, That in caſe Two Terms Payment of the ack-duty run in the Third together unpaid, the Back-tack ſhould expire and become null by Exception without Declarator, and the Granter of the Wadſet be obliged to enter the Wadſetter to the Poſſeſſion of the Lands immediately after the ſaid Failzie to be poſſeſs'd by him as his own Heretage in all Time thereafter, during the not Redemption: The ſaid Mr. *John Paip* diſponed the Wadſet to *Robert Paip* his Brother, and he to *Robert Douglaſs*, from whom the Lord *Newtoun* adjudged the Lands, and diſponed his Adjudication to *Park* of *Fulfoordlies*. *Thomas Nicol* having Right to the Reverſion of the Wadſet, purſues a Reduction thereof, againſt the preſent Laird of *Fulfoordlies*, as being ſatisfied and paid by Intromiſſion with the Rents of the Lands and otherways.

Alledged for the Defender. That he could not be obliged to compt and reckon for the bygone Rents. Becauſe, albeit the Wadſet was affected with a Back tack, yet that Back-tack was qualified with a Clauſe irritant; Whereby the Wadſetter was impowered to poſſeſs without Declarator the Lands as his proper Heretage till Redemption, and the Irritancy being *de Facto* incurred, and the Defender's Authors having attained Poſſeſſion without Declarator, by the Granter of the Wadſets voluntary ceding the ſame; the Right became a proper Wadſet, ſo as the Wadſetter could not be liable to compt till the Purſuer had uſed an Order of Redemption in the Terms of the Act of Parliament 1661. 2. In a Purſuit for Removing, and Mails and Duties before the Sheriff of *Berwick*, againſt the Defender's Father, he was aſſoilzied upon his Adjudication and other Rights: And ſo being *bona Fide Poſſeſſor* by Virtue of that Decreet of Abſolviture, he could not be comptable for Bygones.

Anſwered for the Purſuer. This being an improper Wadſet, the irritant Clauſe takes no Effect till Declarator. And a Declarator was abſolutely neceſſary in this Caſe; Becauſe, before the Wadſetter entred to poſſeſs, the Granter of the Wadſet was denuded of the Reverſion in Favours of the Purſuer's Author, who was not obliged to know the irritant Clauſe till declared. Beſides, the Clauſe for entring the Wadſetter to Poſſeſſion in Caſe of the Irritancy incurred, was not deſigned to give him the Rents unaccountably, in ſo far as they exceeded the principal Sum, but only for Security in Payment. Nay further, the Right is tranſmitted to *Douglaſs Fulfoordlies* immediate Author, with the expreſs Quality that he ſhould be acomptable. And the Act of Parliament 1661, takes only Place in Wadſets proper *ab Initio*, where the Wadſetter takes the Hazard of publick Burdens, of all which the Purſuer is bound expreſly to relieve the Defender. 2. The Decreet before the Sheriff has been colluſive, the Purſuer having produced no Mandate: And it is in the Power of any Perſon who intends to be aſſoilzied, to cauſe execute an inferior Judge's Precept againſt himſelf, and procure a Decreet of Abſolviture, where none is to oppoſe it. Again, the Decreet of Abſolviture in a Removing before the Sheriff is not incompatible with this Proceſs of Reduction and Declarator, and Compt and Reckoning. As to the Pretence of *bona Fides*, that is chiefly ſuſtained in Favours of one who poſſeſſes *pro ſuo*, by ſome colourable Title of Property, which cannot be alledged by the Defender, whoſe Title of Poſſeſſion was originally an improper Wadſet, conveyed and adjudged as ſuch: And every Perſon being preſumed to know the Nature of his own Right, there can be no *bona Fides* in the Caſe.

The Lords repelled the Defences in Reſpect of the Anſwers: And ordained the Defender to compt and reckon, reſerving to him all his Defences in the Compting as accords.

March 13, 1707. John Irvine *of* Kincauſſie, *againſt* Alexander Deuchars *Writer in* Edinburgh.

IN the Competition of the Creditors of *Streichan*, *John Irvine* of *Kincauſſie* having arreſted in the Earl of *Murray*'s Hands at his Dwelling-houſe of *Dunnibirſle* 12 *July* 1706; and *Alexander Deuchar* Writer in *Edinburgh* having arreſted on the 20 of the ſaid Month in the Earl's Hands perſonally at his Houſe of *Tarnaway*; Mr. *Deuchar* claimed to be preferred. Becauſe, his Arreſtment, tho' poſterior to *Kincauſſie*'s, was executed at the Earl's principal Dwelling-houſe of *Tarnaway* where the Bulk of his Eſtate lies, and Seaſin by his Charters is expreſly ordained to be taken, and where he was reſiding at the Time: Whereas *Kincauſſie*'s Arreſtment was executed only at *Dunnibirſle*, a private Seat for a Summer Retirement, that is ordinarly allocated to the Ladies of that Family for a Jointure Houſe, and where the Earl did not reſide at the Time, but only had a Servant or two to take Care of the Houſe, and overſee the building of ſome Park-dikes. And if 40 Days Reſidence in *Edinburgh* ſubjects a Stranger to compear before the Courts there; much more muſt the Earl of *Murray*'s dwelling with his Family in the Heart of a liberal Fortune at *Tarnaway*, the whole Summer Seaſon, conſtitute his Domicile there.

Anſwered for Irvine of Kincauſſie. Albeit the Earl's ſtaying 40 Days at *Tarnaway* might conſtitute a cumulative Domicile to the Effect of Citation or Arreſtment; yet that is conſiſtent with *Dunnibirſle*'s remaining his chief Domicile, tho' it were not his principal Meſſuage. Thus, a Charge of Horning at a Man's Dwelling-houſe in *Galloway* where he retained *Focum & Larem*, was ſuſtained, tho' he had reſided 40 Days at *Edinburgh*. And 11 *February* 1674, *M'culloch* contra *Gordon*, and 40 Days Stay in a hired Houſe at *Edinburgh* was not found to conſtitute a Domicile as to Denunciation and Eſcheat, or Confirmation of a Teſtament, (tho' it would have been ſufficient to ſuſtain Citation) but the principal Domicile was to be conſidered; *November* 20, 1672, *Paterſon* contra *Fermour*; *February* 7, 1672, Commiſſars of *Edinburgh* and *Brechin* contra Earl of *Panmure*. And if it were otherwiſe, legal Diligence would be at a dangerous Uncertainty, and in Hazard of being overturned by Probation of a temporary Change, which is not to be preſumed, *Voet. Comment. ad Pandect. L.* 5. *Tit.* 1. *N.* 99. & 92. *L.* 5. *L.* 6. §. 2. *L.* 27. §. 2. *L. pen. ff. de Senatoribus.* Now ſuppoſe an Arreſtment at *Tarnaway* be good, an Arreſtment at *Dunnibriſle* may be good alſo: And the Queſtion is not, Which was the Earl's principal Houſe, but which of his Houſes was his ordinary Dwelling to the Effect of ſuſtaining a legal Diligence. Now *Tar-*

naway is not the Earl's ordinary Place of Reſidence, his Father not having been there for 18 Years before his Death, and himſelf only twice ſince then. Again, *Tarnaway* is not the only Place of infeſting the Earl in his Eſtate: For his lateſt Charters contain three Places for taking Infeſtment at, *viz. Tarnaway* for his Lands in *Murray*, the Caſtle of *Down* for his Lands in *Down*, and *Dunnibirſle* for his Lands in *Fife*; nor is his Domicile determined by the Place of taking Infeſtment, but by his ordinary Reſidence; which none can know better than the Earl himſelf, who has declared under his Hand that *Dunnibirſle* is his ordinary Reſidence and principal Domicile; and his going to *Murray* in *April* laſt, was not *Animo remanendi*, but to do his Affairs with his Chamberlains, *&c.* with a Reſolution to return home, which he did in *September* thereafter; and that during his Abſence he left at *Dunnibirſlle* his beſt Set of Coach Horſes, Grooms, Houſe-keepers and other Servants, who acquainted him of what paſt there, and particularly of *Kincauſſie*'s Arreſtment.

Replyed for Mr. Deuchars. The cited Deciſions do not meet the Caſe: For they relate to Perſons neceſſarly from home and 40 Days at *Edinburgh* about their private Affairs; and the *Animus perpetuo remanendi* can never appear or be demonſtrated otherways than from the Deed of the Proprietar, ſhewing his Inclination to alter his Reſidence by withdrawing himſelf and his Family from one Place to another, and living there a conſiderable Time. Nor can the Earl's Declaration alter the Nature of Things.

The Lords ſuſtained *Kincauſſie*'s Arreſtment, and preferred him.

Eodem Die. George Robertſon *Writer in* Edinburgh, *againſt Dam* Anna Houſtoun, *and the Lord Juſtice Clerk her Husband.*

GEorge *Robertſon* Writer in *Edinburgh*, as Creditor to the deceaſt Mr. *James Hamilton* of *Bangour*, and now to *John Hamilton* his Son and Heir, raiſed a Reduction and Declarator againſt Dam *Anna Houſtoun* and the Lord Juſtice Clerk her Husband for his Intereſt, concluding that the Purſuer had good Right to remove all Debts or Deeds that might affect the Means or Eſtate of the deceaſt Lord *Whitelaw* her laſt Husband, and that the Lady having vitiouſly intrometted with her deceaſt Husband's Goods and Gear, all Obligements granted by him to her ought to be declared extinct by Confuſion; and that ſhe ought, as vitious Intrometter, to make Payment to the Purſuer of the Sum contained in his Bond, and to pay all the Debts and relieve the Heir thereof.

Anſwered for the Defenders. No Proceſs at the Purſuer's Inſtance: Becauſe, he produces nothing but a ſimple Bond granted by the deceaſt *Bangour* apparent Heir to the Lord *Whitelaw* his Uncle; which could never be the Title of ſuch a Reduction and Declarator, till an Adjudication be led thereon againſt the Granter as lawfully charged to enter Heir to his Uncle. For *Bangour* himſelf could not have inſiſted in ſuch a Purſuit; without being ſerved, and *multo minus* is it competent to his perſonal Creditor.

Replyed for the Purſuer. Bangour the Debtor might purſue *declaratorie* for removing any Debt whereby his Uncle's Heretage might be affected, eſpecially at the Inſtance of a Party *aliunde* liable to Debts of the ſame Kind. And any perſonal Creditor may by Way of Declarator prevent a feared Danger, and ſave the needleſs Expences of Adjudication, Charters, Infeſtments, *&c.* May not a Creditor who has only uſed Inhibition reduce Rights that may affect his Debtor's Eſtate? Yea a conditional Creditor may before the Condition is purified aſſert his Right. So 25 *November* 1669, Creditors of *Balmerino* contra Lord *Coupar*; it was found that Creditors even of an apparent Heir might upon perſonal Bonds inſiſt *ex Capite Lecti*. In a Caſe ſince the Revolution betwixt Sir *John Hall* of *Dunglaſs* and Sir *William Sharp*, Proceſs of Warrandice *declaratorie* was ſuſtained, before Eviction and Diſtreſs. Was not Proceſs ſuſtained at the Inſtance of an apparent Heir not ſerved for declaring the Lands he was to ſucceed to, free of the Predeceſſor's Debts; *July* 1680, Lady *Margaret Cuninghame* contra Lord and Lady *Cardroſs?* And ſuch Reductions are always ſuſtained at the Inſtance of perſonal Creditors upon the Act of Parliament 1621.

Duplyed for the Defenders. Law and Form requires, That People be not put to unneceſſary Trouble of expoſing their Writs to any that has not a Right equally good in Form at leaſt. Therefore, even an Adjudication is no ſufficient Title to force Production of Rights whereon Infeſtment hath followed. And no real Right can be reduced or declared againſt, except upon a real Right. And if an apparent Heir could purſue Reductions and Declarators of real Rights without eſtabliſhing a Title thereto, the Service of Heirs would be needleſs. And the Defenders would find this Inconveniency by it, That an Abſolviture in their Favours could not prove *Res judicata* againſt remoter Heirs, who ſtill might ſerve Heir to the Lord *Whitelaw*, and ſo ſhun the Effect of *Res judicata* againſt the preceeding apparent Heir. Therefore Titles muſt be eſtabliſhed, that the Contradictor be habile; *February* 11, 1635, *Muir* contra *Muir*, *June* 21, 1671, *Leſlies* contra *Jeffrey*. The Anſwer to the Inſtance betwixt the Creditors of *Balmerino* and *Coupar* is plain, for apparent Heirs as ſuch have the Privilege to reduce Death-bed Deeds to their Prejudice: Seing their ſimple Conſent, tho' not entred, excludes all Reduction at the Inſtance of them or their Succeſſors; Which Privilege is not to be extended to other Caſes. As to perſonal Creditors upon the Act of Parliament 1621, their Privilege is founded on a particular Statute; And Reductions *ex Capite Inhibitionis* are founded in Law; Beſides that the Inhibition in ſome Meaſure affects the Subject.

Triplyed for the Purſuer. Tho Adjudication cannot force Production of Rights completed by Infeſtment: Yet a naked Adjudication is of it ſelf a ſufficient Title to reduce even Rights completed by Infeſtment when produced.

The Lords ſuſtained the Purſuer's Title, he completing the ſame by an Adjudication, before he can further inſiſt. And in the mean Time ſtopped Procedure in the Proceſs.

Thereafter *March* 20, 1707. The Defenders craved that the Lords would explain their foreſaid Interloquitor by declaring that nothing more was intended thereby, than that the Purſuer ſhould not be put to further Expence and Loſs of Time in raiſing a new Proceſs; And that the Citation is not ſuſtained as to other Effects that may perhaps afterward occur in the Proceſs, *viz.* as an Interpellation againſt the Defender, to hinder a poſterior Edict or confirmed Teſtament, to cover a prior Intromiſſion from Vitioſity. For that, it is no new Thing to ſuſtain Citations *ad fundandam Litem*, which have been repudiated as to other Effects: As in Declarators of Nonentry.

Anſwered for the Purſuer. 'Tis needleſs and incompetent in this State of the Proceſs, to deſire the Lords Anſwer to Queries. For whatever Debate may ariſe in the Courſe of the Proceſs, as to the particular Effects of the Citation, that comes in moſt properly and naturally, when any ſuch Effects are inſiſted on by the Purſuer: It not being the Lords Way to determine Points upon ſuppoſed Caſes.

The Lords declared, that the allowing Proceſs to go on at the Purſuer's Inſtance, he completing his Title, is only to be underſtood for carrying on the Proceſs without any new Citation. And that the Citation as to other Effects can have no Force but from the completing of the Title, which makes the Purſuer an *idoneous Contradictor*.

March 14, 1707. Anthony *and* Zerobbabel Haigues *elder and younger of* Bimmerſide, *againſt* Thomas Halyburton *of* Newmains.

THE Laird of *Newmains*'s Predeceſſor, having in the Year 1562, got from the Abbot and Convent of *Dryurgh*, *cum omnibus Multuris & Divoriis dicti Molendini, & ſignanter cum Multuris omnium Terrarum & Decimarum Parochiæ de* Mertoun; *Nobis & dicto noſtro Monaſterio pertinen.* And Haig of *Bimmerſide* having begun to build a Mill, *Newmains* ſtopped the Work by a Suſpenſion, at the calling whereof, he repeted a Declarator of his Right to the Multures of *Bimmerſide*'s Eſtate, which lyes within the ſaid Pariſh of *Mertoun*.

Bimmerſide repeted a counter Declarator of Immunity, how ſoon he builds a Mill of his own, conform to a Clauſe in a Contract of Marriage *Anno* 1591, betwixt a Daughter of the then *Bimmerſide* and *Newmains*'s Predeceſſor, which, beſides a certain Tocher, aſtricts the whole Corns of *Bimmerſide*'s Lands (except Wheat and Malt for his Family) to pay Thirl, Multure and Knaveſhip to *Newmains*'s Mill of *Dryburgh* perpetually in all Time coming, except *Bimmerſide*'s Heir happen to build a Mill of his own upon his own Lands within his own Bounds and Heretage of *Bimmerſide*, after the Death of the then *Bimmerſide*, and *Newmains* and his Spouſe.

Alledged for Newmains. Whatever be the Import of that perſonal Contract 1591, he makes no Uſe thereof, but has preſcribed a poſitive Right to *Bimmerſide*'s Multures by immemorial Poſſeſſion, by Virtue of the Abbot's Charter 1562, and a continued Tract of real Rights and Infeftments ever ſince, thirling all the Lands and Tithes within the Pariſh of *Mertoun*, which is ſufficient to ſuſtain his Declarator of Aſtriction. 2. *Bimmerſide*'s Right to build a Mill of his own by Virtue of the Contract 1591, is preſcribed and loſt *non utendo*, within fourty Years. 3. *Eſto* the Faculty to build were not preſcribed, the preſent Building muſt ſtop, becauſe it is not upon *Bimmerſide*'s own Land, within his own Bounds in the Terms of the Contract: The Dam, Water-gang and Sluce, (the eſſential Parts and Pertinents of the Mill) being upon another Man's Ground who is *Newmains*'s Vaſſal and thirled to his Mill; So that the Condition of the Obligement doth not exiſt *in Forma ſpecifica*. 4. Suppoſe ſuch a Mill were allowed to be built, the Griſt it cannot grind, either through Want of Water in the Summer Time, or otherways when it is deſerted, ought to remain aſtricted to *Newmains*'s Mill. Becauſe, where-ever an Exception does not effectually take Place, the Rule retains its Vigour: And the Thirlage cannot be evacuated by once building of a ſham Mill, that cannot ſerve the Thirl, or comes afterward to be let fall. Since all Clauſes are to be underſtood, *ſecundum ſubjectam Materiam, & ut Prævaricatio evitetur.* 5. In all Events the Tithes of *Bimmerſide*'s Eſtate muſt continue aſtricted to *Newmains*'s Mill: Becauſe, the Abbot who was Titular and Heretor of theſe *in Anno* 1562, had Power to thirl them.

Anſwered for Bimmerſide. *Newmains* cannot aſcribe his Poſſeſſion of the Multures in Queſtion, to any other Title than the Conſtitution of Thirlage 1591, whereby the Title in the Charter 1562 was paſt from. Becauſe, *Nemo poteſt mutare Cauſam Poſſeſſionis in Præjudicium Tertii*: And ſeing he pretends not to ſingular Titles, he is preſumed and bound to poſſeſs as his Predeceſſors did. 2. The Contract 1591 being the only Title of the Aſtriction, the Exception *in Gremio* does perpetually qualifie, and can never preſcribe: But every Time the Corns of the Lands of *Bimmerſide* were grinded and paid Multure at the Mill of *Dryburgh* conform to the Aſtriction, the Exception is underſtood to be repeted as effectually as if a Proteſt had been taken for ſalving thereof. And it was *Res meræ Facultatis* for *Bimmerſide* to build or not to build in his own Property, as he pleaſed. Beſides, the Exception being conceived in Favours of Liberty, 'tis the more fully to be extended; And *Bimmerſide* being hindred by the Contract to build a Mill in his own, or in the then *Newmains*, and his Spouſe's Lifetime, that implies a Liberty to build in any Time thereafter. For the Exception muſt be underſtood as ample at the Time of the Contract, as the Conſtitution, which was to take Effect perpetually in all Time coming, except *Bimmerſide* ſhould build a Mill. 3. The Quality in the Exception to build upon his own Ground did not bind up *Bimmerſide* from acquiring a Servitude, or an Aqueduct from a neighbouring Heretor for the better Accommodation of his Mill; And the Water is no leſs neceſſary to a Mill, than the End of a Dam. And to pretend that a Vaſſal who is aſtricted cannot conſtitute a Servitude upon his Ground in Favours of another than his Superior the Maſter of the Thirl, is as extravagant as to ſay, That a Maſon, whoſe Land is aſtricted, cannot lawfully be imployed to build and repair any Mill in the Neighbourhood. 4. As to the Pretence, That tho' the Mill were built, *Bimmerſide* muſt remain aſtricted, in ſo far as his Mill cannot ſerve: This is, in plain *Scots*, to crave, That the Lords may add a new Clauſe to the Charter of Aſtriction; But the preſent Proceſs being a Suſpenſion for hindring the Charger to complete his Mill, he is not bound in *hoc Statu* to diſpute what ſhall be the Effect and Conſequence of the Building; and whether after the Mill is built, he will be ſtill liable as to certain Events. And albeit the Suſpender hath repeted a Declarator with his Reaſons, it cannot be further inſiſted in *in hoc Statu*, than the Reaſons of Declarator and Suſpenſion are Coincident. 5. As to the Tithes, the Abbot could not alienate or diminiſh them by Servitudes: Becauſe, theſe are the Spirituality of the Church, and *extra Commerciam*; and may be ſaid to be freed from Thirlage by the Act 1633, which allows them to be valued and bought without any ſuch Burden. Again, the Abbot's thirling his own Tithes (whereof he, and not *Bimmerſide*'s Predeceſſors, was Proprietar and Titular, and no Doubt drew the *ipſa Corpora*) can only infer a Burden upon himſelf and his Succeſſors the Titulars; and not upon *Bimmerſide* who is only Tackſman, and liable to a ſpecifick Duty.

Replyed for Newmains. Any Kind of Title *etiam a non Domino*, with Fourty Years Poſſeſſion of In-town Multures, doth eſtabliſh an Aſtriction, *Stair, Inſtit. Lib. 2. Tit. 7. N. 16.* And ſuppoſe that *Newmains*'s Predeceſſors had formally in the Year 1562, renounced any Claim of Aſtriction, yet the ſubſequent Preſcription by his continuing to poſſeſs In-town Multures perpetually thereafter by Virtue of his Infeſtments, would revive the Thirlage. Eſpecially conſidering what the Lords have decided in Caſes more narrow, *November 27, 1677, Grant* contra *Grant, February 20, 1675*, Counteſs of *Murray* contra *Weems, July 14, 1675*, College of *Aberdeen* contra *Earl* of *Northesk.* And Poſſeſſion *in dubio* is aſcribable rather to a real Right and Infeſtment, than to a perſonal Title; the former being *Jus nobilius.* 2. *Bimmerſide*'s Faculty to build by Virtue of the Contract 1591 is preſcribed. For the Queſtion is not, If a meer Faculty *in Gremio* of the Poſſeſſor's only Right, can preſcribe, which indeed cannot: But, If a Faculty in the Body of a Right can preſcribe, when the Poſſeſſor has and uſes another Title; which no doubt may preſcribe, notwithſtanding the *Act* 12. *Parl* 1617, which only declares, that Reverſions incorporate in the Body of an Infeſtment uſed and produced by the Poſſeſſor of the Lands as his Title, do not preſcribe. 3. The Pretence for exeeming the Tithes from the Thirlage, is ridiculous: For, was there any Thing more common in the Nation, than for Eccleſiaſticks, with Conſent of their Convents, or Chapters, to thirl their Tithes, either ſeparately, or with the Stock? Which was not underſtood to fall under the Prohibition, more than Tacks of the greateſt Length; Subinfeudation only being that which was prohibited by the Canons. And the Deſign of the Act of Parliament 1633, being only to eaſe the Heretor from the Trouble of having his Tithes drawn by a third Perſon, *ſalvo Jure cujuſlibet*, it did noways evacuate Thirlage conſtitute *ab ante*. Again, the Abbot, who was Titular, having thirled the *ipſa Corpora* of the Tithes, that Thirlage became *Onus reale*, which affects the *Corpora* in the Hands of any immediate Intrometter therewith, and conſequently muſt burden *Bimmerſide* who poſſeſſes Stock and Tithe by a Tack.

Duplyed for Bimmerſide. The Deciſions cited by *Newmains* are not to the Purpoſe; For that betwixt *Grant* and *Grant* had many Specialities, and was founded on Poſſeſſion by Charter and Seaſin ſubſequent to a very ancient Tack: And in the Prattick 1675, betwixt the Counteſs of *Murray* and *Weems*, the 19 Years Tack was a temporary Title; Which, tho' it may be continued *per tacitam Relocationem*, the Maſter's Poſſeſſion could not be underſtood to continue after his Neglect Fourty Years to exact the Tack-duty. Eſpecially ſeing the Lands were poſſeſſed by ſingular Succeſſors, who could not be preſumed to poſſeſs by Virtue of a Tack they were not bound in Law to know.

The Lords found, That *Bimmerſide*'s Faculty of building a Mill within his own Bounds, conform to the Contract 1591, did not preſcribe; and that he might build, tho' both the Ends of the Mill-dam were not on his own Ground, to free him from the Thirl of ſuch Corns as can be grinded at his own Mill. But found the Thirl to the Mill of *Dryburgh* continues ſtill in the Terms of the Contract, whenever *Bimmerſide*'s own Mill cannot grind. And that the Abbot's Feu-charter of the Mill of *Dryburgh* 1562, having thirled the Tithes of the Pariſh of *Mertoun* (within which the Lands of *Bimmerſide* ly) the building of the Mill conform to the Contract, can operate no Liberation from the Thirl of the Tithes.

Eodem Die. *The Creditors and Donatar of the Eſtate of* Dumfermling, *againſt the Laird of* Innes *of that Ilk.*

IN the Reduction, Improbation and Declarator, at the Inſtance of the Creditors and Donatar of the Eſtate of *Dumfermling*, againſt the Laird of *Innes*; The Purſuers having inſiſted to have it declared that they, their Tackſmen and Kenners, have the ſole Right to fiſh in the Water of *Spey* belonging to the Eſtate of *Dumfermling*, and to imploy what Perſons they pleaſe to fiſh the ſame, and to dreſs and pack the Fiſh, and make Barrels for that End.

Alledged for the Defender. That the King, by a Charter in the Year 1587, erecting the Defender's Town of *Gormoch* into a Burgh of Barony, gave to the Inhabitants (beſides the ordinary Powers) *omnimodam Poteſtatem eſſe Piſcatores, & Piſcium Mactatores, &c. cum Poteſtate Salmones alioſque id genus Piſcium condendi* (lie pack Salmond) *ſaltendi, & in Dolia ſolita committendi*, &c. And the Family of *Dumfermling* had paſt all Memory, ſubjected themſelves to make Uſe only of the Fiſhers of *Gormoch*, who for that End have always been bred up and diſpoſed into regular Bands, each conſiſting of eight Men, who orderly ſucceed one another every twelve Hours; and get their Wages in Fiſh, in a certain Proportion to the Number taken. Whereby the Inhabitants of *Gormoch* have acquired a Servitude, and the ſole Right of being Fiſhers and Macktaters, Salters and Packers of all kind of Fiſhes upon the Water of *Spey*.

Replyed for the Purſuers. No Inſtance in our Law and Practice can be given of ſuch an extraordinary Servitude as this; which doth not conſiſt with the Property of the Fiſhing, and debording from the Rules of all predial or real Servitudes, reſolves in a temporary and perſonal *Locatio Operarum*. For it cannot be underſtood a real Burden to affect ſingular Succeſſors, being neither of the Number of the ordinary Servitudes, nor contained in the Infeftments of the ſervient Tenement, but muſt be conſidered as a perſonal Obligement upon the Contracter. And if it were otherwiſe, Purchaſers might be ruined by old Pactions, Reſtrictions and Limitations upon their Property, *Quæ oriuntur ex* *variis Cauſarum Figuris.* Now what Purchaſer in this Caſe could dream, That a Fiſhing originally conſtituted with full Freedom, could be thus burdened, as that the Proprietar ſhould only imploy his Servants out of a certain Sort of People. As to the Defender's Charter 1587, tho it gives the Inhabitants of *Gormoch* the Privilege of Fiſhers, Macktaters, Curers and Packers, it doth not mention the Water of *Spey*, nor doth it give them the ſole Power to hinder others without the Liberties of their Burgh to do the like, but only *omnimodam Poteſtatem*, which is not excluſive. 2. The Purſuers and their Authors making Uſe of the *Gormoch* Men to fiſh their Water was *Actus meræ Facultatis*, like a Man's going in a common Road, or going to another's Mill, or making Uſe of Shearers out of his Neighbour's Land, *&c.* for Fourty Years, which doth not hinder him to alter his Courſe, and uſe his Liberty thereafter.

Duplyed for the Defenders. Omnimodam Poteſtatem eſſe Mactatores Piſcium, &c. can only be underſtood of a ſpecial Privilege upon the adjacent Water: For otherways no Liege is barr'd from being a Fiſher. Which, with the Purſuers conſtant landing their Boats, drying their Nets, and having their Corf-houſe upon the Defender's Territory; And his admitting the ſame only in Contemplation of their imploying his regular Bands of Fiſhers, doth clear it to be *Actus Neceſſitatis*, and not *meræ Voluntatis*. This is fortified by Deciſions, *March* 11, 1634, Sheriff of *Galloway* conta E. of *Caſſils*, *July* 22, 1634, *Forreſter* contra *Feuars*, *July* 10 and 15, 1623, *M'kay* contra L. of *Skelmorly*: Where a general Title and 40 Years Poſſeſſion without any legal Compulſion intervening, was found to infer the moſt grievous Servitudes. And, which comes directly up to the Parallel of the preſent Caſe of a circumſtantiate and circumſcribed Poſſeſſion, The paying of dry Multure during the Years of Preſcription (like the Purſuer's paying of Salmon for Fiſhing-wages) obliges the ſervient Tenement for ever to remain in the ſame State; *Stair Inſtitut. Lib.* 2. *Tit.* 7. *N.* 16. *July* 3, 1675, *Kinnaird* contra *Drummond.* And, as my Lord *Stair* obſerves, there is no more requiſite to preſerve Servitudes of that Kind, than that the Tenants were cauſed to do the ſame any Manner of Way 40 Years, tho without a Proceſs.

The Lords found the Purſuers making Uſe of the People of *Gormoch* in their fiſhing during the Years of Preſcription, not relevant to conſtitute the Servitude libelled: And therefore declared and decerned in the Terms of the Libel.

March 15, 1707. *Baillie* John Hay *Merchant in* Edinburgh, *contra* Charles Hay, David Mitchel *and* John Yorſtoun *Bakers in* Edinburgh.

CHarles Hay, *David Mitchel* and *John Torſtoun* Bakers in *Edinburgh*, having 21, *December* 1704, enter'd into a Contract with the deceaſt Mr. *Chriſtopher Seton*, who had, after his Father's Death in his Brother the preſent Earl of *Wintoun*'s Abſence, taken upon him the Management of the Eſtate of *Wintoun*; "By the which Contract he ſtood obliged to deliver to them at their Granaries in the Water of *Leith* 400 Bolls of Wheat of the Growth of the Earldom of *Wintoun* Crop 1704, with the Ordinary Meaſure that the Earl's Tenants were in Uſe to deliver him his Farm; And they on the other Hand became bound to pay to him or his Order, Eight Pound for each delivered Boll: Baillie *John Hay* as Executor Creditor to the ſaid Mr. *Chriſtopher*, who died before Payment of the Price, confirmed in his Teſtament 2000 Merks, as due to him upon the ſaid Contract by the Bakers, regiſtred the Contract and charged them with Horning. They ſuſpended upon this Ground, That the Price of the ſaid Victual was not *in Bonis* of the he ſaid Mr. *Chriſtopher* the Time of his Deceaſe, nor confirmable by his Creditor: But appears from the Tenor of the Contract to have been the Earl's own Victual, whereof the Price could only belong to him or his Creditors: Mr. *Chriſtopher* being but a *Negotiorum Geſtor*, a Truſtee and Manager, nd in the Caſe of a Factor who had the ſimple *Jus exigendi*, that upon his Death fell to the Heretor for whoſe Behoof he acted. Yea, the Earl upon is Return could have diveſted him of his Truſt, and recovered the Price f the Victual from the Suſpenders: For betwixt *Pearſon* and *Murray* 672, It was found, That Rents uplifted by a Chamberlain were the Maſter's Property, which the Chamberlain could not retain or compenſe by Debts of the Conſtituent he was aſſigned to; and *multo minus* can the Creditor of a Factor affect the Conſtituent's Rents for the Factor's own Debt. And *ita eſt*, That the Creditors of the Earl of *Wintoun* had arreſted in the Suſpenders Hand, and are called in a Multiple-poinding.

Anſwered for the Charger. The Suſpenders being expreſly obliged by the Contract to pay the Price of the Victual to Mr. *Chriſtopher* or his Order, the Mony was as much *in Bonis Defuncti*, as they had granted Bond for it to his Heirs and Aſſignies. And as no Objection could have been made againſt Payment to Mr. *Chriſtopher*'s Aſſigny, far leſs can Payment be refuſed to the Charger who by his Confirmation is come in Place of Mr. *Chriſtopher*. Nor doth it alter the Caſe, That the Wheat contracted for was of the Growth of *Wintoun*; Becauſe, Mr. *Chriſtopher* might have been Maſter of the Product of that Eſtate by ſingular Titles; And the Suſpenders have bargained with him, not *factorio Nomine*, but as Proprietar. The Deciſion *Pearſon* againſt *Murray* doth not meet the Caſe, for whatever Retention, *&c.* a Chamberlain may have againſt his Conſtituent, that cannot hinder the Debtor of a Defunct to make Payment to his Executor Creditor: And whatever my Lord *Wintoun* might plead, 'tis *Jus Tertii* to the Suſpenders to obſtruct the Charger's Payment.

The Lords found, That the Victual was not Mr. *Chriſtoher*'s, and that therefore the Price was not *in Bonis Defuncti*, nor could be claimed by Baillie *Hay* as his Executor Creditor.

Eodem Die. *The Earl of* Leven, *againſt* John Scot *of* Gilmerſcleugh, *and* Francis Armſtrang *of Whitehaugh.*

THe Earl of *Leven* having charged *Gilmerſcleugh* and *Whitehaugh* upon their Bond for 6000 Pound *Scots*, with Annualrents and Penalty; They ſuſpended upon this Reaſon, That the Bond was blank in the Creditor's Name, and ſo null by the *Act* 25. *Par.* 1696.

Anſwered for the Charger. That the Act annuls only Bonds thereafter to be ſubſcribed blank, and this Bond was ſubſcribed before the Act.

Replyed for the Suſpenders. Albeit the Bond was ſubſcribed before, it was not delivered till after the Act: And Bonds in the Senſe of Law are to be underſtood *cum Effectu*; An undelivered Bond not being *Vinculum Juris*. Nor does the Act of Parliament diſcharge only the ſigning of a blank Bond, but requires that at leaſt at Delivery, it be filled up before the ſame Witneſſes, which ſhews that Law regards not the Time of ſigning, but Delivery.

Duplyed. There is no Place left in this Act to conjecture about the Meaning of the Words: For it reprobates only Bonds thereafter to be ſubſcribed blank, unleſs ſome Cautions be obſerved, and makes no Mention of Blank-bonds ſubſcribed before.

The Lords ſuſtained the Bond charged upon, in Reſpect it was of a Date anterior to the Act of Parliament anent Blank-bonds.

March 18, 1707. *Sir* Alexander Cuming *contra Sir* Andrew Kennedy.

IN the Proceſs at the Inſtance of Sir *Alexander Cuming*, againſt Sir *Andrew Kennedy*, about the Office of Conſervator of the *Scottiſh* Privileges in the United Provinces, The Lords by an Act before Anſwer, having allowed a Conjunct Probation to the Parties, *viz.* To Sir *Alexander* for proving the Malverſations charged upon Sir *Andrew*, and to Sir *Andrew* for proving his Exculpation : A Commiſſion was directed to two Perſons named by Si *Alexander*, and other Two named by Sir *Andrew*, and in Caſe of their Abſence, or not Acceptance, to one or more of the Magiſtrates of *Campvere* Sir *Alexander* extracted an Act, and, upon the Failure of the Commiſſioner named, applyed to two *Scepins* of *Campvere*, before whom he examined his Witneſſes ; And brought home a Report containing an Extract under the Secretary's Hand of the principal Depoſitions. Sir *Andrew Kennedy* objected againſt this Report, That the Commiſſion was directed with this Quality That the Depoſitions ſigned by the Witneſſes, Judge and Clerk ſhould be tranſmitted : Whereas nothing is produced but the Clerk's notorial Atteſtation of Depoſitions pretended to be taken before the Magiſtrates of *Campvere*.

Anſwered for Sir Alexander. 'Tis the Cuſtom of the Place to keep all original Depoſitions, Affidavits, *&c.* ſigned by the Deponent, Judge and Clerk in the *Stadt-houſe*, and to give out only Extracts under the Clerk's Hands As is clear from the *Affidavit* and Declarations of the Clerk of the Town and of a publick Magiſtrate, and from the Teſtimony of *Voet.* in his lat practical *Commentary*, *ad* Tit. ff. *de Fide Inſtrumentorum.* Beſides, that it i upon the Matter acknowledged by a Deciſion obſerved by *Dirletoun*, *Februa* 5, 1675, *Burnet* contra *Luitgrue.* And for confirming the Verity of the E tract produced, there is a Declaration of the whole Magiſtrates of the Ci ſigned by the Secretary, and the Town-ſeal appended, and a collation Copy ſigned by the Witneſſes, the Penſionary, Secretary, and two publ Notaries.

Replyed for Sir Andrew. He who accepts of a Commiſſion muſt proſecute the ſame in the Terms thereof, otherwiſe he acts not by Authority thereof, and the Granter of the Commiſſion cannot regard his Report. As to the Deciſion *Burnet* contra *Luitgrue* ; The Lords there demurr'd upon the Informality of the Report, as not duly ſubſcribed : Nor had they ſuſtained it, but that it was ſubſcribed by the Judge, and homologated by an expreſs Letter under *Luitgrue*'s Hand. Sir *Alexander*'s *Affidavit* and Declaration are nothing to the Purpoſe, ſince the Queſtion here is not about the Cuſtom of the Place, but the Manner of executing the Lords Commiſſions : And no foreign Judge can be ſuppoſed ſo uncivil as to neglect the ſame, if required to do it. The Teſtimony of *Voet. de Fide Inſtrumentorum* doth as little towards confirming the Legality of the Report, as if Sir *Alexander* had ſaid, *Baculus ſtat in Angulo, Ergo*, &c. 2. That this is not the Method of reporting Commiſſions ſent abroad, may be cleared from ſeveral Inſtances : As a Commiſſion in the Caſe of the *Viſcount* of *Oxford* and Mr. *John Cockburn*, was executed and reported by returning the Subſcriptions of Deponents, Judges and Clerk from *Rome*, *Leghorn*, &c ; In the Caſe of one *Hay*, The Lords did not ſuſtain notorial Extracts from the Senate of *Hamburg* as probative here, tho they made Faith with them there about the Year 1682 ; A Commiſſion from the Commiſſars of *Edinburgh* in the Caſe of *William Gordon* and his *Wife*, to *John Steenlack Burgermaſter* of *Rotterdam*, and others 1698, for proving the Libel of Adultery againſt her, was duly executed and reported by the Subſcriptions of the Deponent, Judges and Clerk, *Anno* 1704; A Commiſſion in the Caſe of *Van Rixel* Merchant in *Harlem* and *David Cleland* Merchant in *Edinburgh*, to *Jacob van Cralingen* and *John Drummond* Merchants in *Amſterdam*, was duly executed and reported by the Subſcriptions of Parties, Judge and Clerk, together with the Seal of the City of *Amſterdam*.

Duplyed for Sir Alexander. The Inſtances adduced by Sir *Andrew* of Commiſſions otherwiſe reported than Sir *Alexander*'s, are not to the Purpoſe; for theſe Commiſſions were all directed to private Merchants, and not to the Magiſtrates of the Place: Nor is there any Inſtance of a Commiſſion reported from *Campvere*, where Sir *Alexander*'s Commiſſion was executed; And the Cuſtoms of other Cities is no Rule to them.

The Lords repelled the Objection, and ſuſtained the Report.

Eodem Die. Alexander Aliſon *Writer to the Signet*, contra *the Directors of the* African *Company*.

Alexander Aliſon having, as Creditor to *Henry Crawford* Merchant in *Dundee*, one of the joint Adventurers in the *African* Company, arreſted in the Hands of the Directors and the Caſhier, he purſued a Furthcoming, and a Declarator of Right to the Subject.

Alledged for the Defenders. 1. Whatever come of the Subject arreſted, they cannot be decerned perſonally to make Furthcoming. 2. The Act 1695, eſtabliſhing the Company declares, That no Part of the Joint-ſtock ſhall be liable to Arreſtment, and that the Property ſhall only be conveyed by Tranſfers in their Books, except the Share of Profit belonging to any particular Member, which may be affected by the real Diligence of Creditors, and Arreſtment is not a real Diligence.

Replyed for the Purſuer. 1. That he doth not inſiſt to have the Defenders liable perſonally, but only *Ratione Officii*. 2. Tho voluntary Conveyances can only be made by Transfers, the Subject may be affected by the real Diligence of Creditors: And Arreſtment (which is a *Nexus realis* upon the Subject) is certainly ſuch a habile Diligence. Albeit for the general Advantage of the Nation, and Incouragement of that Trade, the Parliament declared the Stock not upliftable; *Res devenit in alium Caſum*, the Company being diſſolved *in Diem* by Law, and the Stock with Intereſt to be paid unto the reſpective Adventurers and Proprietars.

Duplyed for the Defenders. The Mony to be paid in for the Capital Stock and Intereſt not being yet in the Companies Hands, no Arreſtment thereof can be effectual.

Triplyed for the Purſuer. Arreſtment upon a Subject inchoately habile, ſubſiſts after it becomes fully habile: As a Creditor arreſting a Sum due upon a Wadſet before Redemption, is preferable to a ſecond Arreſter after Redemption, *Dirltoun*'s *Queſtions*, Tit. *Arreſtment of Conditional Debts*; Arreſtment of the Price of Lands after a verbal Agreement, was ſuſtained after the Bargain was reduced in Writ, *Stair* Lib. 3. Tit. 2. N. 29; And there are many Deciſions ſuſtaining Arreſtment, *currente Termino*, of what may be due to a Liferentrix, upon her ſurviving the Term.

The Lords found the Purſuer's Arreſtment to be a habile Diligence for affecting his Debtor's Share both Principal and Intereſt in the *African* Company, in Order to oblige the Directors to transfer the ſame in his Favours after the ordinary Form.

Eodem Die. James Murray *of* Conheath, *againſt* John Irvine *of* Drumcoltran.

JAmes Murray *of* Conheath having Right to an Adjudication of a Wadſet granted by Umquhile *John Glendinning* of *Partoun* to *Maxwell* of *Barwhillany* and *Griſſil Maxwell* his Spouſe in Liferent, and to the Heirs to be procreated betwixt them in Fie, purſued Reduction *ex Capite Lecti* of a Diſpoſition granted by the ſaid *John Glendinning* to his younger Children, and transferred by them to *Drumcoltran*.

Alledged for the Defender. It being Fourty Years ſince the Diſpoſition quarrelled was granted, any Action of Reduction thereof *ex Capite Lecti* is preſcribed *non utendo* within the Fourty Years.

Replyed for the Purſuer. Albeit perſonal Actions and Obligations preſcribe by the elapſing of Fourty Years, *Act* 29. *Parl.* 5. *Ja.* 3. yet no Man loſes his heretable Right merely *non utendo*, unleſs the other Party poſſeſs the heretable Subject for the Space of Fourty Years by Virtue of Charter and Seaſin, or Infeſtment on Retour, *&c.* *Act* 12. *Parl.* 22. *Ja.* 6. which the Defenders cannot pretend to have done. And an apparent Heir may enter (if not debarred by interveening Services) to his Predeceſſors who died 100 Years ago; and quarrel Rights to their Eſtate, that are not either granted by the true Heretor, or fortified with Fourty Years Poſſeſſion.

Duplyed for the Defender. Under the Word Obligation in the *Act* 29 of K. *Ja.* 3. *Parl.* 5. all that can be Ground of Action is comprehended: And *November* 28, 1665, *Younger* contra *Johnſtons*, Reduction of Retours and all Actions in Favours of Heirs were found to be comprehended in the ſaid Act. The Delay of a Reduction *ex Capite Lecti* is odious, ſeing thereby the Defender may ſuffer through the Death of Witneſſes to prove the Defunct's Convaleſcence after granting the Deed quarrelled. Again, tho' a Defence on the poſitive Preſcription of heretable Rights requires Poſſeſſion in the Defender; the negative Preſcription which is only a denying of the Purſuer's Title, reacheth both heretable and moveable Rights without Neceſſity of Poſſeſſion. As to the Act 1617, that eſtabliſheth only a poſitive Preſcription of abſolute and irredeemable Rights; and mentions only the negative Preſcription of heretable Bonds, Wadſets or Rights of that Nature in which the poſitive Preſcription cannot take Place, the Defender's Poſſeſſion being always the Granter's Poſſeſſion.

The Lords found the Action of Reduction *ex Capite Lecti* preſcribed, *non utendo* within the Space of Fourty Years.

Eodem Die. *The Dutcheſs of* Gordon, *againſt the Duke her Husband.*

BY Decreet Arbitral pronounced by the Earl of *Marchmount*, the Duke of *Gordon* being decerned to pay 800 Pound *Sterling* of yearly Aliment to the Dutcheſs, with the Burden of Lady *Jean Gordon* their Daughter's Aliment, Education and Apparel; and it being declared, that if Lady *Jean* did not live with her Mother through any other Cauſe than that of the Dutcheſs's refuſing to intertain her, the Dutcheſs ſhould be free from all Charge of her Education without any Defalcation of her Grace's Aliment on that Account: After Lady *Jean* was married to my Lord *Drummond*, the Duke ſuſpended the Aliment upon this Ground, That the Dutcheſs being now free of Lady *Jean*'s Education by her Marriage, the 800 Pound of Aliment muſt ſuffer a Defalcation.

The Lords refuſed to modify the Aliment, and found the Letters orderly proceeded.

Eodem

Eodem Die. Francis Moliſon *Merchant in* Brechin *Supplicant.*

FRancis Moliſon having repreſented to the Lords by a Bill that *Alexander Toung*, *William Clark* and *John Spence* Merchants in *Brechin* had unwarrantably arreſted for ſome pretended Debts his Commiſſioner-Fees for the Town of *Brechin*: In ſo far as, ſeing the Perſon of any Repreſentative in Parliament cannot be attackt for Debts during the ſitting thereof, neither can the Fees deſtined for defraying the Commiſſioner's Charges be affected by Arreſtment or Diligence; theſe Fees being in Effect Aliment, like Fees given by the Queen to her Servants, which are not arreſtable.

Anſwered for the Arreſters. That they know no poſitive Law exeeming Commiſſioners to the Parliament from perſonal Execution: Albeit by Cuſtom where Members of Parliament have been impriſoned upon legal Diligence, the Parliament has ſometimes given Order for their Liberation; and unleſs the Parliament require their impriſoned Members to be ſet at Liberty, they may be detained in Cuſtody. Nor is there any Law or Cuſtom privileging Commiſſioners Fees againſt the Diligence of Creditors; theſe not being contained in the Act of *Sederunt* 1613, which exeems only Penſions granted by the King, and the Salaries of his Miniſters of State and Servants; and *Caſus omiſſus habetur pro omiſſo.*

The Lords found the Arreſtments unwarrantable, and ordained them to be louſed without Caution or Conſignation.

Eodem Die. *Sir* James Hall *of* Dunglaſs, *againſt Dam* Janet Murray *Lady* Pitfirren.

IN the Proceſs at the Inſtance of Sir *James Hall* againſt Dam *Janet Murray*, as repreſenting her Father Sir *Patrick Murray*, this Dilator being proponed for the Defender; That the Proceſs being founded upon a Charge at Sir *James*'s Inſtance againſt the deceaſt *Charles Murray* of *Hadden* as principal, and the ſaid Sir *Patrick Murray* as Cautioner, which was ſuſpended upon Compenſation; and after it had been let ſleep, waken'd only againſt the ſaid Dam *Janet Murray* as repreſenting her Father; whereas it ought alſo to have been wakened againſt *Charles Murray*'s Repreſentatives: It being a Rule that in all Wakenings the principal Cauſe muſt be wakened in the ſame State it was, and all relating to the Proceſs given out.

Anſwered for Sir James. That it was intire to him to inſiſt againſt both or either of the Repreſentatives of Sir *Patrick* or *Charles Murrays* as he thought fit, their Predeceſſors being bound conjunctly and ſeverally to him: And whom one is not obliged to call in the Beginning of a Proceſs he is not obliged to continue the Proceſs in all it's Steps againſt.

Replyed for Dam Janet Murray. Albeit it was in the Option of Sir *James Hall* in the Beginning to have charged Sir *Patrick*, who was bound conjunctly and ſeverally with *Charles*; yet ſeing they were both charged, and the Suſpenſion paſſed in both their Names; it ought to be wakened againſt both. For tho' Sir *Patrick* being a Cautioner bound conjunctly and ſeverally, had not *Beneficium Ordinis*, yet Payment by the Principal did exoner him: And conſequently the Grounds of Compenſation proponed for the Principal ought to be firſt diſcuſſed, and the Proceſs waken'd againſt his Repreſentatives for that End.

Duplyed for Sir James Hall. That any real Defences that were competent to *Charles Murray*, are competent to the Lady *Pitfirren*, as repreſenting his Cautioner: And for proving thereof, ſhe may have a Diligence to recover Papers out of the Hands of the Repreſentatives of the principal Debtor.

The Lords repelled the Dilator.

March 19, 1707. Thomas Buchanan *of* Sandſide, *againſt the Marqueſs of* Montroſe.

T*Homas Buchanan* having obtained a Decreet of Adjudication of the Eſtate of *Buchanan*, upon a Bond granted by *Janet Buchanan* of *Leny*, apparent Heir to the deceaſt Laird of *Buchanan*; the Marqueſs of *Montroſe* craved it might be ſtopp'd, in Reſpect he was content inſtantly to debate and exclude the apparent Heir's Intereſt in that Eſtate.

Anſwered for Sandſide. 'Tis a Novelty to ſtop a Decreet of Adjudication at the Inſtance of a third Party upon Pretence of excluding the Debtor's Right: For an Adjudication is the only Title whereby the Creditors of an apparent Heir can quarrel third Parties Pretences, or force a Production of their Rights. Yea, the Debtor himſelf has not been allowed to propone Defences to exclude Adjudication, and hinder completing of the Diligence: Much leſs can any third Party pretend Intereſt, and if it were otherways, it would be very inconvenient to Creditors whoſe Diligences are preferred according to the Dates.

The Lords allowed the Adjudication to go out, reſerving the Marqueſs's Intereſt *contra Executionem.*

Eodem Die. Alexander Scot *Writer in* Edinburgh, *againſt* Walter Laing *Servant to the Dutcheſs of* Buccleugh.

W*Alter Laing* being purſued by *Alexander Scot* upon his Promiſe to pay to the Purſuer a Bill of 30 Pound *Sterling* drawn by *Colin Ramſay* upon, and accepted by *John Melvill*.

Alledged for the Defender. That he could not be liable to the Purſuer for the Bill; becauſe, it doth not bear Value received of him, and ſo was but a Factory, or Truſt given by *Ramſay* to *Scot* to receive the Mony. For inſtructing that a Bill not bearing Value received imports only a Truſt in the Perſon it is payable to, to receive the Mony for the Drawer's Behoof: A Declaration under the Hands of ſome *Edinburgh* Merchants was produced, bearing, That when they draw Bills payable to their Servants, or any whom they truſt to uplift their Mony, they have no other Security for the Repayment or Check upon the Truſtee to compt, ſave, that the Bills do not bear Value received. So that if the Truſtee ſhould prove unfaithful, or ſhould die before ſending any Letter of Advice to the Drawer or Indorſer, that he received their Mony, the Truſt could not be ſafely proved but by the Want of Value received in the Bills.

Anſwered for the Purſuer. We need not go for a Deciſion in this Matter to the precarious Authority of Merchants, who are divided in their Sentiments, ſeing the Lords, proceeding upon a more ſure Rule, *viz.* The Principles of Law, and the Opinion of Authors, have once and again ſolemnly determined, That Bills not bearing expreſly Value received of the Creditor, do imply that Value was given for them; unleſs redargued by the Creditor's Oath or Writ: As Mr. *Forbes* obſerves in his Treatiſe concerning Bills of Exchange, *Pag.* 49, 59. The Pretence that Merchants could not eaſily fix a Truſt upon their Servants or Correſpondents to whom they make their Bills payable for their own Behoof, unleſs it were preſumed from the Want of the Words, *Value received*, is frivolous: For if the Truſtee be honeſt and exact, he will immediately upon Receipt of the Drawer's Mony give him Credit in his Books, whereby the Truſt will be known whether he die or live; and if the Servant or Correſpondent do not anſwer the Truſt repoſed in them, the Drawer or Indorſer has himſelf to blame for giving Credit to ſuch. Again, is it any extraordinary Thing to ſee Merchants and others depoſite their Mony without any Receipt in a Confident's Hand to ly there till the Owners have Occaſion to make Uſe on't, or draw it out with Advantage? Do not many rich Men in the Country tranſmit their Mony to their Agents at *Edinburgh*, to be lent out at a Term upon Security: And what have the Owners of ſuch Mony to depend on but the Oath and Honeſty of their Doers? Beſides, our Law has privileged Bills of Exchange as to the Way and Manner of proving Truſt: Witneſs the *Act* 1695 *anent blank Writs*, in which Bills are excepted. 2. If Value were not preſumed tho' not expreſſed, many People might be inſnared, who, by not knowing that Formality, might neglect to cauſe inſert Value received in Bills truly onerous. 3. The Defender having promiſed Payment of the accepted Bill to the Purſuer, 'tis *Jus Tertii* to him to object Truſt in the Perſon of the Purſuer, without inſtructing that he is Creditor to, or repreſents *Colin Ramſay* the Drawer. *Vid. Forbes*, Pag. 83.

The Lords found, That Value is preſumed to have been given for the Bill by *Alexander Scot* the Creditor, tho' it bear not Value received; unleſs the Defender prove by Writ or Oath of the Creditor that he paid no Value.

March 20, 1707. *Mr.* Edgert *and* Abraham Edins *Merchants in* Rotterdam, *and* Patrick Home *Writer to the Signet their Factor*, *againſt* Robert Hunter *Merchant in* Edinburgh.

MR. *Abraham* and *Edgert Edins* and their Factor having purſued before the Sheriffs of *Edinburgh Robert Hunter* Merchant there, for Payment of 430 Gilders as the Ballance reſting for ſome Goods ſent to him in the Year 1696, he offered to prove by the Purſuers Oaths, that the foreſaid Good were ſent to him to be ſold and diſpoſed of on their Riſk, which he had done and a Part of the Price could not be recovered by the Buyer's proving inſolvent; which ought to be allowed. Upon which a Commiſſion being granted to *Alexander Carſtares* Factor at *Rotterdam* to take the Oaths of Mrs. *Edins* who are Anabaptiſts; they firſt made Faith before the *Skepin* in *Rotterdam*, and then before Mr. *Carſtares*: *Declaring upon Faith and Honeſty* (their Religion not permitting them to take an Oath) *that they gave no Orders to the Defender to ſell the Goods*. Which Commiſſion being reported to the Sheriffs and adviſed, they found it not proved that the Defender was authorized to diſpoſe of the Goods, and therefore decerned. Mr. *Hunter*, when charged on the Sheriffs Decreet, ſuſpended for this Reaſon, That the Sheriffs had committed Iniquity in ſuſtaining the Chargers Declarations upon Faith and Honeſty in Place of Depoſitions upon a Point referred by the Suſpender to their Oaths. Becauſe, 1. This is inconſiſtent with the Commiſſion, which only gave Warrant to report the Chargers Oath. 2. 'Tis expreſly contrary to the Laws of this Nation which diſpenſe not with the Oaths of any Perſon, whatever Opinion they may be of. 3. The Power of diſpenſing with the Terms of an Oath is *magis Imperii quam Juriſdictionis*, at leaſt falls not under the Power of an inferior Judge: And if ſuch Reports were allowed, all Foreigners would plead Exemption from the taking Oaths.

Anſwered for the Chargers. 'Tis not the Queſtion what way Quakers or Anabaptiſts muſt depone by our Law: For the Chargers live in *Holland*, and by the Law there, ſuch Declarations are ſuſtained. And they who refer any

Thing to the Oaths of *Jews, Mahumetans, Perſians, Papiſts, Quakers, Anabaptiſts, Indians* and *Heathens*, muſt take it in the Form their Religion allows; otherwiſe there could be no Trading or Commerce maintained with them.

The Lords ſuſtained the Declaration upon Faith and Honeſty as equivalent to an Oath, and found the Letters orderly proceeded.

Eodem Die. Hugh Corbet *of* Hardgray, *againſt* William Hamilton *of* Wiſhaw.

H*ardgray*, as Aſſigny to a Decreet of the Commiſſars of *Glaſgow*, againſt *Wiſhaw* for 400 Merks, contained in a Ticket granted by him to the deceaſt *William Anderſon* Provoſt of *Glaſgow*, purſued *Wiſhaw* for Payment.

Alledged for the Defender. Abſolviture, becauſe, 1. The Decreet was in Abſence, and intrinſically null for being pronounced in Vacation-time without a Diſpenſation, by a Commiſſar who is not competent to judge in Actions above 40 Pound *Scots*, except where the Libel is referred to Oath, and the Ticket was preſcribed. 2. Compenſation upon a Bill drawn by *Patrick Murray* Clerk to the Fiſhery-company upon Provoſt *Anderſon* for 1200 Merks payable to *Wiſhaw*, which the Provoſt by a Letter under his Hand to *Wiſhaw* acknowledged and promiſed to pay.

Replyed for the Purſuer. Compenſation upon the Bill and Letters cannot be ſuſtained, becauſe, both being Holograph were preſcribed by the elapſing of Twenty Years before any Diligence done thereon. 2. A Decreet having followed upon the Ticket; no Compenſation can be ſuſtained thereafter. 3. There is no Compenſation in this Caſe, becauſe, the Bill on Provoſt *Anderſon* was to have been allowed to him upon producing the Poſſeſſor's Receipt of Payment in the firſt End of what he owed to the Company: And *Wiſhaw* having neglected for Twenty Years to preſent the Bill, or to offer a Receipt in the Terms thereof, Provoſt *Anderſon* neither did nor could get Allowance of the Sum in the Bill from the Company.

Duplyed for the Defender. The Bill and miſſive Letter could not preſcribe, becauſe *eo Momento* that they did exiſt, they *ipſo Jure* extinguiſhed *Wiſhaw's* Obligation; It being the Nature and Effect of Compenſation, to extinguiſh the concurring Debts: And after Extinction, 'tis abſurd to talk of Preſcription by Courſe of Time. 2. *Wiſhaw* had no Reaſon to purſue upon the accepted Bill, for that he knew it compenſed by his Ticket. But now that he is purſued upon the Ticket, he cannot be debarred from proponing Compenſation upon the Bill: Becauſe, *quod eſt temporale in Actione, in Exceptione eſt perpetuum.* And in Conformity to this Brocard the Lords decided in the Caſes of *Gordon* of *Park* contra *Hay* of *Ranie*, 1702, and *Hay* of *Lochcoat* contra *Bonhard* in the Year 1703. 3. The Act of Parliament excluding Compenſation after Sentence, is only to be underſtood of Decreets *in Foro*, whereas the Decreet founded on was in Abſence, pronounced by a Commiſſar who was not a competent Judge. Now, *Wiſhaw* cannot be blamed for not compearing to propone his Compenſation where he was not bound to appear. Beſides, the Lords have ſometimes ſuſtained Compenſation in a Suſpenſion, or by Way of Defence, even after a Decreet *in Foro*, where there was any probable Cauſe for not proponing the ſame *in prima Inſtantia*; As in the Caſe of the Earl of *Marſhal* contra *Brag*, *June* 1662, obſerved by *Gilmore*. 4. Suppoſe Provoſt *Anderſon* had never got Allowance of the Sum due by him to the Company, what is that to *Wiſhaw*, who hath his liquid Acceptance and Obligement to pay the Bill, which at the very Date thereof, did concur with, and extinguiſh *Wiſhaw's* Ticket for the equivalent Sum? And if the Provoſt neglected to ask a Receipt (which *Wiſhaw* never refuſed) *ſibi imputet.*

Duplyed for the Purſuer. The Act of Parliament doth not diſtinguiſh betwixt Decreets in Abſence and Decreets *in Foro*, in the Matter of repelling Compenſation after Sentence: And it had been needleſs to make any ſuch Act concerning Decreets *in Foro*, which were ſufficiently ſecured by the Regulation Act concerning *competent and omitted*. Therefore the Statute excluding Compenſation after Sentence, ſhould only be underſtood to relate to Decreets in Abſence: As was decided *July* 25, 1676, *Wright* contra *Shiels*.

The Lords repelled the Reaſons of Preſcription of the Ticket purſued on, in Reſpect of the Decreet. But found that the Decreet being in Abſence and againſt Debtors, it doth not exclude the Defence of Compenſation in the ſecond Inſtance. And found that the Compenſation being proponed by Exception doth not preſcribe. And therefore ſuſtained the Compenſation founded on the Precept and Letter produced, and aſſoilzied.

Eodem Die. Janet Buchanan *Lady* Leny, *and her Husband for his Intereſt, againſt the Marqueſs of* Montroſe.

IN the Exhibition *ad deliberandum* at the Inſtance of the Lady *Leny* as apparent Heir to *John Buchanan* of that Ilk her Father, againſt the Marqueſs of *Montroſe*, the Defender having exhibited certain Writs, the Purſuer craved to be allowed to take a Tranſumpt upon her own Charges of ſuch of them as ſhe had a peculiar Intereſt in, and contained Clauſes in her Favours.

Alledged for the Defender. He was not obliged to allow Tranſumpts of his own Writs in an Action *ad deliberandum* which only tends to Inſpection. For to tranſume is much the ſame with giving up the Papers, and inconſiſtent with a *deliberandum*: Seing Intromiſſion with Writs, is *ipſo Facto* Behaviour as Heir, and intrometting with Tranſumpts thereof is equivalent. 2. The Purſuer cannot have Tranſumpts without an active Title as Heir; and tho' ſhe were ſerved Heir, the Defender could exclude her Intereſt by a preferable Right.

Anſwered for the Purſuer. It is not only uſual to purſue Actions of Tranſumpt, but the Lords have frequently allowed Tranſumpts *incidenter* in other Actions, when Writs were produced that were common Evidents, or wherein Parties had ſpecial Intereſt: And the Purſuer's Summons *ad deliberandum* contains a Concluſion for tranſuming ſuch Writs as ſhe has Intereſt in, and the Act thereupon extracted bears, That Tranſumpts of ſuch Writs ſhould be given her upon her own Charges.

The Lords found, That an apparent Heir cannot in a Proceſs *ad deliberandum*, inſiſt to have the Writs exhibited tranſumed: And therefore refuſed to allow Tranſumpts to the Purſuer.

March 21, 1707. *The Laird of* Grant, *againſt the Creditors of* Halgreen.

IN a Declarator of Recognition of the Lands of *Halgreen* at the Inſtance of the Laird of *Grant* the Donatar, the Value of the Ward-lands being proved to extend to about 42800 Pound, and there being a publick Infeftment in them for 12000 Pound granted to Provoſt *Couts* in *Anno* 1686, and ſome baſe Infeftments granted in the Year 1687 and 1688 for a Matter of 10000 Pound, and then a publick Infeftment for 20000 Pound to *Arbuthnet* of *Knox* in *Anno* 1689: The Purſuer contended that Recognition was incurred, and the Declarator ought to be ſuſtained; in Reſpect the baſe Infeftments, tho' at the Date thereof they were within the Half of the Value of the Ward-fie, came to exceed the Half by the ſupervenient publick Infeftment 1689. Not as if the publick Infeftments did infer Recognition, or came *in Computo* to make it up, but the antecedent baſe Infeftments inferr'd it how ſoon the major Part of the Vaſſal's effectual Property, deducing the publick Infeftments, was baſely alienated: Becauſe, he was then without the Superior's Conſent rendred incapable to ſerve him, which is the main Reaſon of Recognition; as *Craig*, my Lord *Stair*, and all the *Feudiſts* obſerve. And as Recognition would have been certainly incurred, had the baſe Infeftments been poſterior to the laſt publick Infeftment, they muſt have the ſame Effect when anterior thereto: Seing *de Facto* the Vaſſal is equally diſabled in this Caſe, as in the other. Thus, *February* 6, 1673, Lord *Hatton* contra Earl of *Weems*; *February* 23, 1681, *Hay* contra Creditors of *Muirie*, tho' Confirmation ſecure againſt Recognition falling by the Infeftment confirmed, it doth not ſecure againſt Recognition upon other prior ſubaltern Infeftments not confirmed. And Infeftment upon Reſignation or Confirmation in Favours of a total Purchaſer, after his Author had made ſome baſe Infeftments within the Half, will not hinder theſe baſe Infeftments to be conjoined with ſubſequent baſe Infeftments made by the Purchaſer himſelf. Yea, baſe Deeds that were legal at the Beginning, do frequently come afterwards to infer Recognition, through the Vaſſal's Neglect to get them confirmed. So the baſe Infeftments granted during the Troubles and Uſurpation, when Wardholdings were ſuppreſt, not ſought to be confirmed after the Reſtoration, did *ex poſt Facto* infer Recognition; *January* 7, 1676, *Cockburn* contra *Cockburn*; *July* 29, 1672, *Hatton* contra Earl of *Northeſk*; *December* 15, 1669, *Maitland* contra *Gordon*. For *ſæpe evenit ut quod ab Initio valuit, poſtea evaneſcat, cum ad Caſum perveneri a quo incipere non potuit*. Yea, with us no ſubaltern Infeftment within or without the Half could be granted of a Ward-fie till the *Act* 71. *Parl.* 14. *J.* 2 allowing Feus ſet to a competent Avail, which was reſtricted by the *Act* 16 *Parl.* 1633. and the Ward Vaſſal diſcharged under the Pain of Recognition to alienate without Conſent of his Superior the moſt Part of their Land.

Anſwered for the Defenders. Albeit the Lords have found that prior baſe Infeftments *valid ab Initio* fell under Recognition by the ſuperveening of other baſe Infeftments, it was never dreamed that the granting of publick Infeftments upon Reſignation ſhould have the ſame Effect as to anterior baſe Infeftments. Becauſe, 1. Recognitions being odious are not to be extended to undecided Caſes: And there was no Fault in the Vaſſal to alienate what was below the Half of the Value, and the Creditors were *in bona Fide* to take and retain their baſe Infeftments without Confirmation till the Granter had alienated the major Part without the Superior's Conſent. 2. If a ſubſequent Infeftment upon Reſignation could infer Recognition of anterior baſe Infeftments, it were eaſie for the Superior and his Vaſſal by Colluſion to evacuate the Fie, and to elude anterior juſt Creditors. 3. 'Tis a Principle in Law, that to infer Recognition, baſe Infeftments equivalent to the major Part of the Ward Land, muſt concur at the ſame Time: So that if one baſe Infeftment be confirmed by the Superior before the taking of another, theſe Two would not concur to make up the major Part. Now ſince the baſe Infeftments in this Caſe at the taking of the laſt did not extend to a Third of the Value of the Eſtate, 'tis abſurd to make Uſe of the ſubſequent publick Infeftment (which was the Superior's own Deed) to make the Recognition incur. For at that Rate a Ward Vaſſal of 10000 Merks granting a baſe Infeftment for 1000 Merks, and thereafter diſponing the other 9000 redeemably or irredeemably with the Superior's Conſent, Recognition would be incurred by the baſe Infeftment for the 1000 Merks, which is ridiculous. 'Tis but a Stretch to alledge, that tho' the publick Infeftment comes not *in Computo*, it muſt be ſubduced from the whole Value; which is to do the Thing *per Ambages*, that cannot be done directly, and is a metaphyſical Subtlety not to be allowed in penal Delinquencies. Nor can the half of the Ward-fie be underſtood as baſely alienated; Becauſe, the publick redeemable Infeſtments for 32000 Pound *in Annis* 1686, and 1689, left *Halgreen* Vaſſal in the whole Property: And if his Ward had fallen, the ſame would have been valued with Reſpect to the whole without any Regard to the Burden of Annualrents, which being a meer Servitude, could be extinguiſhed by a ſimple Renunciation without a Reinveſtiture. The cited Deciſions are nothing to the Purpoſe. For the conjoining Infeſtments granted by the Author, with Infeſtments granted by the Purchaſer, to infer Recognition, was thought very hard, as my Lord *Stair* obſerves; And ſuch as had baſe Infeſtments in the late Times, might have procured Confirmations or Reſignations upon the Progreſs contained in their Rights, whom Law puniſhed for their Neglect to do it: Whereas the expeding Infeſtment upon *Knox*'s Reſignation, did *ipſo Facto* ſubject the intermediate baſe Infeſtments to the Mercy of the Superior. As to the ancient feudal Cuſtoms when Feus were made purely for Service, and were not the Subject of Commerce, and the Superior could not be forc'd to accept of a Vaſſal; 'Tis not worth the while to examine them now, when they are ſold and purchas'd for onerous Cauſes, and the Superior has not the Choice of his Vaſſal, but upon Appryſing or Adjudication may be compelled to admit of any Creditor.

Replyed for the Purſuer. No baſe Infeſtment in a Ward-fie, tho within the half of the Value, is ſafe or can be taken, being an inchoate Delict depending upon the ſubſequent Deeds of the Granter, whereby he retains not the major Part for inabling him to ſerve the Superior: And the Receiver truſting him runs the Risk of coming to have a Ward-fie, whereof the major Part ſtands alienated. Nor is it to be objected, That the Superior here claims the Caſuality from his own Deed of granting a publick Infeſtment, without which it could not be incurred: Becauſe, the interveening baſe Infeſtments, continuing without Confirmation till after the publick Infeſtment, are to be eſteemed of a Date poſterior thereto, *quoad* the Superior who was not obliged to know them; And Omiſſion to ſeek Confirmation thereof immediately after expeding the publick Infeſtment was equivalent to a Reiteration. *Eodem redit* upon the Matter, whether the publick Infeſtments be redeemable or irredeemable, ſeing both equally reduce the Vaſſal to a State of Incapacity to ſerve his Superior. Yea he ſeems to prejudge the Superior more by a redeemable Infeſtment, becauſe, then the Superior retains his burdened Vaſſal with the View of ſerving him as before, tho leſs capable: Whereas in the Caſe of an irredeemable Right, the Superior gets a new Vaſſal who may ſerve him effectually on what is acquired. 2. Whatever Reſtriction might be put upon a common odious Recognition, the Purſuer's Gift is favourable, being granted in Security of a juſt Debt; and therefore ought to be ſuſtained: As Adjudications or Appriſings, found null as to expiring of the Legal, will be ſuſtained as a real Security for the Debt; And a Gift of Eſcheat in Favours of a Creditor will be ſuſtained to him as a Security, tho he be a Friend of the Rebel's, and ſuffer him to retain Poſſeſſion, *December* 23, 1623, *Ballanden* contra *Murray*, *December* 4, 1669, *Jaffrey* contra *Jaffrey*.

The Lords found, That Recognition was not incurred in this Caſe.

March 25, 1707. William Innes *Writer to the Signet*, *againſt the Earl of* Breadalbine.

William Innes Writer to the Signet having purſued a Declarator of Expiration of the Legal of an Adjudication upon the Eſtate of *Breadalbine* to which he had Right: It was objected for the Earl of *Breadalbine*, That the

Legal could not expire; Becauſe the Adjudication was null, at leaſt, could only ſubſiſt as a Security for principal Sum and Annualrent in the Bond it was led upon, and for the neceſſary Charges. In Regard the Annualrent and Penalty were accumulated in a principal Sum at a Term preceeding the Date of the Adjudication, and made to bear Annualrent from that Term; Whereas Annualrent of the accumulated Sum ſhould only run from the Date of the Decreet, by Virtue whereof it bears Annualrent.

Anſwered for the Purſuer. The Decreet of Adjudication is dated the 11 of *March*, and the Annualrent and Penalties are only accumulated at the *Candlemas* preceeding, which is but a ſhort Space; And it has been the Cuſtom till of late, to accumulate at a Term preceeding the Decreet. 2. Tho the Sums are accumulated at the Term of *Candlemas*, it doth not follow that the accumulated Sum was to bear Annualrent from that Term; Since the Decreet mentions not when the Annualrent ſhould commence, nor decerns for any Annualrents at all, but leaves them in indefinite Terms to the Regulation of Law, which imports Annualrent only from the Date of the Adjudication.

Replyed for the Defender. The Smalneſs of the Interval betwixt the preceeding Term and the Date of the Decreet is not the Queſtion, but the Legality and Method of proceeding: And tho perhaps ſeveral Adjudications be led the ſame Way, that is but *Corruptela, non Conſuetudo*; And *communis Error non facit Jus*. And the accumulating of Annualrents and Penalties from a Term preceeding the Adjudication was found ſufficient to reſtrict the Adjudger in *the Caſe betwixt the Children of* Preſtoun *contra Mr.* Thomas Lermont: Becauſe, till the Date of the Adjudication, there was no Warrant for the Accumulation, and the exacting Annualrent of Annualrent without Law is Uſury. 2. It is evident from the Decreet, That accumulating at a preceeding Term could be for no other End, than to make theſe Accumulations bear Annualrent.

Duplyed for the Purſuer. The accumulating at the preceeding Term was for the Adjudger's own Security, and to free him from the Hazard of adjudging for more than was due, and from the Trouble of compting broken Terms in which he might eaſily err. As to the Deciſion in the Caſe of *the Creditors of* Preſtoun, it doth not meet: For there the Sums were accumulated a conſiderable Time before the Adjudication, and decerned to bear Annualrent from the Date of the Accumulation, which cannot be pretended in this Caſe. And it was decided in the Caſes of the *Lady* Innerleith *againſt the Laird of* Cockburn, and of the *Seamen of* Preſtounpans *againſt Doctor* Smelholm, That where Annualrents and Penalties, accumulated at a Term preceeding the Decreet of Adjudication, are not decerned to bear Annualrent from the Date of the Accumulation, that is no Nullity or Ground for reſtricting the Decreet.

The Lords repelled the Nullity proponed againſt the Adjudication, and found it no Ground of Reſtriction; For they thought that ſince the Decreet mentioned not from what Time the accumulated Sum ſhould bear Annualrent, the Term of its Commencement was left to the Regulation of Law, which imports Annualrent only from the Date of the Adjudication.

March 27, 1707. George Fraſer *Brewer in the* Canongate, *againſt* Anna Brown *Relict of* John Gordon *Brewer in* Edinburgh *and her Children.*

Anna Brown, in her Contract of Marriage with *John Gordon* Brewer in *Edinburgh* celebrated after the Birth of their ſecond Son, diſponed ſome Lands, whereof ſhe was Heireſs, to her Husband in Liferent, and to the Heirs procreated or to be procreated of the Marriage, which failing, to the Husband his Heirs or Aſſignies in Fie heretably and irredeemably; reſerving her own Liferent: Which Contract contains an Obligement to infeft either by Reſignation or Confirmation as beſt ſhould pleaſe her and her ſaid Husband, and their foreſaids; And a Precept for giving heretable Seaſin to him or his Atturney; And gives in the Aſſignation to the Writs, full Power to him and his foreſaids (according to the Deſtination of Liferent and Fie above-ſpecified with the Reſervation of her Liferent above-mentioned) to intromet with, uplift, *&c.* And mentions the Writs and Rights of the Lands to be delivered to the Husband to be keeped and uſed by him for the Uſe and Behoof above-mentioned. The ſaid *Anna Brown* ſuſpecting her own Intereſt not well enough ſecured by the Contract, took from her Husband a ſeparate Bond of the ſame Date, whereby he obliged himſelf, failing Heirs of the Marriage, to denude in Favours of her, her Heirs or Aſſignies. *George Fraſer* Brewer in the *Canongate*, a Creditor of the ſaid *John Gordon*, having after his Deceaſe obtained an Adjudication againſt *Francis Gordon* the Defunct's Son, upon a *Cognitionis Cauſa*, and his Renunciation to enter Heir, and purſued a Mails and Duties againſt the Tenants: Compearance was made for the ſaid *Anna Brown* and the ſaid *Francis Gordon* her Son, who alledged that the Rents in Queſtion belonged to them in Liferent and Fie reſpectively, by Virtue of the Contract of Marriage aforeſaid; And ſo could not be carried by the Purſuer's Adjudication for the Debt of the Defunct who was but a ſimple Liferenter.

Replyed for the Purſuer. *John Gordon* the Husband was clearly Fiar by the Conception of the Contract, in ſo far as, 1. He is always named firſt as the *Perſona nobilior*: And even where Lands were diſponed by a Woman to her and her Husband in Conjunct-fie and Liferent, and the Heirs procreated betwixt them, the Man was underſtood to be Fiar in the Caſe betwixt Sir *John Kennedy* and *Kennedy* of *Girvenmains*. 2. *John Gordon*'s Heirs are mentioned in the laſt Place; And by the Current of Deciſions, *in dubio*, they are thought to be the Fiars *quorum Hæredibus maxime proſpicitur*. 3. Seing the Fie could not be *in pendenti*, it behov'd to belong either to the Husband or to the Wife: Now it could not belong to her, who in all the Parts of the Contract reſerved nothing but her Liferent; nor could it be in the Perſon of the Heirs of the Marriage, who would not have Right without a Service; Therefore it was in the Husband allenerly. 4. In the Precept of Seaſin the Wife orders her Baillie to give heretable Seaſin to her Husband, without any Mention of Liferent or Heirs. 5. The ſeparate Bond manifeſtly implies that the Husband was Fiar, in ſo far as the Wife takes him obliged to denude and renounce in the Event of no Children of the Marriage.

Duplyed for the Defender. 1. The Preſumption lies for the Husband *qua Perſona nobilior in Caſu dubio*; But here there is no Manner of Dubiety: The Subject diſponed being the Wife's Heretage, and there being a Son of the Marriage extant at the Time; And in all the material Clauſes, the Husband's Right being expreſt as a Liferent contradiſtinct to a Fie. 2. Albeit the Subſtitution terminates in the Husband's Heirs, he muſt not be preſumed Fiar: Becauſe, his Heirs are ſubſtituted to the Heirs of the Marriage; And in the Bond apart of the ſame Date, which is *Pars Contractus*, as being *Pactum ex incontinenti adjectum*, the laſt Termination in Favours of the Husband's Heirs is changed in Favours of the Wife's Heirs. 3. As the Wife reſerves only her own Liferent: So ſhe conveys nothing to her Husband but the Liferent. Therefore it is plain the Fie could not be in his Perſon, but behoved to remain with the Wife, who was frank Tenementar and fiduciary as to the Fie, for the Behoof of the Children of the Marriage. 4. The Precept of Seaſin muſt be interpreted from the Body of the Contract, and the inſerting of the Word *Heretable* aſcribed to the Error or Ignorance of the Writer, who alſo diſcovered egregious Ignorance in miſplacing the Words *in Fie* in the other material Clauſes. 5. Suppoſe the Wife *Errore Juris* had believ'd by her taking the ſeparate Bond that the Husband had Power to diſpone and renounce when he had not, could that have prejudiced her ?

The Lords found, That *John Gordon* was a naked Liferenter by the Quality of the Diſpoſition in the Contract of Marriage, and preferr'd his Relict and Children to his Creditors.

Eodem Die. William Henderſon *Merchant in* Edinburgh, *againſt* Alexander Aliſon *Writer to the Signet.*

HAry *Crawford*'s Share in the *African* Company being found arreſtable at the Inſtance of *Alexander Aliſon* his Creditor, in Order to oblige the Directors to transfer the ſame in Favours of the Arreſter, (*vid. March* 18, 1707, *Aliſon* contra *the Directors of the* African *Company*) : *William Henderſon* Donatar of *Crawford*'s Eſcheat compeared for his Intereſt, and claimed to be preferred to Mr. *Aliſon.*

Alledged for Mr. Aliſon. That by the *Act* 8, *Par.* 1695, The Shares of the Capital Stock of the *African* Company are exeemed from Confiſcation, *&c.* And only transferrable by the Company's Aſſignments, except that they may be affected by the real Diligence of the Proprietar's Creditors : And the Donatar of his Eſcheat is not a Creditor who has affected the ſame by real Diligence, or got a voluntary Transfer in his Favours. Beſides, theſe Things only by our Law are eſcheatable *quæ poſſunt referri in Fiſcum,* and which of old could be uplifted, and intrometted with by the Treaſurer's *Letters of Intromiſſion,* under which Denomination the Company's Stock, that was in Effect mortified and not upliftable by the Partners themſelves, cannot fall: And therefore the Gift of Eſcheat cannot take Place. Nor is it diſanalogous to our Law to declare this Subject arreſtable by a lawful Creditor, and yet not fall under Eſcheat : As when it is provided in a Vaſſal's Charter, That his Eſcheat, when it falls, ſhould belong to himſelf ; And the Royal Aſſent to the foreſaid Act in Favours of Commerce excluding Confiſcation, or other Transfers of the Property, except by the real Diligence of the Proprietar's Creditors, is fully equivalent. 2. *Eſto* the Share were eſcheatable, yet Mr. *Aliſon* ſhould be preferred, becauſe he hath fully affected the ſame and got it adjudged to him upon his real Diligence prior to *Henderſon*'s Declarator of Eſcheat, which was not executed againſt the Directors till after *Aliſon*'s Arreſtment, whoſe Decreet of Furthcoming is prior to the Day of Compearance in the Donatar's Proceſs. Thus an Executor Creditor was preferred to a Donatar of Eſcheat, the Confirmation being before the Gift; *November 6, 1685, obſerved by the Lord* Newtoun : And Creditors doing Diligence after the Debtor's Rebellion and before Declarator of the Eſcheat, for Debts contracted before the Rebellion, were preferred to the Donatar, *February* 19, 1667, *Glen* contra *Hume, February* 24, 1637, *Pilmoir* contra *Gagie.*

The Lords preferred *Alexander Aliſon.*

March 28, 1707. *Mr.* Grabhame, *againſt* Alexander Piper *of* Newgrange.

MR. *Chieſly* having imployed *Alexander Piper* as Factor to ſell a Cargo of *Spaniſh* Wine and Fruits in *Scotland,* which were to be bought and ſhipped by *Chieſly* and Mr. *Grabbame*; The ſaid *Grabbame* conveened Mr. *Piper* before the Admiral Court, for exhibiting of Bonds taken by him from the Merchants he had ſold the Wines and Fruits to; or otherways to pay a great Sum to the Purſuer as a Partner in theſe Goods.

The Lords advocated the Cauſe from the Admiral, as not being maritim; Becauſe an Exhibition of Writs granted for the Price of Goods ſent from Abroad to a Factor in *Scotland*, to be ſold there, is no more a Sea-faring Cauſe, than the ſending Letters about Buſineſs by a Council Poſt, could drag the Party imployed before the Council. Becauſe, the Nature of a Contract is to be judged from the Place in which it is to receive Execution, without Reſpect to the Manner of ſending the Commiſſion for that Effect, or to the Condition of the Bearer of the Commiſſion: And 'tis as abſurd for the Admiral to judge in this Affair, as to ſet up a privative Claim to cognoſce all Factor Accompts.

Eodem Die. James Gordon *of* Davach, *contra* William Duff *of* Dipple.

IN the Reduction upon the Act of Parliament 1621 *anent Bankrupts*, at the Inſtance of *James Gordon* againſt *William Duff*, for reducing a Diſpoſition granted to the Defender by *Andrew Geddes* of *Aſile* the Purſuer's Debtor, after he had been charged with Horning, denounced and regiſtrated by the Purſuer.

Anſwered for the Defender. The Act of Parliament 1621, relates only to Diſpoſitions granted to one Creditor in Prejudice of the more timely Diligence uſed by another. Whereas *Dipple* at the granting of the Diſpoſition made to him, paid a full and adequate Price for the ſame, and got only Allowance therein of a ſmall Debt that was ſecured, and preferable by the firſt Infeftment affecting the Subject diſponed. 2. Albeit the Defender had got the Diſpoſition quarrelled in Satisfaction of bygone Debt, the Purſuer could not impugn the ſame upon the Act 1621; Seing he did not complete his Horning by denouncing the Debtor at the Market Croſs of the Shire where he lived, to make his ſingle Eſcheat fall, and affect the Price in the Defender's Hands; or by uſing any other Diligence of Adjudication, Inhibition, *&c.* to affect either Moveables or Heretage for ſeveral Years: But had only denounced at the Market Croſs of *Edinburgh*, in Order to Caption.

Replyed for the Purſuer. The Lords have cleared by the conſtant Courſe of their Deciſions, (which is *optima Legum Interpres*) That a Charge of Horning is all that's requiſite by the Act 1621, to hinder a Debtor to gratifie any Creditor in Prejudice thereof, *February* 12, 1675, *Veatch* contra *Ker*'s Executors, *July* 8, 1677, *Murray* of *Keillor* contra *Drummond* of *Machiny*. And ſeing the very uſing of Horning (which is reckoned a Step of Diligence equal to the ſerving of Inhibition againſt the Bankrupt) was ſufficient to ty him up from preferring one Creditor to another; The denouncing and regiſtrating *ex abundanti*, cannot render the Diligence leſs effectual, *ne utile per inutile vitietur.*

Duplyed for the Defender. The cited Deciſions are alien from the Point. For in that betwixt *Veatch* and Executors of *Ker*, the Lords reduced an Aſſignation of a moveable Sum falling under Eſcheat, at the Inſtance of the Donatar, upon whoſe Horning the Eſcheat fell; As being granted in Payment of a poſterior Debt for which no Diligence had been done: And in the other of *Murray* and *Drummond*, it was found that an Heretor could not grant a ſecond Minute of Sale of his Lands, in Prejudice of a former entred into with another Party, which was juſt, tho' there had been no Diligence uſed on the firſt Minute; the Granter of double Rights being guilty of *Stellionate*. But the Defender ought to be aſſoilzied conform to what was decided *February* 8, 1681, *Neilſon* contra *Roſs*, which *in Terminis* comes up to the Caſe in Hand.

The Lords found, That *Davach* the Purſuer is not in the Caſe of the Act of Parliament 1621, his Denunciation not being duly executed at the Croſs of the head Burgh of the Shire where the Debtor lived, and he not having proceeded in Diligence after the Horning: And therefore aſſoilzied the Defender from the Reaſon of Reduction founded on the ſaid Act.

Eodem Die. *Competition of the Creditors of the deceaſt Lord* Ballenden, *and the Counteſs of* Dalhouſie *his Relict.*

IN a Competition of the Creditors of the Lord *Ballenden* and the Counteſs of *Dalhouſie* his Relict, Sir *Robert Sinclair* of *Stevenſon* craved Preference upon a Bond granted by the ſaid Lord *Ballenden* and the Earl of *Dalhouſie*, for the principal Sum of Three thouſand Merks, containing an Aſſignation by the Counteſs of *Dalhouſie* with Conſent of the Lord *Ballenden* her Husband, to her Jointure Rents ſubjoined to the Bond; Which Bond and Aſſignation are ſubſcribed by the Earl of *Dalhouſie*, the Lord *Ballenden*, and the Counteſs.

The Lords found that the Earl of *Dalhouſie*'s ſubſcribing the Bond and Aſſignation did ſupply the Neceſſity of an Intimation, to prefer *Stevenſon* to the other Creditors, whoſe Rights were of a poſterior Date. Albeit it was alledged for them, That the Earl's ſubſcribing the Writ containing the Aſſignation, can only be conſidered in ſo far as it concerns the Aſſignation, as if he had been Witneſs to the Paper: Seing the Earl is only bound in the obligatory Part of the Bond, and the Counteſs aſſigns. In Reſpect it was anſwered for *Stevenſon*, That tho' the uſual Way of making Intimations is by Inſtrument, that is not the only Way, *January* 20, 1630, *Stair, Inſtit. Lib.* 3. *Tit.* 1. §. 9. And the Earl of *Dalhouſie* Debtor in the Jointure was ſufficiently certiorated by his ſubſcribing the Bond in which the Aſſignation was contained.

June 5, 1707. James Brouſter *ſometime Merchant in* Perth, *now Reſidenter in* Edinburgh, *againſt* William Lees *Merchant and Inkeeper in* Douglaſs.

IN the Action at the Inſtance of *James Brouſter*, againſt *William Lees*, the Purſuer having proved that he was received and lodged in the Defender's Houſe in *Douglaſs*, upon the firſt Day of *February* 1704 Years, and that his Breeches were ſtollen from him before the next Morning; He claimed a certain Sum from the Defender as the Value of the Breeches, and what was in them; and that his Oath *in Litem* might be taken thereupon.

Alledged for the Defender. That the Purſuer's Oath could not be allowed to prove in this Caſe: Becauſe, albeit in Law *Nautæ*, *Caupones*, &c. are liable for Trunks, Clockbags, *&c.* imported to their Houſes *in Conſpectu*, and committed to their Care, they cannot be liable for Things not *in Conſpectu*, nor in their Cuſtody; As the Purſuer's Breeches that were only in his own Cuſtody, and not in the Defender's, more than his Perſon was. And in the Caſe of *Thomas Hay* Sheriff Clerk of *Aberdeen*, againſt *Williamſon*, the Lords found no Proceſs for Gold that was ſeen the Night before in Mr. *Hay*'s Purſe in his Quarters, and found amiſſing the next Morning.

Anſwered for the Purſuer. That he is in a very different Caſe from Mr. *Hay*, whoſe Gold that was not *in Conſpectu* of the Inn-keeper, was alledged to have been ſtollen out of his Purſe, and the Purſe left: For the Purſuer's Breeches and all that was in them being taken away *per Averſionem*, his Oath *in Litem* ought to be received as a full Probation in the Matter.

The Lords found the Defender liable for the Value of the Breeches and the Particulars therein; and allowed the Purſuer to give his Oath *in Litem* thereupon, reſerving to themſelves to modifie the ſame.

Eodem Die. Thomas Boyes *Writer to the Signet, againſt* William Schaw *Brother to* Balgarren.

F*Orbes* of *Watertoun* as Principal, and *Thomas Boyes* as Cautioner, being obliged by Contract to deliver to *William Schaw* or Order, at *Airth* upon the Forth the Number of 340 Bolls Meal, at a certain Day, for the Price mentioned in the Contract, whereof 600 Pound was to be paid within ſome few Days after the Date thereof and before Delivery of the Victual, and the reſt at Delivery: *William Schaw* accepted of a Bill for the 600 Pound, of the ſame Date with the Contract, drawn by *Watertoun* payable to *Thomas Boyes* in Part of Payment of the Price of the Victual, and thereafter advanc'd Twenty Pound *Sterling* thereof. *Thomas Boyes* charged *William Schaw* upon his accepted Bill, who ſuſpended upon this Ground, That the Bill had been accepted by him as a Part of the Price of a Bargain of Meal agreed to be delivered to him by *Forbes* of *Watertoun*, for whoſe Performance the Charger was Cautioner in the Contract; and the Meal not being delivered, the Suſpender cannot be liable for the Bill.

Anſwered for the Charger. That the Sum in the Bill was to be allowed in Part of Payment of the Meal, is no Argument for the Suſpender to retain the Mony which was payable before Delivery of the Meal, and ſo had no Dependence thereon: And the mentioning that it was to be allowed as a Part of the Price of the Meal concerned not the Payment to the Charger, but only the Clearance betwixt the Drawer and Accepter.

The Lords found, That Mr. *Boyes* being Cautioner in the Contract, the Objection that the Meal was not delivered being competent againſt *Watertoun*, was alſo competent againſt him.

Thereafter. *July* 26, 1707. *Mr. Boyes alledged.* That the Contract upon *Watertoun*'s Part was fulfilled, in ſo far as *William M*'*alpin* by the Suſpender's Order had received the Meal, as appeared from his Receipt, and the Charger offered to prove by the Suſpender's Oath that he gave Order to *M*'*alpin* for that Effect.

Anſwered for the Suſpender. That he offered to prove by *Watertoun*'s Oath, That, after *M*'*alpin* received the Victual, *Watertoun* intrometted with the ſame, at leaſt upliſted a good Part of the Price thereof out of *M*'*alpin*'s Hand; whereby it appeared that he did not ſtand to the Contract, or truſt to the Security given him by Mr. *Schaw*.

Replyed. It being cleared that *M*'*alpin*, as Truſtee from *Schaw*, did once receive the Meal conform to the Contract, there remained no more to be done upon *Watertoun* or his Cautioner's Part relative to that Bargain: And if *Watertoun* afterwards intrometted therewith unwarrantably, Mr. *Boyes* is not concerned.

Duplyed. Contracts of Sale are *bonæ Fidei,* comprehending not only expreſs Obligements, but even what tacitely *ex bono & æquo alterum alteri præſtare oportet*; and the Contract can never be thought fulfilled before a real and effectual Delivery is made to the Buyer.

The Lords found it relevant, That *M*'*alpin* received the Bargain of Meal by the Suſpender's Order, the Order being proved by the Suſpender's Oath. And repelled the Alledgeance that poſterior to the Delivery of the Meal *Watertoun* intrometted with a Part thereof, or a Part of the Price; reſerving to Mr. *Schaw* to inſiſt againſt *Watertoun* as accords.

June 12, 1707. M'dowal *of* Logan *and* Roſina Agnew *his Cedent, againſt* Andrew Agnew *of* Scheuchan.

PEter and *Andrew Agnews* elder and younger of *Scheuchan* having granted to *Roſina Agnew* Daughter to the former, and Siſter to the latter, a Bond (bearing for Love and Favour, and that ſhe might be provided in a competent Portion) whereby they bound and obliged them and theirs to pay to her, her Heirs, Executors or Aſſignies at the firſt Term after her Father's Deceaſe the Sum of 2500 Merks *Scots*, as for Portion natural ſhe could ſucceed to by the Death of Father or Mother, with Annualrent from the Term of Payment: With this Proviſion, That if ſhe died without Heirs procreated of her own Body alive the Time of her Deceaſe, the Mony ſhould return to the Granters of the Bond and their Heirs. This Bond *Roſina Agnew* aſſigned for an equivalent onerous Cauſe to *M'dowal* of *Logan*, who charged *Andrew Agnew* of *Scheuchan* for Payment, after *Peter* the Father's Deceaſe. *Scheuchan* ſuſpended upon theſe Reaſons, 1. The Bond is for Love and Favour, and for *Roſina*'s Portion natural, which ſhe could ſucceed to by the Death of her Father or Mother, and beſides the Sum therein ſhe got liberally at the Death of both. 2. The Suſpender was only obliged to pay the Sum with this Proviſion, That if *Roſina* died without Heirs of her own Body it ſhould return to him and his Heirs, which ingroſſed Quality and Condition of returning exiſts already, ſhe being ſuperannuated without any Children. And it doth not alter the Caſe that the Charger is an Aſſigny for an equivalent onerous Cauſe: For he may blame himſelf that he gave Mony for ſo clogg'd a Right.

Anſwered for the Charger. 1. Albeit the Bond be in Satisfaction of what the Charger's Cedent could ſucceed to by the Death of Father or Mother, that did not exclude their Liberality to her in their own Lifetime: And all ſhe had from them was but inconſiderable, conſidering their Fortune. 2. The Quality in the Bond is a Subſtitution, and not a Condition either ſuſpenſive or reſolutive: Not a ſuſpenſive Condition, becauſe the Bond provides immediate Execution; nor yet a reſolutive one, becauſe it neither hinders Execution for Payment, nor doth annul and make void the Obligement upon the Nonexiſtence of Children; but only provides that the Mony ſhall return in ſuch an Event. And ſuch Proviſions to return are certainly ſubject to the onerous Deeds of Fiars; *January* 31, 1679, *Drummond* contra *Drummond*. Conſequently the onerous Aſſignation in Favours of the Charger muſt ſubſiſt, tho' the Cedent were dead, and far more in this Caſe where there is nothing to hinder her from preſent Execution upon the Bond. 3. The Bond was granted to *Roſina* for her Portion natural, whereof the full Property would have belonged to her, and that *Surrogatum* muſt be interpreted to belong to her *pleno Jure*, which is very conſiſtent with a Subſtitution, but not with the Nature of a conditional Proviſion.

The Lords found *Roſina Agnew* to be Fiar in the Bond, and that her Aſſigny had Power to uplift, without finding Caution to reimploy; and repelled the Reaſons of Suſpenſion in Reſpect of the Anſwers; And therefore found the Letters orderly proceeded.

June 14, 1707. George Livington *of* Midfield, *againſt Miſtreſs* Margaret Menzies *Daughter to* Culterallers.

IN a Competition for the Eſtate of *Saltcoats* betwixt *George Livington*, who founded on a Tailzie granted to him and others therein ſubſtitute by the deceaſt *George Livington* of *Saltcoats*; and Miſtreſs *Margaret Menzies*, who pleaded that the Granter of that Tailzie had revoked it by a Declaration under his Hand; and made a poſterior Tailzie in her Favours: *George Livington* being allowed to adduce what Probation he could for inſtructing that the Revocation of the firſt Tailzie, and the ſecond Tailzie in Favours of Miſtreſs *Margaret Menzies*, were elicited from *Saltcoats* by Importunity, or undue Inſinuations, when his Judgment was diſturb'd and weaken'd by Sickneſs; and for proving thereof having produced *Alexander Aikenhead* as a Witneſs: Mrs. *Margaret Menzies* alledged, That he could not be admitted, becauſe he is a Subſtitute in the firſt Tailzie, which is revoked by the ſecond, and ſo has too great an Intereſt in the Affair to be allowed to depone as a Witneſs.

Anſwered for Mr. Livington. That *Aikenhead* was but a very remote Subſtitute in the firſt Tailzie, and had ſo very little Expectation thereby, that he was content to renounce the ſame. Beſides, this being a Probation of the Condition a Perſon was in upon Death-bed when only Friends could be ſuppoſed to have been about him, one may be ſuſtained as a neceſſary Witneſs here, who might perhaps be excepted againſt in other Caſes, where *Copia* of indifferent Witneſſes may be had.

Replyed for Mrs. Margaret Menzies. That *Aikenhead*'s Forwardneſs in offering to qualify himſelf to be a Witneſs, by renouncing his Expectation by the irſt Tailzie, is ſo far from being a tolerable Ground of admitting him; that it affords a ſhrewd Preſumption of his being too much intereſſed in the Affair.

The Lords ſuſtained the Objection againſt the Witneſs, and refuſed to dmit him.

June 17, 1707. Inter Eoſdem.

GEorge *Livington* having alſo adduced Mr. *John Ogilvie* School-maſter as Witneſs for proving the Condition that *Saltcoats* was in at the revoking of the firſt, and the granting of the ſecond Tailzie: Mrs. *Margaret Menzies* objected againſt his being received, that after the Diligence was executed gainſt him, he vented himſelf to this purpoſe, That he would depone favourbly for any of the competing Parties that would pay him the Fees reſting to im by the deceaſt *Saltcoats*; and craved a Diligence for citing Witneſſes to prove the Emiſſion of theſe Words.

Anſwered. It were of dangerous Conſequence, to admit Witneſſes to prove Expreſſions, which might reflect upon the Reputation of other Perſons whoſe Teſtimonies deſerve as much Credit as their own; and all Perſons are preſumed to be honeſt in their Depoſitions. For if one Witneſs's Teſtimony could be redargued by others, theſe again might be redargued by other Witneſſes, *& ſic in infinitum*, whereby Proceſſes would never come to an End. And therefore in the famous Caſe of Reprobatures betwixt the Laird and Lady *Miltoun*, the Bench was very tender to allow Witneſſes to prove Corruption or Bribery of other Witneſſes. 2. Mr. *Ogilvie* is a moſt neceſſary Witneſs, for the Matters to be proved were tranſacted while *Saltcoats* was labouring under ſore Sickneſs, when none got Acceſs to him but his own few domeſtick Servants, of whom none attended him ſo cloſly and conſtantly as Mr. *Ogilvie*.

The Lords allowed Mr. *Ogilvie* to depone, and allowed Mrs. *Margaret Menzies* to adduce Witneſſes to confront him.

June 18, 1707. John Meek *in* Hedreſaulds, *againſt* John Dunlop *in* Foulſhiels.

THE Lords refuſed to ſuſtain an Execution of a Summons, where one of the Witneſſes ſubſcribed by the initial Letters of his Name: Becauſe, tho' a Party's Subſcription by two initial Letters be ſuſtained where it is proved that he was in Uſe ſo to ſubſcribe; there is no Neceſſity to ſuſtain a Witneſs's ſubſcribing in that Manner.

June 19, 1707. *The Feuars and Merchants of the Town of* Frazerburgh, *againſt* William *Lord* Saltoun.

IN the Declarator at the Inſtance of the Feuars and Merchants of *Frazerburgh*, againſt the Lord *Saltoun*; the Purſuers having cited *Alexander Gordon* Clerk of the ſaid Burgh to exhibite the Court and Council Books, who firſt compeared and deponed before extracting of a ſecond Diligence againſt him, and again came up and deponed after it was extracted: The Lords refuſed to allow him the Expences of his ſecond Journey, in Reſpect of the ſecond Diligence; but allowed him Expences for his firſt Journey, and granted ſummar Warrant to apprehend and incarcerate the Purſuers Agent till Payment thereof were made.

June 21, 1707. ACT *of* SEDERUNT *concerning the Manner of laying on Arreſtments, and intimating Aſſignations to the Commiſſioners for the* Equivalent.

THE Lords of Council and Seſſion conſidering that the Commiſſioners are now appointed by Her Majeſty, for managing the *Equivalent*; and that it is expedient and neceſſary, that the Way and Manner of laying on Arreſtments, and intimating Aſſignations by theſe pretending Right to the ſaid *Equivalent*, ſhould be aſcertained for directing and ſecuring all having Intereſt; Do therefore appoint and declare, That for hereafter all Arreſtments that ſhall be laid on, and Intimations of Aſſignations that ſhall be made by the ſaid Perſons pretending Right to the ſaid *Equivalent*, are to be laid on, and made in the Hands of the ſaid Commiſſioners conveened in their ordinary Meetings, as the ſame ſhall be from Time to Time appointed, and that in their Intervals of the ſaid Meetings, the ſaid Arreſtments are to be laid on, and the foreſaid Intimations are to be made by the ſaid Perſons pretending Right as ſaid is, at the Office to be kept by the ſaid Commiſſioners on every lawful Day of the Week, betwixt the Hours of Nine and Twelve before Noon, as alſo, betwixt the Hours of Two and Six in the Afternoon of the ſaid Days (*Saturday* as to the ſaid Afternoons excepted) at which Office, and at the Time and Hours foreſaid, One or more of the ſaid Commiſſioners, or their Clerk to be authorized by the ſaid Commiſſioners for that Effect, ſhall attend to receive Copies of the ſaid Arreſtments, as likeways to receive the ſaid Intimations, and in Caſe that in the ſaid Intervals, upon the ſaid Days, and at the ſaid Hours, none ſhall be found attending at the ſaid Office, or the Doors thereof ſhut, that then it ſhall be lawful to the foreſaid Perſons pretending Right, as ſaid is, to make the Arreſtments and Intimations foreſaid at the Door of the ſaid Office, and leave and affix Copies thereon, in due and legal Manner, as accords: And it is hereby declared, That Arreſtments to be laid on, and Intimations to be made in Manner foreſaid, for hereafter, ſhall be judged to be as legally made, as if made in the Hands of the ſaid Commiſſioners, or their *Quorum*, when conveened in any of their ordinary Meetings; as alſo, That Arreſtments laid on, or Intimations made for hereafter, not in the Order hereby preſcribed, ſhall not be ſuſtained as duly and orderly made. And the ſaid Lords of Council and Seſſion do hereby ordain theſe Preſents to be forthwith printed and publiſhed at the Market Croſs of *Edinburgh*, that none may pretend Ignorance.

Eodem

Eodem Die. *The Laird and Lady* Airth, *and Sir* George Hamilton *their Aſſigny, againſt Captain* James Blackwood, John Telfer, *and the Laird of* Grange.

IN the Competition of the Creditors of *Grange* for the Mails and Duties of that Eſtate; the Laird and Lady *Airth* having inſiſted for Preference upon a Charter of Adjudication and Infeſtment; and becauſe they could not produce the Adjudication it ſelf which is loſt, they repeated *incidenter* a proving of the Tenor thereof; condeſcending upon this *Caſus Amiſſionis* that the Lady and her Brother being left Pupils, under the Tutory of Sir *Robert Miln* whoſe Houſe was burnt at *Leith*, therein probably the Adjudication periſhed; and that the Warrants and Records thereof were probably loſt through a double Diſorder that happened in the Clerks Office, occaſioned firſt by a Fire in the Neighbourhood, and then by the great Fire in the Parliament Cloſs: And adduced the following Adminicles, 1. The Contract of Marriage betwixt *Grange* and *Jean Bruce* his Spouſe which is the Ground of the Debt, and a Decreet of Conſtitution againſt *Grange*'s Heir, with theſe Words indorſed, *Given out to* Dundas *to ſee Summons*, 4 *Executions, ſpecial Charge and Execution of this Decreet*. 2. The Letters of ſpecial Charge extracted from the Signet. 3. The Summons of Adjudication from the Signet. 4. A Certificate from the Keeper of the Minute-book, bearing a Decreet to be put up of the Date libelled. 5. The Adjudication is found in the Minute-book of extracted Decreets. 6. An Extract of the Allowance of the Adjudication was produced. 7. Horning thereon raiſed and executed againſt the Superiors. 8. The Exiſtence of the Decreet was offered to be proved by Witneſſes beyond Exception who ſaw the ſame.

Alledged for Telfer *the competing Creditor*. 1. It were dangerous to allow a proving of the Tenor of Decreets, or judicial Acts or Inſtruments; becauſe that were to prove by Witneſſes what is Law, and what were the Interlocutors and Sentences of the Lords, and what Dates theſe were of, which it is impoſſible any Witneſs can depone upon. Beſides, Nullities, Defects, and even Falſhood in judicial Acts might be covered by a proving of the Tenor. For which Reaſon the Tenor of Appriſings or Executions of Horning cannot be made up. 2. The *Caſus Amiſſionis* is not real, but feigned. For Sir *Robert Miln*'s Houſe was burnt much about the Time of the Lady *Airth*'s Father's Death before he could have Leiſure to get up his Pupils Papers, and that Houſe was more his Office than his Lodging. Again, tho' Papers were miſlaid in the Clerks Office through the Diſorder occaſioned by a Fire in the Neighbourhood, none were loſt. And the ſaid Diſorder having happen'd Six Years after the pretended Decreet, the ſaid Decreet would have been booked with others in the Regiſter of Decreets, and the Warrants put up, with other Warrants of that Date: Neither of which is done. 3. As to the Adminicles condeſcended on, they are of no Import. For 1. The original Contract and Decreet of Conſtitution do not neceſſarly infer that Adjudication followed thereon, more than perſonal Diligence which was equally competent: And if the outgiving upon the Decreet of Conſtitution (which ſhould have been marked upon the Back of the Summons) relate to the Summons of Adjudication, no Decreet of Adjudication could yet have been obtained; becauſe, that Summons is not yet ſeen and returned by *Dundas*, which behoved to have been done ſince there was no former Adjudication. 2. The Extract of the Letters of ſpecial Charge from the Signet are obviouſly null through Want of a Warrant to cite the Tutors and Curators of *Grange* who continued under Pupillarity for many Years thereafter, as appears from the Charter of Adjudication which bears the Adjudication to have been led againſt him and his Tutors and

Curators: Nor is there any Execution upon this ſpecial Charge. 3. The Extract of the Summons of Adjudication is of as little Moment, for that doth paſs of Courſe, and probably never came the Length of a Decreet. 4. There are many Decreets put up in the Minute-book that never were extracted. Again, the Keeper's Certificate and the Extract of the Allowance cannot be applyed to the ſame Decreet; For by the Certificate *Charles Oliphant* is Clerk thereto, and *John Hay* is made Clerk by the Extract. Beſides, this Allowance has been recorded upon Truſt, and never ſigned by the Ordinaries: For tho the pretended Decreet bears Date the 20 *February* 1678, and the Allowance is in *April* thereafter, yet the Decreet is not extracted till *July*, as appears from the *Reſponde-book*; And it is not to be ſuppoſed that the Ordinaries would ſign an Allowance of a Quarter of a Year's Antedate. 5. Nor is the Decreet adminiculated by the Horning againſt the Superiors, which paſſeth of Courſe upon the Credit of the Allowance; nor yet by the Charter, becauſe Decreets of Adjudication are ſeldom or never produced in the Treaſury, in Reſpect the Charter bears the Reddendo of the former Vaſſal, againſt whom the Adjudication is led, and paſſes of Courſe. And the Seaſin which depends upon the Charter as its Warrant, and is but the Aſſertio of a Notary, is a yet leſs ſufficient Adminicle. And, 6. Witneſſes tho never ſo habile or of the greateſt Integrity cannot ſupply all the Executions wanting the Signatures of Proceſs, the Nullity of the ſpecial Charge, *&c.*

Anſwered for the Laird and Lady Airth. There can be no Reaſon aſſigned for allowing to prove the Tenor of extrajudicial Deeds that doth not equall take Place in the Caſe of judicial Acts: Seing the former doth conſiſt a much in Form and Solemnity as the latter, and both are equally expoſed t Fatalities, or the Hazard of Loſs. Yea, there is not ſo much Ground to fea that falſe or null judicial Acts may be ſuppreſſed for the Benefit of making up the Tenor, as that extrajudicial Inſtruments of that Kind may be ſo made up: Becauſe, private Inſtruments are drawn by Perſons for whom there is only the general Preſumption of Probity; Whereas in judicial Deeds publick Perſons interveen *ex Officio*, whom Law preſumes to do every Thing legally and formally. Now *Airth* is in a much ſtronger Caſe; For the Decreet he craves to be made up is adminiculated which judicial Acts of the ſame Nature and Authority with it ſelf; Whereas Inſtruments of Notars are made up commonly by relative Writs and the Teſtimonies of Witneſſes, a Kind of diſſimilar Probation, where every Part is of leſs Authority than the Atteſt of the Notary, *&c.* to be proved. Again, The Lords do not ſimply rejec the proving of the Tenor of Appriſings, tho harder to be made up than any of their Decreets, but on the contrary ſuſtained it in the Caſe of *Glendoick* contra *Brodie* of *Aſlisk*, 25 *February* 1691. And the proving of the Tenor of a Decreet of Prorogation was ſuſtained in *December* 1704, *Douglaſs* contra *Heretors* of *Birſe* obſerved by Mr. *Forbes* in his *Treatiſe* of *Church-lands* and *Tithes* Page 446. *et ſeq.* So the Parliament have often in their judicative Capacity made up whole Progreſſes of Writs both judicial and extrajudicial. And the Act of Parliament, diſcharging the making up of the Tenor of Executions of Horning preſumes, That *de Jure communi* the Tenor of all loſt Writs may be made up: Seing an Exception required a particular Statute. 2. Where Writs that of their own Nature uſe not to be retired (as the Adjudication in Queſtion) cannot be produced, a *Caſus Amiſſionis* is not ſo ſtrictly required: And no Law requires that the extraordinary Accidents of Fire, or Sword, or Tempeſt ſhould be proved, but the common and probable Occaſion of ſuch Loſſes is ſufficient. 3. The Adminicles produced do forcibly atteſt the Exiſtence and Subſtance of the Deed; Law ſupplies the Solemnities, and the Lords Authority and Records preſume that every Thing was orderly done. Again, the Specialities objected againſt theſe

heſe Adminicles are very inconſiderable, and eaſily reconcileable to them, For the Decreet has been put up in the Minute-book by *Charles Oliphant* the Under-clerk, and been brought to the Bill-chamber after it was ſigned by Mr. *John Hay* the principal Clerk. Nor can the Charge to enter Heir be ſaid to want a Warrant to cite Tutors and Curators, ſince that is implied under a Warrant lawfully to charge a Minor. As to the ſeeming Difference betwixt the *Reſponde-book* and the Regiſter of Allowances, the former as of no Authority muſt cede to the latter, which is a publick Record. Beſides, the *Reſponde-book* concerns only the Time of Payment of the Dues which is reconcileable to the Decreet's being ſigned ſome Months before: for the Extracter might have prevailed with the Clerk to ſign the Decreet, and let it ly in his Hands till the Dues were paid.

Replyed for Telfer and Blackwood. Here there is no principal Letters of ſpecial Charge, nor principal Summons, nor Executions of either, nor any Signatures at all, nor ſo much as a Copy of the Adjudication: Whereas in the proving of the Tenor betwixt the Lord *Glendoick* and *Brodie*, all theſe were extant with a Decreet of Tranſumpt before the Lords, which was equivalent to a Tenor.

The Lords waved to enter into the Conſideration of the general Point, Whether the Tenor of judicial Writs can be proved: But found, That the Adminicles adduced did not prove the Tenor.

Thereafter *July* 4, 1707. The Laird and Lady *Airth* craved, That ſince they were over-rul'd in the proving of the Tenor of their Decreet of Adjudication; The Lords would at leaſt ſuſtain the ſame upon the foreſaid Adminicles as a real Security for the principal Sum due to them, without any Accumulation, or elſe ſtop Decreet in the Mails and Duties for ſuch a Time as they might eſtabliſh a real Right in their Perſons by leading a new Adjudication.

Anſwered. The Adjudication being a *Non Ens*, it can have no *Accidentia*, and therefore cannot be ſuſtained as a Security, which were to tranſubſtantiate a perſonal into a real Right. Nor ought any Stop to be put to the Decreet of Mails and Duties upon pretence of Diligence to be done, which is uncertain both as to Effect and Time.

The Lords ordained the Decreet of Certification to be extracted, but ſtopped the Preference in the Mails and Duties till the firſt of *December*; betwixt and which Time the Laird and Lady *Airth* might adjudge and be in a Capacity to compete with real Creditors.

June 24, 1707. Alexander Gordon *of* Auchintoule, *againſt* Alexander Duff *of* Drummure, *and the other Creditors of* Weſtertoun.

IN a Competition of the Creditors of *Weſtertoun*, the Execution of an Inhibition uſed by *Alexander Gordon* of *Auchintoule*, againſt *John Anderſon* younger of *Weſtertoun*, being quarrelled as null, for that it bore Three Knocks only to have been given at *Weſtertoun*'s Dwelling-houſe; and the *Act* 75, *Parliament* 6. *James* 5. requires Six Knocks, which not being a Ceremony, but an eſſential Requiſite for certiorating of the Lieges, cannot be diſpenſed with: And by conſtant Cuſtom, Executions not bearing Six Knocks are always reduced and found null.

Anſwered for Auchintoule. Albeit the ſaid *Act* 75. requires the giving of Six Knocks, it doth not declare Executions otherways given to be null, but only inflicts a Puniſhment upon the Executer, and *Caſus omiſſus habetur pro omiſſo*. And lately an Execution not bearing that the Copies delivered contained the Date of the Delivery, and the Witneſſes Names and Deſignations, as the Act of Parliament preſcribes, was yet ſuſtained, in Reſpect that the Statute did not annul the Execution wanting ſuch a Clauſe.

The Lords ſuſtained the Nullity.

June 26, 1707. *Mr.* Robert Sinclair *Writer in* Edinburgh, *againſt Mr.* George Purves *of* Ewfoord, *and* John Purves *his Grand-ſon.*

MR. *George Purves* of *Ewfoord* who is blind, having aſſigned to the deceaſt *Jean Purves* his only Daughter, and the Heirs of her Body, a Bond of Four thouſand Merks, granted to him by *William Purves* his only Son; with the Reſervation of his own Liferent, and the Burden of Fourty eight Pound payable to his Lady during her Lifetime, in Caſe ſhe ſurvived him; with Warrandice from Fact and Deed, and a Declaration that the ſaid Aſſignation is by and attour what the Aſſigny got in her Contract of Marriage; and a Clauſe mentioning that the Bond and Aſſignation were depoſited in the Hands of Mr. *Thomas Wood* Miniſter at *Dunbar*, to remain there during Mr. *George*'s Lifetime, or while he ſhould have Uſe for the ſaid Bond for Security of his reſerved Liferent, to be delivered after his Deceaſe to the ſaid *Jean Purves*, to be diſpoſed of by her and her foreſaids at their Pleaſure; and that the ſame being then in the Cuſtody of the ſaid Mr. *Thomas Wood*, ſhould be ſufficient as if it had been a delivered Evident in *George Purves*'s Lifetime: In Corroboration and Fortification of which Aſſignation, the ſaid *William Purves* Debtor in the Bond ſubſcribes Conſenter thereto. Sometime thereafter, *George Purves* granted a ſecond Aſſignation of the ſaid Bond to *John Purves William*'s Son, whereby he revoked the Aſſignation in Favours of his Daughter, and thereupon purſued an Exhibition and Delivery of the Bond and firſt Aſſignation, againſt Mr. *Thomas Wood*, wherein Mr. *Robert Sinclair* Son and Heir to *Jean Purves* compeared, and craved that the Bond and firſt Aſſignation might be exhibited and delivered to him, and repeted a Reduction of the ſecond Aſſignation, and a Declarator of his own Right to the Bond.

Alledged for Mr. George and John Purveſes. That Mr. *George* ought to have Redelivery of the Bond and Aſſignation, for theſe Reaſons, 1. The Aſſignation to *Jean Purves* was revocable at any Time before her Acceptation thereof, and much more now after her Deceaſe without accepting. For, as *Perezius* in *Cod. Lib.* 8. *Tit.* 54. *N.* 23, 24. *Tit.* 55. *N.* 7. obſerves, by the *Roman* Law a Donation is altogether imperfect, and but a Deſtination, before it is accepted. And this is conſonant to our Practice, *February* 1, 1672, *Cockburn* contra *Craigivar*. So in Conſignations for Redemption of Wadſets or Annualrents, tho' made expreſly for the Behoof of the Creditor, the Conſigner may, at any Time before the Creditor's Acceptance thereof, reſile from the Order, and uplift the conſigned Mony. And the Contract of Depoſitation being only betwixt the Deponent and Depoſitar, the former is to be obeyed at any Time before the Perſon for whoſe Behoof it was entred into declare his Acceptance. Eſpecially in this Caſe, where ſomething was to be performed by the Aſſigny, *viz.* The Payment of the Annualrent to the Cedent during his Lifetime, and Fourty eight Pound to his Relict. For the Nature of ſuch a Right is fitly compared by Lawyers, to a Man holding out the End of a Rope to another in Favours of whom he deſigns to bind himſelf, who (if he draw back before that other take hold on't) is under no Ty. 2. The Aſſignation being gratuitous, it ought to be largely interpreted in Favours of the Cedent who had competently provided his Daughter in her Contract of Marriage. And by the laſt Words of the Depoſitation, the Bond was not to be underſtood a delivered Evident to the Daughter, unleſs it had been left in the Cuſtody of the Depoſitar at the Cedent's Death. Beſides, for what other End did not the Father deliver the

Aſſignation to his Daughter her ſelf who was a Widow, than that he might revoke it in his Lifetime.

Anſwered for Mr. Robert Sinclair. The Aſſignation is a plain irrevocable Conveyance put out of the Granter's Hand for the Behoof of himſelf, his Daughter and her Heirs, according to their reſpective Intereſts of Fie and Liferent. And whatever legal Preſumption there might be of an implyed Truſt and Power of Revocation in Favours of a Father granting a Writ to his Child *in Familia*, and depoſiting the ſame in the Hands of a third Party: Yet a Writ granted to a Child *foris-familiat* and her Heirs, and depoſited ſimply in a third Party's Hands, muſt be underſtood for the Behoof of that Child to whom the Bond was expreſly to be delivered after the Father's Death, to be diſpoſed of by her and her foreſaids at their Pleaſure. Nor is it of any Import that the Daughter had not accepted: For this is not the Caſe of an Offer, but a plain Conveyance of a Right in Favours of a third Party, out of the Hands of the Granter, which needs no formal Acceptance by the Aſſigny. And there is no Burden preſtable by the Aſſigny, but only a Burden upon the Annualrent, of a Bond bearing Annualrent for the Father and his Wife's Lifetime. Again, which puts the Matter out of Doubt, the Aſſignation bears Warrandice from Fact and Deed, which is not conſiſtent with a Power to alter. And *William* the Debtor in the Bond, and Father to the ſecond Aſſigny, ſubſcribes Conſenter to the firſt Aſſignation.

The Lords found that the Aſſignation granted by *Ewfoord* to his Daughter, containing Warrandice from Fact and Deed, is a delivered Evident, and not revocable by his granting a poſterior Aſſignation; And ſuſtained the firſt Aſſignation as to the Fie of the Sums thereby aſſigned, and reduced the ſecond Aſſignation, and remitted to the Ordinary to proceed and determine in the Exhibition.

July 1, 1707. Walter Sympſon *Servant to* Robert Boid *Writer in* Edinburgh, *againſt* Jean Hamilton *Daughter to* Claud Hamilton *of* Garrin.

IN the Competition betwixt the ſaid *Walter Sympſon* and *Jean Hamilton*; the Lords found that an Adjudication againſt an apparent Heir for his own Debt, who had been three Years in Poſſeſſion but never infeft, is not ſufficient to prefer the Adjudger in a Competition for Mails and Duties with one deriving Right by Diſpoſitions from Perſons infeft as Heirs Portioners to the remoter Predeceſſor laſt infeft: Without Prejudice to the ſaid Adjudger to purſue theſe Heirs paſſing by their immediate Predeceſſor to make them perſonally liable for his Debt, as accords in the Terms of the *Act* 24. *Seſſ.* 5. *Parl. W.* and *M.*

July 3, 1707. Alexander Duncan *of* Strathmartine, *againſt* John Scrimzeour *of* Kirktoun.

J*Ohn Scrimzeour* of *Kirktoun* having obtained Decreets of Conſtitution againſt *Wintoun* of *Strathmartine*, as lawfully charged to enter Heir to his Father, for Payment of principal Sums, Annualrents and Penalties, contained in his Father's heretable Bonds, without uſing previous Requiſition in the Terms of theſe Bonds; And having thereafter made Requiſition, and then adjudged, the Days of Requiſition being expired before executing of the Summons of Adjudication, and the Requiſition therein narrated: *Alexander Duncan* the Purchaſer of the ſaid Eſtate of *Strathmartine*, raiſed Reduction and Improbation of *Kirktoun*'s Adjudication, and contended it was null as proceeding upon Decreets of Conſtitution, which are null, for decerning to make Payment of Penalties in heretable Bonds bearing Requiſition, tho' no preceeding Requiſition was made.

Alledged for Kirktoun. That a Clauſe of Requiſition doth not ſuſpend the Debtor's Obligement, or any ordinary Action for Payment, provided he have Fourty Days *Induciæ* from the Citation to the Day of Compearance; but only ſuſpends ſummar Diligence by Horning, Caption, or Adjudication. Nor was the Adjudication quarrelled led immediately upon the heretable Bonds, but upon a Decreet of Conſtitution following upon a general Charge to enter Heir, which took off the Neceſſity of extrajudicial Requiſition: Seing thereby the Debtor had a longer Forbearance than the Terms of the Requiſition would have allowed. Now to clear that ſuch Solemnities may be ſupplyed by judicial Acts, Intimation is a legal Solemnity as requiſite to complete an Aſſignation, as Requiſition is neceſſary to make Way for ſummar Diligence; and yet a Charge of Horning, or a Proceſs ſupplies the Want of Intimation. And in the Caſe of Decreets *Cognitionis Cauſa*, the Charge to enter Heir and Proceſs ſupply Requiſition: Conſequently Requiſition may be ſupplyed by a Proceſs. 2. *Et ſeparatim*, Requiſition was uſed for the more Security, after obtaining of the Decreet of Conſtitution.

Replyed for Duncan of Strathmartine. As the Want of Requiſition would have afforded to the Debtor a good Ground of Suſpenſion againſt Horning and Poinding: So it affords a good Defence againſt the Conſtitution upon which theſe Diligences might follow; at leaſt in ſo far as concerns a Penalty, which is only incurred in caſe of not Payment of the Principal and Annualrents after Requiſition. And albeit a Conſtitution might be purſued againſt an apparent Heir for Principal and Annualrents, ſuch a one could not be purſued and decreeted for Penalties, which neither he nor his Predeceſſor had incurred. Nor can the Charge to enter Heir ſupply Requiſition in this Caſe, as is alledged in the Caſe of Decreets *Cognitionis Cauſa*; which the Heir cannot quarrel becauſe of his Renunciation, and by which he is not prejudiced, being only decerned *dicis Cauſa* to ſuſtain the Perſon of the Defunct, that the *Hæreditas jacens* may be affected for what is libelled *Periculo Petentis*. For in Proceſſes of Conſtitution, the Heir can only be purſued to pay the Sums in his Predeceſſor's Obligement in the Terms thereof; and ſo may juſtly quarrel a Decreet againſt him for exorbitant Penalties never incurred by his Predeceſſor. 2. No Regard can be had to the Requiſition produced, becauſe not uſed *debito Tempore*, before the Decreet of Conſtitution for Principal, Annualrents and Penalties: And tho' libelled upon in the Adjudication, it is not therein marked produced.

Duplyed for Kirktoun. It is not only denied that the Penalty could only be incurred by a previous Requiſition, but the contrary is certain: For it were in vain to uſe Requiſition againſt an apparent Heir who is not bound in the Bond, till once the Debt be conſtituted againſt him by a Decreet.

The Lords reſtricted *Kirktoun*'s Adjudication to a Security for his Principal and Annualrents, upon this Nullity, That it was led for heretable Sums which required Requiſition, and yet no Requiſition was uſed before the Decreet of Conſtitution againſt *Wintoun* of *Strathmartine*, as lawfully charged to enter Heir to his Father.

Thereafter *July* 19, 1707, *Kirktoun* craved that the Lords would ſuſtain his Adjudication as a Security for Principal, Annualrents, and a fifth Part more, in Regard of his lying out and wanting the Uſe of his Money theſe Ten Years bygone, or at leaſt would allow him the termly Failzies incurred through the not Payment of Annualrents, which required no Requiſition, and the neceſſary Charges deburſed in procuring his Adjudication, and expeding his Charter and Infeſtment.

Anſwered. The Act of Parliament allows not a Fifth Part more except in the Caſe of ſpecial Adjudications : And how could that be allowed here where the Adjudication doth not bear it? And the containing an additional Fifth Part would by the Act of *Sederunt* have been another Nullity. 2. The claim of termly Failzies is moſt extravagant, becauſe, a null Adjudication can have no Penalties, and no Advantage taken of Debtors is more hard upon them and uſurious than the termly Failzies : and nothing is due under the Name of neceſſary Charges, the Debtor being in no culpable *Mora* by the null and irregular Diligence uſed againſt him.

Replyed. There is nothing more reaſonable, than that *Kirktoun* ſhould have ſome Allowance for his loſing the Intereſt of his Annualrents, which became a principal Sum to him when he paid the Creditors: Seing the Reaſon why the Act of Parliament allows a Fifth Part more to Adjudgers, is becauſe of their wanting the Uſe of their Mony. 2. *Kirktoun*'s Adjudication is not found intrinſically null, but only reſtricted upon an Informality in the Requiſition: And 'tis ordinary to ſuſtain an Adjudication, where Accumulations are cut off, as a Security for principal Sum, Annualrents and neceſſary Expences. Nor are the termly Failzies of an Annualrent any Hardſhip, theſe being ſmall and proportioned to the Annualrent.

The Lords adhered to their former Interlocutor, and refuſed to allow either a Fifth Part more, or the termly Failzies.

July 5, 1707. William Turner *Notary in* Birſe, *againſt* Alexander Roſs of Tilliſnaught.

ALexander Roſs of *Tilliſnaught* having purſued Reductioon of one *Middleton*'s Teſtament againſt *William Turner* ; and the Cauſe coming to be adviſed *in Præſentia* upon the 19 *January* 1695 ; and the Votes happening to be equal, the Lord *Rankeillor* then Preſident ſuperſeded to give his caſting Vote till he ſhould attempt an Accommodation : And that proving abortive he reported the ſame to the Bench, the 9 *February* 1695, and in Preſence ſigned the Interlocutor of the former Date. Thereafter his Lordſhip having given in a Repreſentation upon the 26 of the ſaid Month of *February*, when another Preſident ſat in the Chair, bearing that the Decreet had been put in the Minute-book of the Date when it was ſigned, and not when it was voted: The Lords allowed the ſame to be put up of new again of that preſent Day's Date; and it was extracted accordingly. *William Turner* raiſed Reduction of this Decreet upon this Ground of Nullity, That the Interlocutor which is the Warrant thereof was not ſigned in Preſence immediately after voting in the Terms of the *Act* 18. *Seſs.* 4. *Parl. W. M.* and the Lord *Rankeillor* could not Three Weeks after, when he was not Preſident have his deciſive Vote without the Queſtion had been put to the whole Lords and voted *de novo*.

The Lords repelled the Reaſon of Reduction.

July 8, 1707. Margaret Dobie *Relict of* William Oliphant *Merchant in* Edinburgh, *againſt* Margaret Oliphant *his only Daughter, and* Charles Robertſon *her Husband for his Intereſt.*

WIlliam *Oliphant* having diſponed to *Margaret Dobie* his ſecond Wife, in Implement of her Contract of Marriage, his Goods and Gear, Merchant Ware in his Houſe, Shop and Cellars, Houſhold-pleniſhing, Gold, Silver, Compt-books, Tickets, *&c.* providing that ſhe out of the *Superplus*, after Satisfaction of her Contract of Marriage and his own juſt Debts, ſhould pay to *Margaret* his Daughter of a former Marriage what ſhe wanted of her Proviſion of 8000 Merks at his Deceaſe, and having by a ſecond Diſpoſition, narrating the former, and a Faculty therein to alter, diſponed to the ſaid *Margaret Dobie* the Liferent of all free Goods and Gear, Debts and Sums of Mony heretable or moveable which ſhould belong to him at his Deceaſe, with the Burden of intertaining *William Robertſon* his Grand-child, and the one Half of the Fie to her, and the other to the ſaid *William Robertſon* to whom ſhe and other two were named Tutors: Upon *William Oliphant*'s Deceaſe, *Margaret* his Daughter and her Husband got the Defunct's Shop and Cabinets to be lock'd and ſeal'd up by an Order from the Commiſſars of *Edinburgh*.

Margaret Dobie apply'd to the Lords for an Order to remove the Seals, and to get up the Keys of the Houſe, Shop, Ware-houſes and Cellars.

Anſwered for Margaret Oliphant. That the Relict could not be allowed to poſſeſs till once an Inventary were made of all that pertained to the Defunct at his Deceaſe heretable and moveable, and ſhe find Caution for the Intereſt of all concerned: Becauſe, inventaring is a neceſſary *interim* Remedy againſt ſmuggling Trade, and *Margaret Oliphant* is a Creditor for her Proviſion of 8000 Merks, *&c.* And as neareſt of Kin has Right to the Office of Executry; and to a Legitime.

Replyed for Margaret Dobie. For a Creditor to require an Aſſigny to Heretables and Moveables by a Deed *inter Vivos* to inventar the ſame and find Caution, is a Novelty in Law; and the Inventars to be made and recorded in a competent Judicature for the Pupil will ſecure his Intereſt.

The Lords ordained the Seals and Padlocks to be taken off, and the Goods in the Houſe, Shop, Ware-houſes and Cellars to be inventared and valued, but found no Neceſſity to inventar the Writs concerning the Heretage, or to inventar the Compt-book, and in Reſpect of the Diſpoſitions produced, found *Margaret Dobie* not obliged to find Caution, and continued her Poſſeſſion by Virtue thereof.

July 10, 1707. *Dam* Jean Nisbet *and Sir* William Scot *of* Harden *her Husband, againſt the Laird of* Preſtoungrange.

THE deceaſt Dam *Jean Moriſon* having, during the Life of Sir *John Nisbet* of *Dirlton* her Husband when he was about to ſettle his Eſtate, got a Bond of 40000 Merks bearing Annualrent from the preſent Laird of *Dirlton*, to take Effect in the Event of his Succeſſion to the Eſtate; and the Lady having in *Anno* 1691, after her Husband's Deceaſe, when the Granter of the Bond was in Poſſeſſion of his Eſtate, tranſacted the old for a new Bond of 30000 Merks, whereof ſhe upliſted 6000 Merks that ſame Year, 3141 Pound in the Year 1693, and by the foreſaid Tranſaction got communicated to her a general Diſpoſition and Aſſignation granted by Sir *John* of all that ſhould belong to him at his Deceaſe: The Lady *Harden* Executrix to her Father, purſued the preſent *Dirlton* for Payment of the 30000 Merks Bond, and called *Preſtoungrange* as Executor to his Siſter the ſaid Lady *Dirlton* for his Intereſt. In which Proceſs the Lords, 25 *February* 1697, preferred the Lady *Harden* to *Preſtoungrange* as to what was reſting of the 30000 Merks, and reſerv'd Action againſt him as accords for what had been paid to his Siſter. The Lady *Harden* and her Husband purſue now *Preſtoungrange* for Annualrent of the foreſaid partial Payments, made to his Siſter from the 25 *February* 1697.

Alledged for the Defender. That no Annualrent was due, tho' the Mony upliſted did bear Annualrent, till a Denunciation for not Payment thereof; becauſe it was upliſted by a probable ſtanding Title at the Time, *viz.* The Bond in the Lady *Dirlton*'s own Name fortified by her Husband's Diſpoſition *omnium Bonorum*, and it was ſhe her ſelf that firſt made the Sum to bear Annualrent. Yea, 'tis the great Intereſt of Mankind that no *bona Fide* Intrometter *pro ſuo* be inſnared into Annualrents upon the emergent Deciſion of a dubious Point of Law; as one who has a probable Title, tho' it be reduced thereafter, is not accountable for *Fructus medio Tempore bona Fide percepti.* So a Perſon having upliſted a Sum bearing Annualrent, by the colourable Title of an Executor Creditor which was thereafter reduced, was not found liable for Annualrent, *January* 10, 1673, *Ramſay* contra *Robertſon*. 2. No Annualrent is due with us without a particular Statute, or Paction, or a confirmed Cuſtom: Thus no Annualrent was due even after Denunciation till an Act of Parliament was made for that Effect; nor was Annualrent due to a diſtreſs'd Cautioner paying the Debt, or due by a Factor appointed by the Lords for Sums bearing Annualrent that he upliſted, till Acts of *Sederunt* ordained it.

Replyed for the Purſuer. Albeit it be true in general, that Annualrent is only due *ex Pacto vel Lege*, that general Rule hath many Exceptions. Now here Annualrent doth plainly ariſe *ex Pacto*: In ſo far as the 40000 Merks Bond bearing Annualrent belonged to Sir *John Jure Mariti*, and conſequently to the Purſuer his Executrix; and no unwarrantable Deed of the Defender's Siſter inverting the Right and Poſſeſſion of the ſaid Bond, could ſtop the Courſe of Annualrent in Prejudice of the Purſuer. Therefore the Defender who repreſents her muſt make up the Purſuer's Damage thereby, and reſtore the Bond in the ſame Caſe as it ſtood betwixt them and the Debtor before her intermeddling. There is no Shadow of a *bona Fides* in this Caſe: For the Lady's concealing the 40000 Merks Bond from her Husband to whom it belong'd, was upon the Matter a Crime, which the common Law, out of Reverence to the married State, did vindicate in ſofter Words, *Actione Rerum amotarum*; and ſhe could as little pretend to an *illeſa Conſcientia Rei aliena*, when ſhe took the 30000 Merk Bond in Place of the *Res amota.* Nor is it to the Purpoſe to alledge, that the Lady had a colourable Title from *Dirleton*, who had a general Aſſignation from her Husband: Seing the Lords already found that Aſſignation could not comprehend *incognita* to the Cedent; and it were abſurd to imagine that the Aſſignation ſhould contain the very Bond granted for obtaining thereof. 2. Albeit there be particular Laws and Statutes for making Annualrents due only *ex Mora*: Yet Annualrents ariſing from other rational Cauſes are ſuſtained without any ſpecial Law. So the Price of Lands by Cuſtom bears Annualrent; and Annualrent hath been granted between Merchants without any expreſs Paction. Again, a Perſon delivering up another's blank Bond to the Debtor who afterwards turns inſolvent, or entring into a Contract with him to conceal the Bond from the Owner, would be liable *ex Dolo* for the Sum and Annualrents, as if himſelf had been Debtor in the Bond.

Replyed for the Defender. Mony of it ſelf is not like Lands or other Things which naturally produce Fruits, and therefore an Obligement for Annualrent thereof, which with us may exceed the Stock, cannot be introduced without Conſent of Party or a particular Law. Annualrent is due for the Price of Land only becauſe the Debtor poſſeſſeth the equivalent Rents: And is ſometimes decerned in Name of Damage againſt one Merchant in Favours of another; becauſe, by the Nature of their Imployment the one is ſuppoſed to have trafficked with the Mony, and the other wanted the Subject of his Trade.

The Lords aſſoilzied the Defender from Annualrent.

July 15, 1707. Walter Abercromby *Writer in* Edinburgh, *againſt* Innes *of* Dunkinty.

IN the Reduction and Improbation at the Inſtance of *Walter Abercromby* Writer in *Edinburgh*, as Aſſigny conſtituted by *Alexander Abercromby* his Father, againſt *Innes* of *Dunkinty.*

Alledged for the Defender. That the Aſſignation which is the Purſuer's Title is intrinſically null: In ſo far as, albeit it be of a Date ſince the Act of Parliament 1681, one of the two Witneſſes inſert, *viz. John Farquharſon* in *Loch* doth not ſubſcribe.

Replyed for the Purſuer. There are two Witneſſes ſubſcribing, whereof *Robert Farquharſon* is one, who is wrong inſert in the Body of the Writ under the Name of *John*: For at that Time there was no ſuch Man as *John Farquharſon* in *Loch*, but *Robert Farquharſon* did live there; and the Error by inſerting *John* for *Robert*, ought not to prejudice the Purſuer, *ubi conſtat de Perſona*. And ſuch a Nullity in Executions of Summonſes is never ſuſtained: Albeit the ſame Act 1681 declares Executions, as well as Bonds and Aſſignations, to be null where the Witneſſes are not deſigned.

Duplyed for the Defender. 'Tis impoſſible that the Nullity can be thus ſupplied: For if *Robert* be taken for the Witneſs, then he is not ſpecially inſert and deſigned in the Body of the Writ, as the Act 1681 expreſly requires under the Pain of Nullity. And how can it be alledged with any Countenance that *Robert* is *John?* Or ſince condeſcending is expreſly excluded by the foreſaid Act; How can the Condeſcendence upon one Man for another be admitted? Again, tho' in the Interpretation of Writs formal as to the Solemnity, an Error in one Part may be explained or corrected by another: If the ſubſtantial Solemnity of a Writ were allowed to be corrected by a Condeſcendence, and Probation of extrinſick Facts not contained therein, our Security by the Act 1681 is at an End, at leaſt altogether precarious. The Deſignations of Perſons in Executions or Libels are in a different Caſe. For theſe may be drawn over again, if wrong at firſt: But a *Jus quæſitum* through the Nullity of a voluntary Conveyance cannot be taken away from Parties intereſſed, by a ſubſequent Condeſcendence. And a Meſſenger may more eaſily miſtake the Names of Witneſſes, than the Granter of a Bond or Aſſignation will miſtake the Perſons ſubſcribing to his Deed.

The Lords unanimouſly ſuſtained the Nullity, and found it not ſuppliable, now after the Act of Parliament 1681: And declared they would decide ſo in all Time coming.

Eodem Die. *The Creditors of* Edinglaſſie, *againſt* George Gordon *of* Carnouſtie.

SIR *George Gordon* of *Edinglaſſie* having Right by Progreſs to an Appriſing of the Lands of *Carnouſtie*, led in *Anno* 1649 by *Forbes* of *Watertoun*, againſt Sir *George Ogilvie* then Heretor; The Creditors of Sir *George Gordon* adjudged theſe Lands from his apparent Heir, and inſiſted in a Proceſs of Sale: Where Compearance was made for *George Gordon* his ſecond Son, who contended that the Lands of *Carnouſtie* could not be expoſed to Sale for his Father's Debt, ſince he had Right thereto by Charter and Seaſin proceeding upon a Gift of Recognition, incurred by Deeds of Sir *George Ogilvie* the former Heretor, declared in his Favours.

Anſwered for the Purſuers. Recognition could not be incurred by any Deeds of Sir *George Ogilvie* after he was denuded by the Appriſing 1649, upon which *Watertoun* was infeſt under the Great Seal: Whereby he became the King's Vaſſal, and the Caſualties of Ward Marriage and Relief could only fall due by his Death, and Recognition could only be incurred by his Deeds; and the Right of the former Vaſſal reſolv'd in a ſimple Reverſion; *cum non poſſint eſſe duo ejuſdem Rei Domini.* Which may be cleared from the conſtant Courſe of Deciſions, particularly *July* 28, 1680, *The King's Advocate* contra *Yeaman*, where the Marriage was found to fall by the Death of an Appriſer within the

Legal; *February* 3, 1681, *Ker* contra *Henderſon*, where an Appriſer's Charge againſt the Superior with an Offer of a Year's Rent, would have excluded Non-entry by the Reverſer's Death; and *March* 10, 1621, Lord *Balmerinoch* contra *Seton*, it was found that an Appriſer infeft might reduce poſterior voluntary Infeftments by which the Debtor's Lands had recognoſced. Now that Recognition cannot be inferred in Prejudice of an Appriſer by any Deed of the Reverſer, is further made out from the Inſtance of Inhibition, which by the *Act* 15. *Parl.* 2. *Ja.* 7. cannot be prejudiced or diſappointed by Recognition incurred by the Debtor's poſterior Deeds. And by the Act of Parliament 1621 no Bankrupt or interpoſed Perſon can wrong lawful Creditors, who have done Diligence by Inhibition or Compriſing, duly to affect the Dyver's Eſtate, which excellent Proviſion in our Law would be eaſily evacuated, if it were permitted to a Dyver to defraud his Creditors by doing of Deeds inferring Recognition.

Replyed for George Gordon. The Reverſer by an Appriſing is not ſo diveſted of his Eſtate, as to ceaſe to be Proprietar; on the contrary, all the Characters of Property remain during the Legal, with the Burden of the Appriſer's Security; and the Donatar of Recognition pleads the Effect thereof no higher than to carry the Property with that Burden. So the Reverſer may poſſeſs, remove Tenants, receive Vaſſals, take Compoſitions, and confirm Charters: Yea, when the Appriſing is extinguiſhed, the Reverſer needs no Reſignation from the Appriſer, or new Right from the Superior: Conſequently he the Reverſer is Proprietar, and the Appriſer but a Creditor. So that the Property can only be evacuated by the feudal Delinquency of the former: Otherwiſe a Creditor infeft for Relief or Warrandice in Wardlands, or an Appriſer of theſe, might be Subject to the Caſualities of Ward, which were hard. Again, by an expreſs Act of Parliament 1681, Appriſers or Adjudgers are declared incapable during the Legal to vote in the Election of Commiſſioners to the Parliament or Convention: And were it not abſurd that a great Eſtate ſhould be ſunk by the Fact of an Appriſer for a ſmall Sum, in Prejudice of the Reverſer and his other Creditors. As to the Act 1686, which provides that Inhibition ſhall exclude Recognition: It might be contended that it makes for the Defender, ſince it was otherwiſe before the ſaid Statute; and there is no ſuch Statute in Favours of Appriſers. But that's not to the Purpoſe: For the Defender do's not controvert, but an Appriſing will be ſuſtained as a Security for the Debt, notwithſtanding of Recognition incurr'd by poſterior Deeds during the Legal, tho' the Legal in that Caſe could never expire in Prejudice of the Recognition, ariſing to the Superior from the very Nature of a proper Fie, and underſtood as a Part of the *Reddendo* thereof. The Deciſions urg'd for the Purſuer do not concern the preſent State of the Caſe. For the Argument from the Deciſion in the Caſe of Marriage or the Ward-duties doth not hold in Recognition: Becauſe, Marriage or Ward-duties do not extinguiſh the Fie, but are only Caſualities ariſing from the Condition of the Perſon of the Vaſſal; whereas Recognition makes the very Fie it ſelf to return; which can never happen by the Deed of a Party having only a Right for Security, as an Appriſing during the Legal is, but by the Deed of the Reverſer who has the Right of Property. So at fartheſt, the Deed of an Appriſer during the Legal could only make his own Appriſing and Security recognoſce. And in the Deciſion againſt *Yeaman*, the Marriage was not modified according to the Appriſer's whole Eſtate, but to two Years Rent of the appriſed Eſtate.

The Lords found, That the Deeds of the Reverſer, and not of the Appriſer, do infer Recognition during the Currency of the Legal.

Eodem Die. *Mr.* John Steuart *of* Blackhall, *againſt the Adjudgers of the Eſtate of* Corſhill.

IN the Competition betwixt the Adjudgers of the Eſtate of *Corſhill* and Mr. *John Steuart* of *Blackhall*, who craved Preference upon a Diſpoſition of Relief granted to him by *Corſhill*, clothed with Infeftment before the leading of their Adjudications: It was alledged for the Adjudgers, That the Diſpoſition of Relief could be no Ground of Preference; Becauſe, it bears this Clauſe, *That the granting thereof ſhall be nowiſe prejudicial to any former Right granted by* Corſhill *to his lawful Creditors, of their juſt and true Debts owing by him to them*; Whereby their anterior Debts, tho' only perſonal were ſalv'd. Becauſe, 1. The Exception is of any former Right of their juſt and true Debts owing by him to them, and not for their juſt and true Debts: And the Word *of* made the Clauſe reſpect perſonal Bonds, whereas the Word *for* would more properly have related to real Securities. 2. The Clauſe had been uſeleſs, had it reſerved only prior real Rights: For theſe could not be prejudiced thereby, and ſo needed not to be reſerved; And *Verba debent aliquid operari.* 3. *Blackhall* has look'd upon that Clauſe to be a Reſervation in Favours of all the prior Creditors, or elſe he would never have been at the Trouble and Expence to lead ſo many Adjudications as he has done, for the very Debts contained in the Diſpoſition. 4. The Words are to be interpreted *contra Proferentem, i. e.* the Party who ought to have cleared the Meaning of them, and that is *Blackhall*; The Clauſe being ingroſs'd in Favours of Creditors in a Right granted to *Blackhall*, who may blame himſelf that real were not diſtinguiſhed from perſonal Creditors.

Anſwered for Blackhall. The Clauſe can only operate in Favours of anterior real Creditors. For, 1. The Diſtinction betwixt *of* and *for*, which in that Clauſe would ſignifie one and the ſame Thing, is frivolous. 2. Tho' the Words be not extended to perſonal Creditors, they will operate very much: For there might have been many Objections againſt the former voluntary real Securities. Yea, if they be extended to perſonal Creditors, the Diſpoſition to *Blackhall* was to no Purpoſe: Seing *Corſhill* at the granting thereof, had more Debt than his Eſtate was worth. It were abſurd, that under the Notion of *Verba debent aliquid operari*, we ſhould make them *operari quidlibet*, and that which overthrows the very Deſign of the Diſpoſition. 3. The accumulating Securities *ex ſuperabundante non nocet*: And beſides, *Blackhall* had good Reaſon to adjudge notwithſtanding his Infeftment of Relief, that thereby he might have a more direct Security, which at Length might become a ſovereign irredeemable Right. 4. Any Thing the Creditors can draw from a Contract where they were not Parties, is rather ſtrictly to be interpreted, conſidering that voluntary Grants in Favours of others, are not to be drawn too much in Prejudice of the Granters. 5. It cannot be thought that by the foreſaid Clauſe, perſonal Creditors were meant, becauſe the Deſign of the Diſpoſition and Infeftment of Relief was to give *Blackhall* real Security, beyond the perſonal Security of Relief that formerly he had, and conſequently to put him in a better Condition than other perſonal Creditors. For the Clauſe aforeſaid was of the Nature of an Exception, the ſame upon the Matter, as if it had been worded thus; *Excepting from this Diſpoſition any former Right granted by* Corſhill *to his Creditors, of their juſt and true Debts.* Now, by the Rule of Interpretation, *Exceptio* muſt be *de Regula:* Conſequently this Exception in a Diſpoſition for real Security, muſt neceſſarly be underſtood of real Rights. 6. The Clauſe cannot operate in Favours of perſonal Creditors. For had theſe never adjudged, they could not by Virtue thereof effectually diſappoint a Proceſs of Mails and Duties at *Blackhall*'s Inſtance, founded ed upon his real Right of Relief: Nor can it be any more effectual to them, ow that they have adjudged; Becauſe the Meaning of the Proviſion was to ecure the former Rights of Creditors in the State they then were, and not to ortifie Adjudications that then were not, and poſſibly would never exiſt. 7. To ſhew that by the Diſpoſition to *Blackhall*, a Preference to perſonal Credi-ors was deſigned; By another Clauſe therein it is provided, That after his own ayment by Intromiſſion, he ſhould be comptable for the ſuperplus Intromiſſions o *Corſhill's* other Creditors: Which argues plainly, That *Blackhall* was to be rſt paid, and that theſe other Creditors were the perſonal Creditors; the real reditors being ſalv'd by the other Clauſe preferring them to *Blackhall* him-elf.

Replyed. To interpret the Clauſe in *Blackhall's* Senſe, would make it altogether eluſory; For the Intereſt of prior real Creditors would have been intire however: Seing, if their Infeftments were valid, they were certainly ſecure; And tho' there had been Nullities therein, they would have proved ſuch Diligences as might be a Ground to reduce the poſterior voluntary Right in Favours of *Blackhall*, upon the Act of Parliament 1621. Therefore the Uſeleſneſs of the Clauſe, if not extended to perſonal Creditors, is a greater Argument it ſhould be extended to them; than it is to ſay, That the Diſpoſition to *Blackhall* would be to no Purpoſe, if the Clauſe were extended to perſonal Creditors. For the Diſpoſition being his own Evident, he who is *in Lucro captando*, and took it with a Reſervation in Favours of Creditors, ought not to be allowed to explain that Reſervation ſo, as they who are *in Damno vitando* ſhall have no Advantage by it. 2. As to the Clauſe, whereby *Blackhall*, after relieving of himſelf, was to hold Compt to the other Creditors for the ſuperplus Rent, conform to his Intromiſſions: That was upon Suppoſition that he did intromet, and that the Rents were ſufficient to both; In which Caſe, being only liable for actual Intromiſſions, he might retain for his own Satisfaction in the firſt Place, and leave the reſt to the other Creditors. But that Event of his intrometting did not exiſt.

The Lords found that the Diſpoſition by *Corſhill* in Favours of *Blackhall*, operates in his Favours a Preference to the perſonal Creditors, who had not ſecured themſelves by anterior preferable Diligence.

July 16, 1707. *The Three Daughters of the deceaſt* William Waddel *Tenant in* Gilmertoun, *againſt* William Wadderſtoun *of* Haugh.

WIlliam *Wadderſtoun* of *Haugh*, having granted a Bond for One thouſand and thirty Merks payable to *Thomas Waddel* and *James Wadderſtoun*, Uncles and Tutors to the Three Daughters of Umquhile *William Waddel* in *Gilmertoun*, for the Uſe and Behoof of the ſaid Pupils; And *William Wadderſtoun* being charged to make Payment of the Bond at the Inſtance of the ſaid Three Daughters and their Husbands, as Aſſignies conſtituted after their Majority by their Two Tutors: He ſuſpended upon this Reaſon, That he offered to prove by the Oath of *James Wadderſtoun* one of the ſaid Tutors yet alive, that the Sums in the ſaid Bond were ſatisfied and paid to him and the Co-tutor, except the odd Thirty Merks.

Anſwered for the Chargers. That however during the Tutory any Charge at their Tutors Inſtance might have been taken off by their Oaths: Now the Office being expired, the Tutors who are *functi* cannot depone to the Prejudice of their former Pupils, to whom they granted *Virtute Officii* the Aſſignation charged on; more than if after Compt and Reckoning, a Tutor found liable in a Ballance, having granted in Payment thereof an Aſſignation to any Effects due to himſelf, it could be pretended that his Oath could prejudice the Aſſigny. 2. One of the Tutors who were conjunct in the Adminiſtration being now dead, the other's Oath can no more be taken than he could act by himſelf: And both being Co-creditors in the Bond, as one of them could not charge without the other's Concourſe; neither can one diſcharge without the other; Nor could this Tutor's Oath afford Recourſe againſt the Repreſentatives of the other Tutor. And here the ſurviving Tutor and the Suſpender are Brothers in Law, who may collude to the Chargers Prejudice.

Replyed for the Suſpender. The Manner of Probation by the Tutors Oath, is in this Caſe moſt competent: Becauſe the Bond charged on was granted to the Tutors *nominatim*, in Contemplation of a Diſpoſition granted by them to the Suſpender, of ſome Moveables belonging to their Pupils. And as the Suſpender could have been charged for Payment at the Tutors Inſtance, it is competent to him to inſtruct any Reaſon of Suſpenſion by the Tutors Oath. And the Oath of any one of the Tutors is ſufficient, ſeing that would give Recourſe to the Chargers, againſt the other's Repreſentatives.

The Lords found that the Tutors Oath could not prejudge the Chargers.

July 17, 1707. *The Tutors of Sir* Robert Gordon *of* Gordonſtoun *Supplicants.*

THE Lords, upon a Repreſentation given in by the Tutors of Sir *Robert Gordon* of *Gordonſtoun*, found that neither he, nor his Tutors were bound, in the Ranking of the Creditors on Sir *Patrick Ogilvie* of *Boyn*'s Eſtate, to depone upon the Verity of a Debt for which he the Pupil was a Creditor by Adjudication: And therefore ſtopped any Certification againſt his Intereſt for not deponing, until he were of Age to depone; And allowed his Intereſt to be ranked in the mean Time.

July 18, 1707. Margaret Crichtoun *Relict of* Thomas Moffat, *againſt* *Mr.* John Borthwick *of* Cruickſtoun.

THomas Moffat having, as Creditor to *James Tweedie* in the Sum of Three hundred and fourty two Pounds, arreſted the like Sum in the Hands of Mr. *John Borthwick* of *Cruickſtoun*, and afterwards diſponed the Debt and Diligence to *Margaret Crichtoun* his Spouſe: She purſued a Furthcoming, wherein *Cruickſtoun* alledged that he ought to be aſſoilzied; Becauſe, he had paid conform to Letters for louſing the Arreſtment produced.

Replyed for the Purſuer. That if *Cruickſtoun* had paid, he had paid unwarrantably, the Letters of louſing never having been executed againſt the Arreſter: For the Letters bear, *That Intimation be made to the Arreſter, that the Arreſtment is louſed, and Caution found*, otherwiſe the Arreſtment to remain unlouſed. The Reaſon of this Stile is, becauſe, if the louſing be not intimated, the Arreſter cannot know from whom to ſeek his Payment, nor how and when to do Diligence againſt the Cautioner, who *medio Tempore* may prove inſolvent.

Duplyed for the Defender. 1. Before the *Act* 17. *J.* 6. 1617. (as appears by the Narrative thereof) Meſſengers were intruſted with the louſing of Arreſtments, taking Caution, and intimating the ſame to the Parties, by Tickets or Schedules: But that Courſe not being ſafe to the Lieges, it was ordained by the ſaid Act, That all Caution for louſing of Arreſtments be found in the Books of Seſſion, and received by the Clerks before giving out the Letters, yet no Intimation or Execution of the Letters is required. For the Arreſter is ſecure by the Caution found, and the Letters under the Signet are a Publication thereof. 2. It was not neceſſary to execute the Letters of looſing the Arreſtment againſt the Arreſter, ſeing they bear *Caution to be found*; And the Will of the Letters of Arreſtment is only *to ſecure the Subject ay till Caution be found*; And the Stile of the Letters of looſing Arreſtment ſeem only to have been introduced as a Warrant to certiorate the Arreſter not to proceed after he was ſecured by the Caution found, of which he might be certiorated at the Bill-chamber, and Signet-office, which are publick Records patent to all the Lieges: And for the Sufficiency of the Caution the Clerks are liable.

Triplyed for the Purſuer. That the Act 1617, makes more for him than for the Defender: In ſo far as it expreſly requires the intimating the looſing of an Arreſtment to the Arreſter, which was alſo neceſſary before the ſaid Act, tho through an Abuſe it had been omitted.

The Lords found the Arreſtment to have been effectually looſed: tho the Letters of Looſing were not intimated to the Arreſter.

Eodem Die. *Mr.* William Zeaman, *againſt* Janet *and* Margaret Grieves, *Daughters of the deceaſt* George Grieve *Apothecary in* Dundee.

IN the Action of Compt and Reckoning at the Inſtance of Mr. *William Zeaman*, as Aſſigny by *John* and *Janet Zeamans*, againſt *Janet* and *Margaret Grieves* as repreſenting Umquhil *George Grieve* their Father, who had been Curator to the Purſuer's Cedents, and alſo their Debtors in a Bond of 2000 Merks, dated 28 *March* 1682: The Defenders founded upon an Article of 300 Pound, the Expence of confirming the ſaid *John* and *Janet Zeamans* Executors to their Father, as a Ground of Compenſation to extinguiſh the Bond *pro tanto*.

Alledged for the Purſuer. The Defenders could have no Allowance of the ſaid 300 Pound, in Regard Tutors and Curators who give not up judicial Inventories of the Minor's Effects, by the Act of Parliament 1672, are to have no Allowance of Expences wared out by them in the Affairs of their Minors: And *ita eſt* the Defenders Father neglected to make up Inventories in the Terms of the ſaid Statute. 2. The Bond was granted by *Grieve* the Curator before his acting as ſuch: And ſo can only be compenſed by Sums due to him before his entring upon the Office: For after that Time *præſumitur intus habere*.

Anſwered for the Defenders. It was not neceſſary to give up judicial Inventories, ſeing before *George Grieve*'s Acceptance of the Curatory, full Inventories of the Minor's Father's Eſtate had been made by the Friends on the Father and Mother's-ſide, and what is therein omitted, was ſupplied by the Inventories given up in the Teſtament. 2. The Act of Parliament doth only cut off perſonal Expences, and incident Charges deburſed in managing the Affairs of the Minor, tho the Clauſe ſeem to be general, and can never be extended to Expences profitable to the Minor. 3. The Certification in the Act being conceived againſt perſonal Omiſſion, it can only be extended to perſonal Charges. 4. Expences deburſed in making up Titles to purſue or diſcharge, are as onerous as Payment of the Minor's Debt. Nay the foreſaid Expences of Confirmation muſt the rather be allowed to be ſo, ſeing it was given out at a Time when the Biſhop and Commiſſar could have forc'd the Minor to confirm: And if an Agent had deburſed that Mony for the Curator, it would have been a good Article in his Accompt.

Replyed for the Purſuer. Such ſham Pretences of previous Inventories made up by Friends without a Judge preſent, cannot be eſteem'd exact and authentick; So as to free the Defenders Father of ſupine Negligence, and the

Breach of a ſtanding Law for not making up judicial Inventories at the Time of his accepting the Office of Curator, or acting as ſuch: From the Omiſſion whereof the Preſumption of concealing, ſuppreſſing and Imbezelling becomes *Juris et de Jure* by the Act 1672. 2. The Act of Parliament, as clearly as Words can expreſs, excludes Curators who neglect to make Inventories, from all manner of Charges expended by them in the Minor's Affairs. 'Tis abſurd to pretend that the Expences ſought to be allowed were *in Rem verſum* to the Minor: For by that Rule all incident Charges of Journies, or communing with the Minor's Debtors or Creditors might with as good Reaſon be claimed. 3. All Omiſſions, however perſonal as to the Curator, ſtill become real Leſion and Prejudice to the Minor. 4. However neceſſary the making up of Titles may be, yet a Curator, who enters upon his Office otherways than Law preſcribes, is preſumed to do ſo, rather for his own Advantage, and to get Acceſs to the Minor's Effects, than towards the fair diſcharging of his Office: *Nam ſemper præſumitur contra verſantem in illicito.* And tho this Article might have been ſuſtained in an Agent's Accompt to a Curator who imployed him, that is no Argument for the Curator's having Allowance thereof from the Minor contrary to a ſtanding Law: Seing it is not in the Caſe of Payment of a Minor's Debt.

The Lords ſuſtained the Article of Expences of Coat and Confirmation of the Minor's Father's Teſtament, as a Ground of Compenſation *pro tanto.*

July 22, 1707. *Mr.* James Halden *contra Mr.* Henry Rymer *and Mr.* Robert Ramſay *Provoſt of the old College of* St. Andrews.

Upon a comparative Trial of ſeveral Competitors for a vacant Chair of a Regent in the old College of *Saint Andrews*, before the Provoſt and the three remaining Regents: Two of theſe Regents gave their Opinion in Favours of Mr. *James Halden*, as the Perſon beſt qualified for the Poſt; the Third was *non liquet*; and the Provoſt declared for Mr. *Henry Rymer*, and at his own Hand admitted him. A Complaint of this was made by Mr. *Halden* to the privy Council, and remitted to the Lords of Seſſion: Where it was alledged for Mr. *Rymer*, That the Regents had neither Right nor Poſſeſſion to elect. In ſo far as, by the Foundation the College conſiſting of a Provoſt, a Licentiate, and Batchelor of Divinity, four Maſters of Arts, Burſers of Divinity, and ſix Scholars of Philoſophy, was to be governed by the Provoſt, Licentiate and Batchelor of Divinity, who were impowered to elect for the ſupplying of Vacancies. And albeit the Offices of Licentiate and Batchelor of Divinity are long ago extinct, the Powers conferred upon the governing Part of the College do accreſce to the Provoſt: Becauſe, by the common Law, albeit a College cannot be conſtituted in one Perſon, it may ſubſiſt if reduced to one. 2. The Provoſt *de Facto* has the ſole Power of admitting.

Replyed for Mr. Halden. The College is now quite altered from its original Inſtitution; being at firſt a College of Theology, whereof the Provoſt behov'd to be a Divine and a Preacher, and the four Maſters of Arts were Students of Theology: Whereas now the Provoſt is no longer a Theologue, and the College is converted into a Profeſſion of Philoſophy and Arts, whereof the Maſters are no longer *Ancillantes Theologiæ* in that College, but deſigned Regents or Profeſſors of Philoſophy, a Deſignation which imports Government; Conſequently the Foundation-charter cannot be the Rule. 2. Even by the Foundation the *Præpoſitus* had not the ſole Election, but was to judge in Conjunction with the *Licentiatus* and *Baccalaureus*, whoſe Abſence was to have been ſupplied by other Two, in Place of whom the Regents and

Profeſſors

rofeſſors of Philoſophy are come ſince the Reformation. Theſe Regents are Uſe to concur in all Acts of Adminiſtration, as the ſetting of Tacks, *&c.* d alſo do vote in Elections, and concur by their Preſence and Aſſiſtance Admiſſions, tho the very Act of Admiſſion be performed by the Provoſt Principal of the College. 3. The Regents Power was plainly homolo- ted by the Provoſt's allowing them to vote in this Election.

Duplyed for Mr. Rymer. The Foundation is the true and fix'd Rule, cept in ſo far as the ſame is altered by Law; And it will not be found, That there is any legal Conſtitution transferring the Power to the *Artium Magiſtri* or Regents who came not in Place of the *Licentiatus* and *Baccalaureus*: For theſe were Churchmen whoſe Offices are extinct. 2. The Adminiſtration of the common Stock of the College is not regulated by the Foundation; And therefore Cuſtom might prevail to give them ſome Power in that, tho it could not inveſt them with any Power contrary to the Terms of the Foundation. 3. Suppoſe the Provoſt had homologated the Regents Power, by taking their Votes, he could not diſpenſe with the Rules of the Foundation: But the Truth is, he only in Courteſy ask'd their Opinion by Way of Advice, which put no Obligation upon him to follow it.

The Lords preferred Mr. *Halden*, and declared Mr. *Rymer*'s Admiſſion void and null.

Eodem Die. Janet Cowie *and Mr.* David Hardie *her Husband for his Intereſt, againſt* William Brown *of* Seabegs, Janet Cowie *and others.*

John Cowie of *Bothkenner*, having granted for Love and Favour to *William Brown* of *Seabegs*, *Janet Cowie* and others *reſpective*, a Diſcharge and ſome Aſſignations of ſome moveable Debts due to him: *Janet Cowie* as one of the five Heirs Portioners of the ſaid *John Cowie* her Brother, and as Creditor to him in 500 Merks, raiſed Reduction of the foreſaid gratuitous Deeds *ex Capite Lecti*, with a Concluſion of Declarator, That notwithſtanding thereof, the Granter's moveable Goods and Gear is liable to be affected, both for ayment of the Debt due by him to the Purſuer, and for the Purſuer's Relief of the other moveable Debts to which ſhe might be obnoxious as Heir.

Anſwered for the Defenders. 1. The Purſuer as Creditor cannot be heard to reduce, except upon the Act of Parliament 1621, about Deeds *in Fraudem Creditorum*, which cannot take Place here where the Defunct was ſolvent. 2. Neither can ſhe reduce as Heir the Rights quarrelled: Becauſe, they relate only to Moveables, and none of them burdening or affecting the Heretage, and the old Statute in the *Majeſty* forbids only the diſponing of Heretage without Conſent of the Heir; Which, by the Rule of *Incluſio unius*, &c. argues, That Men are at Liberty even on Death-bed to do what they pleaſe with their Moveables, except Children be wrong'd of their Legitime, or a Relict of her Share, which is not the Caſe.

Replyed for the Purſuer. The Defunct could not, by any gratuitous Deeds on Death-bed which are of a teſtamentary Nature, prejudice the Heir, or any of his own lawful Creditors. For, 1. The Moveables of the Defunct ought to be burdened and affected with his moveable Debt, and he could not diſpoſe of his Moveables, except in ſo far as they were free: It being a Maxim in Law, That *Bona non ſunt niſi Debitis deductis*; And ſo decided, *December* 14, 1684, Lady *Colvil* contra Lord *Colvil*. The Purſuer needs not recur to the Act of Parliament 1621, ſhe being founded in the common Law, whereby Legacies can only be of the Defunct's free Moveables, and if more be legated they ſuffer a proportionable Abatement. Is it not a good Defence againſt all Gifts on Death-bed, That *Debita excedunt Bona*? Which evinceth that Debts are not thereby to be prejudiced. So the Lords found, that a ſpecial Legatar could not purſue the Debtor, till the Executor was called, leſt the Debts ſhould exhauſt even the ſpecial Legacy, *March* 10, 1627, *Forreſter* contra *Clerk*. 2. The Purſuer has Right as Heir to crave it may be declared, That no Deed on Death-bed can directly or indirectly burden or affect the Heretage: And if Perſons who have conſiderable moveable Debts were allowed to exhauſt their Executry by gratuitous Deeds, it were eaſie to evacuate the Law of Death-bed by expoſing the Heretage to be ſwallowed up by the moveable Debts.

Duplyed for the Defender. The cited Deciſions are not to the Purpoſe. For tho Legacies be affected with the Burden of Debts: Deeds *inter Vivos*, tho granted on Death-bed, are not. 2. Tho the Heir is to be relieved, by the Executor, of teſtamentary Deeds; That Relief is not to be extended to Deeds *inter Vivos* tho made upon Death-bed. For how can the Executor's Obligement to relieve the Heir, which commenceth but after the Defunct's Deceaſe, operate *retro*, to reduce an Aſſignation or Diſcharge granted by the Defunct to third Parties. True, Bonds granted upon Death-bed are reducible when they come to affect Heretage: Becauſe, thereby the Law is directly eluded. But here the Heir is left only under Debts contracted by her Predeceſſor in *liege pouſtie*, by the withdrawing ſome moveable Subjects from her Relief, which is a different Caſe.

The Lords found the Defunct's Moveables, notwithſtanding of the Diſcharge and Aſſignations on Death-bed, liable both to the Payment of the Debt due by him to the Purſuer, and for the Purſuer's Relief of other moveable Debts, to which ſhe might be obnoxious as Heir. And found the foreſaid Deeds reducible *ex Capite Lecti*, in ſo far as the ſame prejudges the Purſuer as Heir or Creditor.

Eodem Die. *Mr.* Alexander Maitland *contra* Alexander Brand *of* Reidhall.

IN the Declarator of Nonentry at the Inſtance of Mr. *Alexander Maitland*, againſt *Alexander Brand* of *Reidhall*, It was alledged for the Defender, That the Cauſe was ſleeping: In ſo far as nothing was done therein from the 14 of *February* 1706, to the 30 of *June* 1707; whereby it lay over more than Year and Day, even after Deduction of the whole Space of the Adjournment of the Winter-Seſſion, *viz.* From the firſt of *November* 1706, to the fourth of *February* laſt bypaſt. And therefore no Proceſs could be ſuſtained till the Cauſe were wakened.

Replyed for the Purſuer. The Time of the Adjourmnent of the Seſſion by the Parliament, is to be conſidered as *Tempus utile*, and ſo before the Proceſs could ſleep, he ſhould be allowed three Months of Seſſion, without reckoning the interveening Vacation.

Duplyed for the Defender. The Year within which a Proceſs muſt be called to hinder ſleeping, was never imagined to be a Year of Seſſion-months, but *Tempus continuum*, including Seſſion and Vacation. This is farther cleared from the Tenor of the Acts adjourning the Seſſion, whereby it is declared, That the Space of Adjournment ſhould not be reckoned in annual Preſcriptions, which argues plainly, That the ſaid individual Space of Time ſhould only be deduced, without any Alteration of the Nature of theſe annual Preſcriptions from a *Tempus continuum* to a *Tempus utile*.

The Lords repelled the Defender's Alledgeance, and found that the Cauſe is not ſleeping.

July 23, 1707. David Burton *Glazier*, *againſt* William Hamilton *of* Monkland.

D*Avid Burton* Glazier having charged *William Hamilton* of *Monkland* to make Payment of 2000 Merks aſſigned to the Charger by *Hamilton* of *Dalziel*, he ſuſpended upon this Ground; That he offered to prove by the Cedent's Oath, that the Sum aſſigned was only in Truſt in his Name, for the Behoof of *John Hamilton* of *Bogs*; which being proved, no Charge could be ſuſtained therefore againſt the Suſpender: Becauſe, *Bogs* was his Tutor, and had not cleared Accompts.

Alledged for the Charger. The Debt being aſſigned for an onerous Cauſe, the Suſpender could not have the Benefit of the Cedent's Oath.

Anſwered for the Suſpender. That he had preſented a Bill of Suſpenſion, which was paſt againſt *Dalziel* the Cedent before Intimation of the Aſſignation; whereby the Debt became *Res litigioſa*, and ſo he muſt have the Benefit of the Cedent's Oath. As *February* 15, *1662*, Laird of *Pitfoddels contra* Laird of *Glenkindy*, it was found that a Debtor purſuing Reduction of his Bond againſt an Aſſigny, ought to have the Benefit of the Cedent's Oath: Notwithſtanding it was alledged, that the Debtor calling him in the Reduction as Aſſigny, could not pretend his Right was not intimated. And indeed nothing is more required to make *Res litigioſa*, but a Party's ſignifying his Mind as to the Right by a legal Remedy; which no Doubt was done by obtaining the paſt Bill of Suſpenſion, after which no Diligence could have been done by the Creditor or his Aſſigny till the Days of the Siſt had elapſed.

Replyed for the Charger. Nothing can render a Subject litigious but *Deductio in Judicium* before the Aſſignation was intimated: So that there having been no Intimation of the Suſpenſion, nor Citation upon it before the Aſſigny's Intimation; 'tis impoſſible that the Subject could be litigious. For the paſſing of a Bill is no judicial Act to which any Body is cited: And before Intimation the Cedent himſelf might have proceeded to Diligence. The Deciſion adduced is not to the Point, for there the Cedent's Oath had been taken before the Diſpute came in about it. And the Lords found that the Proceſs at the Debtor's Inſtance, wherein the Aſſigny was called, could not be ſuch an Intimation of the Aſſignation as to exclude the Cedent's Oath.

The Lords repelled the Reaſon of Suſpenſion, and found that the paſſing of the Bill of Suſpenſion without Intimation, did not render the Subject litigious, ſo as to give the Suſpender the Benefit of *Dalziel*'s Oath.

Eodem Die. John Cuninghame *of* Enterkin, *againſt his Curators.*

IN the Action of Compt and Reckoning at the Inſtance of *John Cuninghame* of *Enterkin* againſt his Curators: The Lords found, That the Purſuer's immixing himſelf in his own Affairs, and intrometting during his Minority, doth only exoner the Curators for ſo much as they can inſtruct he intrometted with, and did not free them from Diligence; ſo as to make them liable only for their actual Intromiſſions.

Eodem Die. *Sir* Alexander Wedderburn *of* Blackneſs, *againſt* James Man *late Baillie in* Dundee.

J*Ames Man* Son and apparent Heir to   *Man* who ſtood infeſt in ſome Acres of Land lying near the Ports of *Dundee*, having in the Year 1704 diſponed theſe Acres to Sir *Alexander Wedderburn*, with an Aſſignation to that current Year's Rent; and Baillie *Man* as a Creditor of the Tenant's having poinded that whole Crop out of his Barn-yard, before the Maſter's Rent was ſatisfied: The Lords found that Sir *Alexander Wedderburn* had *Jus Hypothecæ* for the Year's Rent, as his Cedent the apparent Heir would have had.

Eodem Die. Andrew Baillie *of* Parbroth, *againſt* David Walker *of* Harlawſhiels.

IN the Proceſs againſt *David Walker* of *Harlawſhiels*, at the Inſtance of *Andrew Baillie* of *Parbroth*, for the bygone Annualrents of a Bond for 1750 Merks, granted by the Defender to *Margaret Jackſon* Relict of *William Dunbar* in *Harlawſhiels*, as the Price of her Liferent Annuity of 20 Pound *Sterling* affecting the ſaid Lands purchaſed by the Defender, payable at the firſt Term of *Whitſunday* or *Martimas* after his the Purchaſer's Right to the Lands ſhould be ratified by his Author's Heirs, with Annualrent from the Term of Payment, to which Bond the Purſuer had Right by Aſſignation from *Margaret Jackſon*.

Alledged for the Defender. That he could not be liable for Annualrents, the Ratification aforeſaid not being yet procured, and conſequently the Term of Payment not come.

Replyed for the Purſuer. Tho' he could not oblige the Defender to make Payment of the principal Sum till the Condition were purified by the Ratification of his Right; yet he muſt be liable for Annualrents, the Principal being a Part of the Price of Lands, whereof he enjoys the Profits.

Duplyed for the Defender. Albeit our Cuſtom, favouring natural Equity, allows Annualrent upon Obligements granted for the Price of Lands, tho' not provided by any expreſs Clauſe therein: Yet this being introduced contrary to the general Diſpoſition of Law, which makes Intereſt due only *ex Pacto, vel Lege*, it ought not to be extended to the Purchaſer of a Liferent; which hath not, as the Price of Land, a perpetual Cauſe yielding Profit to compenſe the Payment of Annualrents, but may ceaſe the next Moment after the Sale by the Death of the Liferenter. 2. Tho Obligements granted for the Price of Lands, without Mention of Annualrents, are found to bear Annualrent: Yet where Annualrents are declared to commence from a determined Period, the Annualrents after the Sale, till that Term, are preſumed to be tranſacted and remitted. *Et quid tam congruum Fidei humanæ, quam ea, quæ inter eos placuerunt, ſervare?*

Triplyed for the Purſuer. Annualrent before the Term of Payment not being expreſly excluded, is due by the Proviſion of Law. The Reaſon for mentioning Annualrent after, and not before the Term, was, becauſe the Purchaſe could not be evicted after the procuring of Ratifications from the only Perſons having Intereſt to quarrel the Sale. But it being uncertain, if, or when Eviction might occur before that Term of Payment, therfeore Annualrent in the ſaid Interval was left unmentioned, to be determined by Law, according to Emergencies: Which in the Caſe of Eviction or Diſtreſs, would ſtop the Courſe of Intereſt, and no ſuch Thing happening, would make the ordinary Intereſt to be due.

The Lords repelled the Defences: And found that the Bond bore Intereſt from the Granter's Entry to the Poſſeſſion of the Land. But thereafter, *July* 29, 1707. *Inter eoſdem*, It was found relevant to aſſoilzie the Defender from Annualrents preceeding the Term of Payment of the Bond, that it was *actum et tractatum* at the granting thereof, that it ſhould only bear Annualrent after the ſaid Term, to be proved by the Oaths of the Writer and inſtrumentary Witneſſes.

Eodem Die. James Kidzew *Taylor in* Edinburgh, *againſt* David Hardie *Cordiner there.*

D*Avid Hardie* being charged at the Inſtance of *James Kidzew*, to make Payment of the Sum of 732 ℔. 2 ſh. 10 d. of Principal, with a certain nalty and Annualrents contained in a Bond, granted by him to Umquhile *James Smeiton* Merchant Burgeſs of *Edinburgh*, and *Helen Wiſhart* his Spouſe, and the longeſt Liver of them Two, their Heirs and Aſſignies, and aſſigned to the Charger by her as the Surviver: The ſaid *David Hardie* ſuſpended upon this Reaſon, That *James Arbucles* Merchant in *Edinburgh* having arreſted in his Hands all Sums he was owing to the Charger's Cedent, and having in a Forthcoming before the Baillies of *Edinburgh*, where the Cedent the Arreſter's Debtor was called for her Intereſt, referred the Debt to the Suſpender's Oath, who deponed, that at the Time of the Arreſtment he was only owing to the Cedent 171 ℔. 17 ſh. 8 d. which by Decreet of the ſaid Baillies was paid to the Arreſter; he could be no further liable, the Matter being *Res judicata & jurata.* So the Defender in a Forthcoming, who had deponed at an Arreſter's Inſtance was aſſoilzied from a Purſuit afterwards for the ſame Debt; *February* 13, 1664, *Ruſſel* contra *Cuninghame*, obſerved by *Gilmore.*

Anſwered for the Charger. The foreſaid Decreet of Forthcoming was *Res inter alios acta:* And the Arreſter's referring the Verity of the Debt to the Suſpender's Oath, could not prejudice the Creditor in the Bond, who was only called for her Intereſt to object againſt the Arreſter's Debt, and was not obliged to furniſh him with Inſtructions that *David Hardie* was her Debtor. The cited Deciſion is not to the Purpoſe; for there the Creditor had no other Mean of Probation to inſtruct his Debt but the Debtor's Oath, who had deponed *negative*, and therefore was not obliged to ſwear over again.

Replyed for the Suſpender. The Charger's Cedent being cited in the Forthcoming for her Intereſt, it was certainly her Intereſt to furniſh the Arreſter with all the Inſtructions ſhe could for proving the Debt, and to notice the Manner of Probation he made uſe of, as much as if ſhe had been purſuing her ſelf. For Payment to the Arreſter, was equivalent to Payment made to her ſelf: Seing ſhe was thereby exonered of ſo much of what ſhe owed to him; and the Defender's Oath in the Forthcoming muſt hinder her to recur to any other Probation; as well as if ſhe had aſſigned to the Arreſter for his Security what was due to her by the Suſpender, and he the Arreſter had in an Action for Payment at his Inſtance againſt the Suſpender (wherein ſhe was called for her Intereſt) referred to his Oath what he was owing: A Forthcoming upon an Arreſtment being a legal Aſſignation.

The Lords repelled the Reaſon of Suſpenſion.

Eodem Die. Alexander Aliſon *Writer to the Signet, againſt the Children of* William Trent *of* Pitcullo.

IN a Competition of the Creditors of the Laird of *Forret*; the Children of the deceaſt *William Trent* of *Pitcullo* having founded on an Aſſignation granted by the common Debtor of his Lady's Jointure to their Father, eſtabliſhed in their Perſon by Confirmation before the Commiſſar of St. *Andrews*: *Alexander Aliſon* objected, That no Reſpect could be had to their Title, becauſe, it bears them who are Pupils to be ſurrogated in the confirmed Teſtament to the Procurator-Fiſcal, without being authoriz'd by Tutors for that Effect, which is contrary to the *Act 26. Parl.* 1690. And *quod Jure prohibente fit, eſt ipſo Jure nullum.*

Anſwered. 'Tis *Jus tertii* to Mr. *Aliſon* to make ſuch an Objection; the Act of Parliament being chiefly deſigned to prevent Vexation occaſioned to the Lieges by Charges of Horning at the Fiſcal's Inſtance. And here the Fiſcal was not decerned after a Charge given to the neareſt of Kin: But only the Commiſſar continues the old Stile of Confirmation, *Decerning the Fiſcal to the Behoof of the Children.* Now ſeing theſe are actually confirmed, what doth it matter whether they are ſaid to be ſurrogated to the Fiſcal or not? Yea, the Commiſſars of *Edinburgh* always uſed that old Stile, except within theſe Two or Three Years, and it's ſtill uſed in all inferior Commiſſariots. 2. It is not competent to any Perſon to alledge againſt a Pupil the Want of Tutors, except in a Proceſs only: For in other Things *poteſt Conditionem ſuam meliorem facere,* without the Authority of Tutors. Nor again, do's the Act of Parliament require preciſely Tutors and Curators to concur in the Confirmation, but only enumerates the Perſons who may be confirmed, excluding others.

Replyed. 'Tis a neceſſary Security for all Parties having Intereſt, that a Confirmation intrinſically null be not ſuſtained. So that it is not *Jus terii,* but *excluſivum Juris agentis.* And inferior Commiſſars ſhould not be incourag'd to continue this informal Method after the Commiſſars of *Edinburgh* have laid it aſide: For *Conſuetudo non uſque adeo ſui valitura Momento ut aut Rationem vincat aut Legem.*

The Lords repelled the Nullity, and ſuſtained the Childrens Title.

July 24, 1707. *The Town of* Brechin, *againſt the Earl of* Panmure *and the Lord* Grange.

King *James* VI. in *Anno* 1583 granted a Commiſſion of Juſticiary under the Quarter Seal to the Baillies of *Brechin*, with a Power to uplift Fines, to continue during Pleaſure till recalled: And ſome few Years thereafter gave the Offices of Conſtabulary and Juſticiary within the ſaid Burgh and its Liberties to *David* Earl of *Crawford*, by whoſe Son it was reſigned in Favours of the Earl of *Marr*; who obtained a Charter under the Great Seal upon the 20 *May* 1613, and thereafter conveyed it to the Earl of *Panmure*'s Predeceſſors. Upon the 18 and 13 Days of *January* and *February* 1637 a tripartite Contract was entred into betwixt *Patrick Maul* of *Panmure*, the Biſhop, and the Magiſtrates of *Brechin*; whereby (for ſopiting and removing all Controverſie and Difference that uſed to be betwixt the Depute-juſticiary and the Town, anent the Juriſdiction in Matters of Riot and Blood, to which both pretended Right) it was agreed, That Three Baillies ſhould be choſen yearly, one by the Biſhop, another by *Panmure*, and the third by the Town Council out of a Leet of Six to be made by the ſaid Council, and *Panmure* conſented to grant a Deputation yearly to the Baillie to be named by him of the Offices of Juſticiary and Conſtabulary within the City and Liberties thereof. Again, by an Act of the Town Council *Anno* 1636, (where *Panmure*'s Juſticiary-depute was preſent and conſenting) it was ordained that the Fines of the Court of Juſticiary ſhould, as long as *Panmure* had the naming of one of their Baillies to be his Conſtable-depute, belong to the Town, to be intrometted with by their Treaſurer for the Time. After their Treaſurer had been in immemorial Poſſeſſion of uplifting theſe Fines, the Conſtable at length claim'd them: Upon which there aroſe a legal Competition for them betwixt the Town and the Lord *Grange*, who has now a Gift of the Office of Conſtabulary and Juſticiary in Place of the Earl of *Panmure*.

Alledged for the Town. That they had preſcribed a Right to theſe Fines by Fourty Years Poſſeſſion, conform to the Town Council Act 1636: And Juriſdiction preſcribes by long Poſſeſſion upon any colourable Title, which the ſaid

Act of Council certainly is, being fortified by the ſolemn Contract betwixt he Conſtable's Predeceſſors and the Magiſtrates of *Brechin*, which acknowedges that the Town had a Pretenſion to the Juriſdiction of Juſticiary within t ſelf, and annexes the ſame to the Town, leaving to the Conſtable the annul Nomination only of the Baillie, to be inveſted with the Power of Juſticiary-depute.

Anſwered for the Lord Grange. The ſaid private Act of the Town, to which *Panmure* was not conſenting, cannot be a Ground of Preſcription, to carry way from him the natural Perquiſites and Fines of his Court, to which he has o clear a Right by the Charter and Documents abovementioned. For the Town's pretended Poſſeſſion of the Fines, was meerly precarious, depending pon the Conſtable and his Predeceſſor's Goodneſs, and the upliſting thereof, *eræ Facultatis.*

The Lords found the Act of the Town-Council of *Brechin* in the Year 1636, annot be a Title of Preſcription, to ſeparate the Benefit of the Fines impoſed y the Juſticiary-depute, from the Juriſdiction, and apply the ſame to the own.

Eodem Die. John Rule *Son to* John Rule *Apothecary in* Drumfreis, *againſt the Children and Repreſentatives of* John Reid *Merchant there.*

THE deceaſt *John Rule* Apothecary in *Drumfreis*, having, by his Bond dated a little before his Death, narrating, *That* John Corbet, John orſbie, *and* John Reid, *had, at his Deſire, accepted the Overſight of his Interent, and Children, during their Minority, which would require Trouble and Exences, obliged himſelf to pay Six hundred Merks equally among them betwixt and* Whitſunday *thereafter; with Annualrent and a Penalty*; And *John Reid* having ied after he had overſeen the Interment of the Granter of the Bond, and the erm of Payment was elapſed: *John Rule* Son to the Granter raiſed a Proceſs againſt the Repreſentatives of Mr. *Reid*, for declaring the Bond null as to is Part, in Reſpect it was granted *ob Cauſam quæ non eſt ſecuta*; *John Reid* aving died without being at any Trouble or Expence in overſeeing the Deunct'sChildren, which had been the main Conſideration for giving of the Bond; nce the going to his Burial was a common neighbourly Duty and Work of umanity. So that the Defenders could no more have Benefit by the ſaid ond, than if it had been granted to him for being Advocate or Agent, or Facor to the Granter's Children, and he had died without performing any Office f that Nature. As a Prentice-fee cannot be demanded when the Maſter dies efore the Apprentice get any Inſtruction.

Anſwered for the Defender. The Bond is a ſimple Obligement, notwithſtaning the Narrative, which is neither Quality nor Condition thereof. For tho' hat was the Motive, it was to make no Stop to the Payment: And *de Facto ohn Reid* ſurvived the Term of Payment. Nor is the Caſe of a Bond for rentice-fee to the Purpoſe: And as to a Bond granted to an Advocate for his ervice, the Sum therein would be due, tho' the Granter ſhould have no Buneſs, and never imploy the Advocate.

Replyed for the Purſuer. Whatever might have been pretended, if the Moy had been actually *bona Fide* upliſted and ſpent: It cannot be demanded now when it is yet in the Debtor's Hand; and the Cauſe of the Bond never perormed.

The Lords aſſoilzied the Defenders, and found the Bond good in their Faours: In Regard their Father had ſurvived the Term of Payment, and had verſeen Mr. *Rule*'s Interment, and had accepted the Curatory of his Chilren.

July 25, 1707. James Corbet *Merchant in* Glaſgow, *againſt Mr.* William Cochran *of* Kilmaronnock.

K*ilmaronnock* and *James Corbet*, and other Ten, being equal Sharers in a Ship called, *The Hopewell*, and its Cargo to and from *Guinea*, *Kilmaronnock* granted Bond the 29 of *October* 1701, to *James Corbet*, in theſe Terms, *That where* James Corbet *has diſponed to me his Twelfth Part, I oblige my ſelf to pay to him therefore the Sum of Three hundred Pound* Sterling, *at* Candlemas *next, with Annualrent from the Term of Payment, with this expreſs Proviſion, That the Ship arrive ſafe in* Scotland *or* England, *and otherwiſe he ſhould be free*: And becauſe *James Corbet* did at the ſame Time inſure to *Kilmaronnock* the ſaid Share bought by him at Ten *per Cent.* he gave a ſeparate Obligement to Mr. *Corbet* of the ſame Date for Thirty Pound *Sterling*, as the *Præmium of Inſurance*. The Ship and Cargo came ſafe to *Guinea*, where Negroes were bought and taken in, and ſailed thence to *America*, where Ship and all was ſold by the Super-cargo: The Produce whereof being returned to *London*, *Kilmaronnock* received his own Twelfth Share. *James Corbet* purſued *Kilmaronnock* for the Three hundred and thirty Pound *Sterling* contained in his Bond, who alledged Abſolviture as to the Three hundred Pound, becauſe the ſame was conditional, and conceived with an Irritancy, which is incurred by the Ship's never returning to *Scotland* or *England*.

Alledged for the Purſuer. The Irritancy could not be underſtood incurred, becauſe the Ship and Goods were ſold in *America* by the Super-cargo, for whoſe Actions the Purſuer was not anſwerable, after he had diſponed his Share to the Defender. Beſides, the Price and Produce of the Ship and Cargo returned to *England*, which was equivalent. And the Defender having homologated the Sale as to one Twelfth Part, he could not reprobate the ſame as to the Share purchaſed from the Purſuer. For had the Price anſwered his Expectation, he had uplifted that Part alſo: And *quem ſequitur Commodum*, &c. 2. The Purſuer was no otherways liable for the Return of the Ship, than as an Inſurer: And Inſurers are not liable for the Deeds of Super-cargos, but only for the Accidents of Hoſtility or Piracy, or Streſs of Weather, or Fire, or the like.

Anſwered for the Defender. The plain Words of his conditional Obligement, whereby he ſecured himſelf, cannot be ſupplyed by pretended Equivalents. The Loſs by the undervalued Sale in the Weſt *Indies*, did not happen through any Fault of the Super-cargo, but through the Inſufficiency of the Ship. The Defender's receiving his own Twelfth Proportion of the Price was moſt reaſonable and warrantable, ſeing he had no Recourſe for it in Caſe of his Refuſal: For a Creditor, to whom a Debt is partly due *proprio Nomine*, partly as Aſſigny, having abſolute Warrandice, may take what he can get of his own proper Debt, without being excluded from Recourſe upon his Author's Warrandice. Nor doth it follow, that becauſe the Defender would have had Right to the Product of the Share bought, had the ſame been ever ſo profitable, that therefore he muſt be ſatisfied with it when diſadvantageous. For by his Agreement he had Right to the whole Profit, whereas the Purſuer's Right to the Price was limited to the Event of the Ship and Cargo's arrival to *Scotland* or *England*. 2. If there had been any Inſurance in this Caſe, as there is none, it muſt have comprehended all imaginable Events or Damage ariſing by the Inſufficiency of the Ship, or the Infidelity of the Maſters, or Arreſtments, *&c.* which are uſually comprehended in Policies of Inſurance. Again, albeit the Writ had carried the Form of an Inſurance, and that were leſs comprehenſive as it is, yet what hindred *Kilmaronnock* to add thereto (as he hath done for his Security) a ſpecial Proviſion beyond the common Form? 3. As no Action can be ſuſtained on the firſt Bond; the ſecond muſt fall in Conſequence, as being *Pars Contractus*, and given in Contemplation of the Ship's returning, and Cargo's being delivered at the reſpective Ports, which hath failed.

Replyed for the Purſuer. That he knew nothing of the Ship's Inſufficiency, and he ſold her *talis qualis*. Again, if through Inſufficiency ſhe had periſhed in the Voyage, the Bond had not then indeed been purified: But Inſufficiency in a Harbour, is capable of Refitment.

The Lords found, That the Ship and Cargo being ſold in *America*, and the Price thereof returned, the Condition of the Bond is not purified: And therefore aſſoilzied from the Three hundred Pound *Sterling*, but decerned for the Thirty Pound.

July 31, 1707. Robert M'dowal *of* Logan, *againſt* Andrew Agnew *of* Scheuchan.

IN a Cauſe at the Inſtance of *M'dowal* of *Logan*, againſt *Agnew* of *Scheuchan*, the Lords upon the 12 of *June* laſt, having found that *Logan* had Right to upliſt Two thouſand five hundred Merks contained in *Scheuchan*'s Bond: He the Debtor proponed Compenſation, upon this Ground, That *Logan* was Debtor to him, as repreſenting *Patrick M'dowal* of *Logan* his Father, in the proportionable Relief of a Debt paid upon Diſtreſs by *Scheuchan*, for which he ſaid *Patrick M'dowal* was bound conjunctly and ſeverally with him; And offered inſtantly to prove Payment to the Creditor by his Diſcharge, and to prove by *Logan*'s Oath, That he repreſents his Father.

Alledged for Logan. That the Compenſation was not liquid, the compenſing Debt not being conſtituted againſt him as repreſenting his Father, by a Decreet anterior to the Alledgeance of Compenſation, in which it would be competent to *Logan* to make his Defences. So Compenſation upon a Bargain of Victual offered to be liquidated by the Purſuer's Oath, was repelled for the like Reaſon, *December* 1, 1626, Lady *Ballegerno* againſt the Laird of *Lawriſtoun*.

Anſwered for Scheuchan. To liquidate a Debt, is only to make appear *quid, quale, quantum*; And Compenſation opponed to an Heir who is *una Perſona cum Defuncto*, is *inter eoſdem*. Compenſation operates *ipſo Jure retro*, if proponed before Extract of the Decreet upon the Debt to be compenſed, tho' there be no Decreet for the compenſing Debt: For, if the other Party have any Objections againſt it, he may preſently propone them; *February* 14, 1633, *Keith* contra *Heriot*, *March* 16, 1639, *Forſyth* contra *Coupland*. But the imaginary Poſſibility of having Objections againſt the compenſing Debt, cannot ſtop the real Effect thereof. As to the Deciſion cited for *Logan*, it doth not meet: For there the compenſing Subject being Victual, and not Mony, and ſo *alterius Generis*, did not compenſe *retro* from the Time of the Concourſe to ſtop the Annualrent of a liquid Bond.

The Lords ſuſtained *Scheuchan*'s Compenſation, he proving by the Charger's Oath, That he is Heir ſerved and retoured to his Father.

November 18, 1707. *Mr.* James Chiſholm *Chirurgion in* Edinburgh, *againſt* James Steidman *Skipper in* Grangepans.

JOhn Bairdie having taken home to his Houſe his Siſter's Son, when *James Steidman* the Child's Father was abroad on a Voyage, and educated him at *Linlithgow* about ſeven Years; He aſſigned his Claim of Aliment to Mr. *James Chiſholm*, who had married the Cedent's other Siſter. Mr. *Chiſholm* purſued *James*

Steidman for the ſeven Years Aliment of his Son, upon the Grounds following. 1. Donation in the Caſe cannot be preſumed for Want of a previous Paction: Becauſe, the Pupil could not contract; And no Paction could be made with the Father, who was abroad when the Child was brought to his Uncle's Houſe. So that this is the ſimple Caſe of a Pupil having Means of his own, intertained by a Perſon that was not oblig'd to do it. 2. Tho it ſhould be conſidered as the alimenting of one that is Major without Paction, the Father being Major; Yet even in that View the Defender muſt be liable in Aliment for his Son *Actione Negotiorum Geſtorum.* And as when a Man acts profitably for an abſent Tutor, he is preſumed to do the Buſineſs of the Tutor, except in ſo far as the Pupil's Fortune is inriched thereby, *L. 6. Pr. L. 37. ff. de Negot. Geſt. Voet.* in his Commentary upon the ſaid *Title N.* 10. So this is a Matter betwixt a Man and his Brother in Law, whoſe *Negotium* in his Abſence being ***maxime utiliter geſtum*** by taking Care of his Son, he ought to pay for it. Eſpecially conſidering, That by the univerſal Cuſtom of *Europe*, ***ne unus locupletetur cum alterius Damno***, Repetition is allowed in Caſes where the Civil Law denies it: As when the Perſon abſent after his Return prohibited his Friend to proſecute *Negotium inceptum*, which he did notwithſtanding perfect to Advantage, *&c. Voet. ibid. N.* 11, 12, 13. 3. The Matter is put beyond Controverſie by Deciſions, *January* 1663, *Stirling* contra Laird of *Ottar* obſerved by Preſident *Gilmore*, and *July* 7, 1675, *Wilkie* contra *Moriſon*, obſerved by my Lord *Stair*, *July* 3, 1701, *Tait* contra *Trotter*. 4. Suppoſe the Father had been at Home, and ſent his Son to Mr. *Bairdie* to be ſchool'd and educated, and he had complyed with the Father's Mandate, Aliment would have been done by the Father: Becauſe, the Mandant is bound to make up what is expended in Execution of his Mandate, that *Officium* be not *damnoſum.* Again, *In dubio, Animo repetendi aluiſſe quis præſumitur, Colerus de Alimentis, Lib. 3. Cap. 5. N.* 33, 34. And 'tis a common Saying, That *Error et Stultitia potius præſumitur, quam* ***Donatio.***

Anſwered for Mr. Steidman. Where a Perſon capable by himſelf or another to bargain for his Intertainment, is alimented by a near Relation who invited him to his Houſe, as in this Caſe, the Aliment is underſtood to be furniſh'd *donandi Animo.* And tho the abſent Father could make no Agreement for the Child, the Mother might have done it as *Præpoſita* in her Husband's Abſence to the *Negotium* of alimenting the Family. 2. 'Tis not enough to ſay, That *Negotium* was *utiliter geſtum* for *James Steidman*: For the Queſtion is, Whether *geſtum erat Animo donandi*, or with a Deſign of Repetition. 3. The cited Deciſions are not applicable to this Caſe: For theſe of *Stirling* contra L. of *Ottar*, and *Wilkie* contra *Moriſon*, concern only Mothers purſuing for Aliment given to their Children more out of Neceſſity, than *Animo donandi*, againſt their Father's Repreſentatives; Whereas here no Neceſſity gave Riſe to the Aliment, but the Alimenter's free Deſire to have his Nephew in his own Family. The Practick betwixt *Tait* and *Trotter*, where *Trotter* being ſent in his Infancy by his Father to be kept and nurs'd in *Tait*'s Houſe at *Howdoun*, and continued there a Matter of thirteen Years without any Paction, Aliment was found due for all that Time, tho *Tait*'s Wiſe was a near Relation, vaſtly differs from the Caſe in Hand: For *Tait*'s Relation to *Trotter* was but very remote, and *Trotter* ſent his Child out of *Edinburgh* to *Tait*'s Houſe for his Health and the Country Air; Whereas *Bairdie* was the Child's Uncle, and the Child came from his Mother's Houſe where he breathed as freſh Air as at *Linlithgow.* 4. Nothing in this Affair looks like a Mandate, tho Mr. *Steidman* when preſent allowed his Son to continue in his Uncle's Family, which was only an acquieſcing to Mr. *Bairdie*'s Deſire of keeping his Nephew: And *Mandatum* is a Contract whereby *Negotium Suſcipienti gratis gerendum committitur.* Beſides, the alimenting of Mr. *Steid-*

man's

man's Son with a view of Repetition, and heaping a conſiderable Debt upon his Head, when the Charge of Intertaining the Child in his own Family would have been inconſiderable and inſenſible, was no Favour to Mr. *Steidman*, but a great Loſs. 5. Mr. *Bairdie* a conſiderable Time after the Child was returned Home, finding himſelf in great Straits, wrote earneſtly to Mr. *Steidman* for the Loan of Twelve Pounds *Scots*, without mentioning any Claim of Debt he had againſt him. And thereafter *Bairdie* granted a Ticket to *Steidman*, bearing, That he was reſting to him, after Compts cleared in his Book, Thirty ſix Pounds *Scots*, which he obliged him to pay to him upon Demand. Whence it follows, That Mr. *Bairdie* never reckoned Mr. *Steidman*'s Son's Aliment a Debt upon him.

Replyed for Chiſholm. 1. The Mother as being *veſtita Viro* could not oblige her ſelf for her Son's Aliment: And it cannot be pretended that ſhe was *Præpoſita huic particulari Negotio.* 2. The Defender miſtakes in Point of Law, when he argues that Aliment cannot be ſought *Actione Mandati*; Becauſe, a Mandate is a gratuitous Office: For it's only gratuitous as to the Mandatar's perſonal Service, and not as to Expences laid out by him in executing the Mandate. 3. As there is no Place for a Preſumption of Donation from the Want of Paction: So there is as little from the Relation of the Parties, which is but collateral. 4. As to the Ground of Preſumption from *Bairdie*'s Letter and Ticket, the Queſtion is, If Aliment was originally due, and not if *ex poſt Facto*, it was diſcharg'd or accounted for: Nor is *Bairdie*'s long forbearing to ſeek Payment of the Aliment of any Import; The Delay of a Debt being no Diſcharge.

The Lords found *James Steidman* liable in an Aliment for his Son to *John Bairdie*, and remitted to the Lord Ordinary to modifie the ſame.

November 19, 1707. Barbara Hodge *contra* William Miller *Gardiner at the Abbey of* Holyroodhouſe.

IN the Reduction and Improbation at the Inſtance of *Barbara Hodge* as Heir ſerved and retoured to *Margaret Hunter*, againſt *William Miller*, for reducing a Diſpoſition of a Tenement at the Weſt Port of *Edinburgh*, granted to the Defender by *Agnes* and *Margaret Kincaids*, upon this Ground; That *John Horner* the *Kincaids* Author was denuded in Favours of the ſaid *Margaret Hunter*, before he diſponed to them: The Purſuer offered to prove by the Defender's Oath, That theſe Writs and Evidents denuding *Horner* in Favours of *Hunter* were in his own Cuſtody.

Alledged for the Defender. 1. The Purſuer can never get her Right to the foreſaid Tenement declared, and attain Poſſeſſion, altho the Defender ſhould be holden as confeſt, for not deponing upon his having the Purſuer's Evidents: For feudal Titles are not made up by holding Havers as confeſt, but by proving the Tenor; And the only Deſign of craving the Defender's Oath, is, Becauſe the Purſuer knows that he being a Quaker will ſcruple to depone in the common Form. Yet, 2. The Defender is content to *declare ſolemnly as in the Preſence of GOD, and as he ſhall anſwer to GOD at the great Day, That he ſhall declare the Truth.* Which *Formula* materially includes all that is intended by an Oath, and the like was taken for an Oath from *David Falconer*, a Perſon of the Defender's Principles, in the Competition of the Creditors of *Halkertoun*. Again, Quakers in *England*, *Holland*, and elſewhere, being indulged for the Preſervation of their Property to give a Declaration in the Terms aforeſaid in Stead of an Oath, It is hoped the Lords will require no more from the Defender: Seing to require Oaths from Perſons of his Perſwaſion, would expoſe their whole Subſtance as a Prey to un-chriſtian People, who might calumniouſly refer Things to their Oaths, and take Advantage of their refuſing to depone.

Replyed for the Purſuer. 1. By the Defender's being holden as confeſt upon the foreſaid Alledgeance, it would be preſumed in Law, That the Purſuer hath undoubted Right to the foreſaid Tenement in Queſtion, and that the Defender hath no Right, and conſequently ought to cede Poſſeſſion. 2. The Defender's Offer to ſubſcribe a Declaration in the Terms of the foreſaid *Formula*, cannot be admitted in Place of a ſolemn Oath, without overturning the known Principles of Law and Form: Becauſe a Party deponing muſt with Hand lifted up, and Head uncovered, (in Token of that Adoration he pays to GOD) repeat theſe Words, *By GOD himſelf, and as I ſhall anſwer to GOD, I ſhall declare the Truth.* As to the Pretence that the Defender and all his Party might be ruined if holden as confeſt for not deponing, by covetous Perſons commencing groundleſs Actions againſt them, and referring a relevant Point to their Oath, being ſure that they will not ſwear: This is abundantly confuted by the Experience of many Ages; No Complaints having ever been heard of covetous Perſons ſo making a Prey of Quakers, *&c.* Albeit it hath been the conſtant and inviolable Practice of this Nation to hold all Perſons, without Exception, as confeſs'd, who refuſe to depone in common Form; And if any Folks of that Kidney ſuſtain Loſs thereby, they have themſelves to blame. On the other Hand, if Declarations, however ſolemn, be ſuſtained in Place of Oaths, not only Quakers, Anabaptiſts, *&c.* But any Perſon pretending Tenderneſs of Conſcience, and that he thinks it unlawful to ſwear, may plead the ſame Exemption: And 'tis loudly talked, That theſe great Pretenders to Strictneſs, are not always juſt in their Dealings. Again, nothing ſeems more unreaſonable than to deprive innocent Perſons of their Mean of Probation through the Fault of Quakers, *&c.* And ſince even an Oath proves often a ſlender Bond upon the Conſcience, what can be expected from bare Declarations? Whatever may be the Cuſtom of other Nations, we have no Law or Cuſtom exempting any Perſon from deponing upon a relevant Alledgeance referr'd to Oath: Nor can ſuch an extravagant Indulgence be granted without an Act of Parliament. *Teſtibus enim, non Teſtimoniis credendum eſt*, is ſo far true, That a Witneſs's extrajudicial Oath, tho ſubſcribed by him, is not regarded; And one would think that a Perſon's Declaration ſhould far leſs be received in Lieu of his Oath. Is it not unequal to allow a Quaker to refer a Point to the Purſuer's Oath, and to oblige the Purſuer to take the other's Word of Honour or Declaration, tho amounting to no more, in the Opinion of the Quaker himſelf, than to an Aſſeveration, which ſome, inclining to defraud their Neighbour, may be tempted to make, who would ſcruple to perjure themſelves. *In Fine*, the Barons and Officers of the Army may more reaſonably plead to have their Word of Honour taken for an Oath, which they may be ſuppoſed to regard as much, as Quakers do their Declarations.

The Lords remitted to the Ordinary upon the Witneſſes, to take the Quaker's Oath in the Terms of the foreſaid *Formula* offered by him.

Eodem Die. *Sir* Alexander Cuming *of* Culter, *contra Sir* Andrew Kennedy.

IN the Reduction and Declarator at the Inſtance of Sir *Alexander Cuming* againſt Sir *Andrew Kennedy*, for reducing Sir *Andrew*'s Liferent Right to the Office of Conſervator of the *Scots* Privileges in the United *Provinces*, upon this Ground; That he had neglected his Duty at the *Staple Port*, and omitted to put the Laws in Execution againſt Tranſgreſſors of the *Staple*, and been guilty of other Malverſations: The Defender founded on the Queen's

Indemnity dated 16 *March* 1703, to exculpate him from any Malverſations preceeding that Time. "In Reſpect the ſaid Indemnity Pardons, Remits, and Acquits all Her Majeſty's Subjects of all Breaches or Abuſes of, or Malverſations in publick Truſts, with all other Crimes, Delinquencies or Tranſgreſſions incurr'd by Word, Writ, or any other Act, either of Omiſſion or Commiſſion preceeding the Date, which directly or indirectly are, or may import the Contravention of any Law, Cuſtom or Conſtitution of *Scotland*; And that in ſo far as the ſame may infer any Pain or Puniſhment, either in their Lives, Fortunes, Eſtates, Fame or Reputation.

Alledged for Sir Alexander Cuming. The Queen's Indemnity cannot exoner Sir *Andrew* as to preceeding Malverſations. Becauſe, 1. Sir *Andrew* was proſecuted and complained on before the Indemnity: And a Perſon attainted of Felony is not underſtood to be pardoned, without a ſpecial Clauſe remitting the Proſecution and Attainder, *Cromp.* 115. *N.* 1. *Lamb.* 502. *Dalton* 245. and *Julius Clarus* gives an Inſtance of one who was executed 1558, albeit *obtinuerat Literas Impunitatis a Principe*, which bore not that *Tempore Impetrationis erat in Carcere detentus.* 2. Sir *Andrew* continued not innocent after the Indemnity, but re-acted the Malverſations complained of; and the Breaker of the Peace after Pardon, forfeits the ſame, and may be hang'd notwithſtanding: *Crom. ibid. Dalt.* 247. 3. The civil Proſecution of Deprivation falls not under the Indemnity, but only in ſo far as the Proſecution may be criminal by inferring Pain or Puniſhment: *Prodeſt enim hujuſmodi Principis Indulgentia Reo, quoad Pœnam corporalem avertendam, non etiam quoad Pœnam et intereſſe*; *Perez. in Codic.* 4. The Indemnity concerns only the Contravention of any Law or Cuſtom of *Scotland*, whereby the Sovereign only is prejudiced, and not the Contravention of foreign Treaties, the Law of Nations, and a particular Contract in Favours of the Royal Burrows and the Nation, which Sir *Andrew* is charg'd with: Nor can it be imagined, That Her Majeſty intended to anſwer the Complaints of foreign States, with an Indemnity to the Perſon that injured them. 5. The Indemnity could only take away involuntary Tranſgreſſions in Office: Whereas Sir *Andrew*'s Malverſations were voluntary and deliberate *Lucri faciendi Gratia.* Nor can Indemnities alter or change the Nature of a Perſon, ſo as to make a Man that has often betrayed his Truſt, fit to be truſted again; more than it would render one convict of habitual Perjury a habile Witneſs. 6. An Indemnity doth not reſtore againſt legal or implyed Irritancies, which in the Conſtruction of Law are the ſame; can not be extended to Recognition, Eſcheat or the double Avail of Marriage, or the like, which are penal: As it would not hinder the Deprivation of a Meſſenger notoriouſly malverſing, or continue a Miniſter guilty of Simony, or ſupport Marriage diſſolv'd by Adultery. Beſides, tho an Indemnity pardons, it doth not reſtore Perſons to their forfeited Offices.

Anſwered for Sir Andrew. There is no Parity betwixt extending the Indemnity to legal Irritancies and feudal Delinquencies, whereby the Intereſt of private Parties would be prejudiced, or to Simony, which is regulated by a Superior Authority; And the extending it to exculpate from Malverſations inferring Deprivation of an Office. 2. 'Tis frivolous and a metaphyſical Stretch to pretend, That Malverſations which may deprive a Perſon of his Office and Property, and alſo reach his Reputation, fall not under the Verge of the Indemnity; as if forſooth the taking a Man's Bread from him, and his good Name, that is dear to an honeſt Man as his Life, were no Pain or Puniſhment.

The Lords ſuſtained the Defence founded on the Indemnity, to exculpate for any Malverſations preceeding the 16 Day of *March* 1703, which was the Date of the Act of Indemnity.

November 21, 1707. Gavin Waddell *Portioner of* Bothwell, *contra* Bethia Waddel *and* John Gilhaigie *her Husband.*

IN the Reduction and Improbation at the Inſtance of *Gavin Waddel* as Heir to *James Waddel*, againſt *Bethia Waddel* and *John Gilhaigie* her Husband, for reducing an Appriſing of ſome Tenements and Acres of Land in *Bothwel* belonging to the ſaid *James Waddel*, led by *Janet Hamilton Bethia*'s Mother, upon a Decreet of Conſtitution obtained againſt him as repreſenting *Alexander Waddel* his Father, for Implement of the Proviſions in her Contract of Marriage with *Alexander*; the Purſuer crav'd Certification againſt the Contract in Reſpect it was not produced. The Defenders to ſtop Certification, repeated *incidenter* a proving of the Tenor, condeſcending upon this *Caſus Amiſſionis*, that *James Waddel* the Purſuer's Predeceſſor had wrongouſly by Ways and Means abſtracted the Contract; as appear'd by a Declaration under *James*'s Hand, emitted for the Exoneration of his Conſcience before the Miniſter and Schoolmaſter of the Place. For making up the Tenor, the Decreets of Conſtitution and Appryſing, by Virtue whereof the Defenders had been Thirty Years in Poſſeſſion, were produced; And in Fortification Two honeſt Witneſſes deponed, That they ſaw the Contract about Thirty eight Years ago, ſubſcribed by *Janet Hamilton*, and by *James Hamilton* of *Boigs* her Brother as a Witneſs, and remembred of a Liferent-proviſion therein made to her, but did not mind the whole Contents thereof, being *in Re antiqua.*

Alledged for the Purſuer. No Reſpect can be had to *James Waddel*'s Declaration, becauſe it was reduced as being granted on Death-bed. Beſides, it is ſuſpected to be falſe, for that the Subſcriber writes his Name *ad longum*, who a few Days before had ſubſcrib'd other Papers by the initial Letters of his Name, being incapable to write more: And the Lady *Parkhead* to whom by the Declaration, he ſays, he delivered the Contract, purſued in an Exhibition, denied that ever ſhe ſaw the ſame. 2. The Decreet of Conſtitution is no ſufficient Adminicle, being founded only upon an Extract of the Contract regiſtred in the Time of the *Engliſh* Judges a Year after *Alexander Waddel*'s Death, which was no better than a Copy: Now the exacteſt Copy, and even notorial Doubles, have been rejected as Adminicles for proving of Tenors; *Dirltoun Deciſ.* 77. Nor can Regard be had to the Alledgeance of long Poſſeſſion: Becauſe, *Janet*'s Poſſeſſion was only by Virtue of her Liferent, after whoſe Deceaſe *James Waddel* the Purſuer's Predeceſſor, and his Brethren poſſeſs'd ſucceſſively. 3. As to the Witneſſes adduced, they are not *Teſtes Inſtrumentarii*, and declare nothing as to the Subſcription of *Alexander Waddel* the principal Party.

Anſwered for the Defenders. 1. The Declaration, without Reſpect to the Law of Death-bed, muſt be conſidered as the Confeſſion of a dying Man, who is to be preſumed to have been ſincere. It is not of Import that a ſick Man in a chronick Diſtemper ſubject to unequal Paroxiſms of Fever and Calmneſs did write his Name better at one Time, than at another. As to the Circumſtance of the Declaration concerning its having been delivered to a Lady who denies upon Oath that ever ſhe ſaw it: The Declarant might have been eaſily miſtaken by giving it to one he thought was the Lady, or to ſome Perſon to deliver it to her; And ſhe might have received it tho ſhe never ſaw it, by getting it ſealed under a Cover from another Hand; But whatever Way it came from the Declarant, he got it out of *Janet Hamilton*'s Coffer. Beſides, in mutual Obligations, eſpecially Contracts of Marriage, where there are many Parties and Witneſſes, the *Caſus Amiſſionis* is not ſo nicely inquired into; As in the Caſe of a ſimple Bond, which may be extinguiſhed by retiring. 2. It was a Principal and not a Copy of the

Contract that was produced in the Proceſs of Conſtitution : It being uſual in the *Engliſhes* Time for the Keeper of the Regiſter, to mark the ingiving of the Paper to be regiſtred, and to return the ſame to the Party, taking only a Copy to record it by; which Copies, after the Practice was reprobated, came to be confounded and neglected. And the *Engliſh* were ſo wiſe as not to regard the frivolous Subtilty of not regiſtrating a Writ after the Granter's Death. Again, tho' Execution or Diligence of Horning, Poinding or Caption upon a Writ ſo regiſtred might have been declared null : Yet where nothing followed upon the regiſtrating but what might have proceeded upon the principal Contract it ſelf, tho' it had never been marked regiſtrate, by Way of Action; *non refert* whether the regiſtrating was before or after the Granter's Death. Again, the Poſſeſſion of *James Waddel* and his Brethren was but clandeſtine before the Defenders adverted to their Intereſt, who ſince the other's Removal have poſſeſſed a Matter of Thirty Years. 3. Tho' in a proving the Tenor of this Contract in Order to purſue thereon, it were reaſonable to require a nice and mathematical Inſtruction of the whole Contents of the Writ, and Subſcriptions : Yet the Adminicles and Documents adduced by the Defender are more than ſufficient to exclude Certification againſt it, being expede in *Anno* 1638, now Seventy Years ago. For albeit poſitive Falſhood might be a Ground to reduce a Writ *quandocunque*, yet this old Contract upon which Two Decreets, Infeftment, and Poſſeſſion hath followed, cannot be taken away only by the preſumptive Falſhood of a Certification.

The Lords found (there being no Qualifications of Falſhood inſiſted in) the Adminicles proved, and relevant to exclude the Certification.

December 4, 1707. Alexander Aitkin *of* Middlegrange, *againſt* James Goodlets *elder and younger of* Abbotſhaugh.

JAmes Goodlet in his Contract of Marriage with *Agnes Melroſs*, *obliged himſelf, his Heirs and Succeſſors in the Eſtate therein-mentioned, to pay to the* *eſt of the Children to be procreated of the Marriage, the Sum of Ten thouſand Pound* Scots, *to be divided equally among them at their reſpective Ages of Sixteen Years; with Annualrent during the not Payment, and this Proviſion, that the Portion of any of theſe younger Children dying unmarried ſhould fall to the Survivers.* There having been Four Children of the Marriage, whereof one went abroad without returning home, the Father diſponed his Eſtate in Favours of his ldeſt Son *James Goodlet* younger, with the Burden of paying his anterior juſt and lawful Debts, and 10000 Merks to *Alexander* and *Jean Goodlets* his other Children, as their Portion natural. *Jean* having died leaving a Daughter behind her, who was ſerved Heir to her Mother, and then died: *Alexander Aitkin* the Father, as Heir to his Child, purſued *James Goodlets* elder and younger for Payment of the 5000 Merks provided to *Jean* his Wife, and for the equal Third Part of *John*'s Portion who had deceas'd before his Siſter after e was Sixteen Years complete.

Alledged for the Defenders. Abſolviture, *quoad* the 5000 Merks, becauſe moveable, and ſo not to be carried by a Service. 2. Abſolviture from any ſhare of the Brother's Portion, becauſe *non conſtat* he is dead. And *eſto* his Death were proved, the Purſuer's Wife being neither Heir nor Executor to him, his Portion would belong to the ſurviving Brother.

Replyed for the Purſuer. Tho' the 5000 Merks was moveable by the Contract of Marriage, it became heretable by the ſupervenient Diſpoſition, which made it a real Right upon the Eſtate diſponed by *James Goodlet* elder to his on; both the Procuratory of Reſignation and Precept of Seaſin being affected with the Burden thereof, whereby the Daughter was preferable to all the

Deeds of the Son. 2. That the Brother is dead is inſtructed by the Diſpoſition, wherein the Father reckons on no more Children but Three: Eſpecially conſidering, that the Purſuer having offered to prove by the Defender's Oath that he was dead, the Deponent acknowledged, *That he ſuſpected the worſt*. Again, the Portion of the deceaſing Children being provided in the Contract of Marriage to the Survivers, the ſurviving Children had Right to draw the ſame, without any Title of Succeſſion. And tho' the former, by arriving at the Age of Sixteen, might ſeem *facere Partes*; yet by their Death without uplifting the Mony, the latter's Right revived, as if the deceaſed Children had never exiſted.

Duplyed for the Defender. The younger Childrens Proviſion that was moveable by the Contract of Marriage, became not heretable by the Diſpoſition, more than all the Father's other Debts wherewith he thought fit to burden his Son. For tho' the Burden did undoubtedly make the Son and Lands diſponed to him liable for the Debts and Proviſions, which thereby turned heretable *quoad Debitorem*, it did not change the Nature of theſe Debts, which notwithſtanding remained perſonal *quoad Creditorem*. Nor doth it appear to have been the Father's Intention by the burdening Clauſe in the Diſpoſition, to alter the Nature of his Daughter's Proviſion, but only to ſecure her as to the Payment: Eſpecially conſidering, that it was not originally conſtituted by the Diſpoſition.

The Lords found, That the Proviſion in Favours of the Four younger Children by the Diſpoſition granted by the Father to the Son, became heretable; and that the Brother is preſumed to be dead.

December 5, 1707. Iſobel M'lierie *Relict of* Thomas Glen, *againſt* James Glen *Merchant in* Edinburgh.

IN the Reduction at the Inſtance of *Iſobel M'lierie* againſt *James Glen*, for reducing his Adjudication of a Tenement in the *Canongate* belonging to the deceaſt *Thomas Glen* the Purſuer's Husband, upon this Ground; That the Bond whereupon the Adjudication proceeded being granted by the Defunct to *James Glen* his Brother a conjunct Perſon, for the Sum of 3000 Merks (Ten Times more than *James* was worth) payable about Five Weeks after the Date, and Adjudication thereon being led inſtantly after the Term of Payment; it was reducible upon the Act of Parliament 1621, as gratuitous and granted *in Fraudem* of the Purſuer, who was her Husband's Creditor *ab ante* by her Contract of Marriage.

Anſwered for the Defender. That he ought to be aſſoilzied from the Reaſon of Reduction, becauſe, 1. The Act of Parliament 1621 relates not to Bonds, but only to Diſpoſitions, Aſſignations, *&c.* And ſuch correctory Statutes being *ſtrictiſſimi Juris*, are not to be extended beyond the Words thereof, *June* 28, 1665, *Monteith* contra *Anderſon*. 2. Albeit the Act could be extended, yet ſeing the Bond whereupon the Adjudication followed bears for borrowed Mony, there is no Neceſſity further to prove the onerous Cauſe thereof, *January* 22, 1630, *Hopringle* contra *Ker*; for to require the Cauſe of Bonds of borrowed Mony to be otherways inſtructed than by the Narrative, would ruin all Commerce betwixt near Relations. Seing there would be the ſame Reaſon for obliging to prove the onerous Cauſe of a Bond produced as an Inſtruction of the Onerosity of another, as to prove the Cauſe of that other; and ſo *in Infinitum*: And there is frequently borrowing and lending without Witneſſes, and borrowing of Mony is not probable by Witneſſes.

Replyed for the Purſuer. The Act of Parliament reduceth all fraudulent Alienations in general: So that to reſtrict it to Diſpoſitions and Aſſignations ſpecially mentioned, as the more ordinary Sort of Conveyances, were *Fraudem facere Legi, & captare Verba*, without noticing the Scope and Meaning thereof. Were it not abſurd to allow a conjunct and confident Perſon Receiver of a Bond, by adjudging thereon the next Day, to carry off the Bankrupt's Eſtate; and yet to annul all other Deeds without an adequate onerous Cauſe? This were to pave a Way to Bankrupts for effectually defrauding their Creditors. 2. The Difficulty of proving the onerous Cauſe of the Bond, is not ſo great as repreſented: For if the Mony was truly lent, it may be inſtructed by antecedent Bargains betwixt the conjunct Perſons; or that the Defender uplifted ſo much Mony from another Hand, and took Bond for it from *Thomas Glen*. Whereas it is notour, that the Defender was never capable to lend ſuch a Sum, nor was ever Maſter of 100, far leſs of 3000 Merks: And the ſmall Time betwixt the Date and Term of Payment of the Bond, with the haſty leading of Adjudication thereon, do clearly argue a deceitful Deſign to carry off the Lands in Prejudice of lawful Creditors. 3. Deciſions are ſtrictly to be interpreted, being founded on Specialities and Matters of Fact to which they are adapted: And there is a Difference betwixt a ſingle Deciſion, and Cuſtom, or frequent Deciſions. Nay, have not the Lords ſometimes receded even from old Cuſtoms, for preventing Inconveniencies: *Quia quod Conjectura credebatur prodeſſe, poſtea invenitur inutile*?

The Lords, in Reſpect the Bond on which *James Glen*'s Adjudication was led, was for a conſiderable Sum, payable in Five Weeks Time, and the Adjudication was ſuddenly led, found *Iſobel M'lierie*'s Reaſon of Reduction on the Act 1621 relevant; unleſs *Glen* aſtruct the onerous Cauſe of the Bond.

Eodem Die. Patrick Bell *Merchant in* Glaſgow, *againſt* Robert Campbell *of* Silvercraigs.

IN the Proceſs againſt *Robert Campbell* at the Inſtance of *Patrick Bell*, as having Right to the bygone Annualrents of 10000 Merks by Progreſs from *Mary Steuart*, to whom they were aſſigned by the deceaſt *Robert Campbell* of *Silvercraigs* her Husband, the Defender's Father, for Payment of theſe Annualrents that had been intrometted with by the Defender: He the Defender contended, That the Aſſignation to *Mary Steuart* the Purſuer's Author was null, for having but One Witneſs inſert and deſigned therein, tho' it be ſubſcribed by Two Witneſſes.

The Purſuer offered to ſupply the Nullity, by condeſcending upon the Deſignation of the other Witneſs, which is always ſuſtained as to Writs anterior to the Act of Parliament 1681, the firſt poſitive Law denying Supply to Writs not deſigning the Witneſſes.

Anſwered for the Defender. The *Act* 175. *Parl*. 13. *Ja*. 6. requiring the Writer's Name and Deſignation to be inſert in Writs before inſerting of the Witneſſes, implies that it was then a known ſtanding Law, that Witneſſes Names and Deſignations ſhould be inſert in all Writs, to which they were adhibited Witneſſes; and the Act 1681 was but correctory of an evil Cuſtom of ſupplying the Deſignation of Witneſſes, that had crept in by Prattick. Yea, the inſerting Witneſſes Names and Deſignations was ſo far approved in our Law before the Act 1681, that even Witneſſes inſert, tho' not ſubſcribing, were conſidered as inſtrumentary Witneſſes, to approve or improve the Writ: And the ſaid Statute, which allows only of ſubſcribing Witneſſes, requires expreſly that in the Terms of the former Law their Names and Deſignations be inſert in the Body of the Writ. 2. Whatever may be ſaid for ſupplying the Deſignation of Witneſſes whoſe Names are inſert in the Body of the Writ, a Witneſs's Name and Deſignation was never allowed to be condeſcended on, where neither Name nor Deſignation was inſert in the Body of the Paper; as Sir *George Mackenzie* obſerves on the *Act* 80. *Parl.* 6. *Ja.* 6. where he cites for this a Deciſion, *January* 24, 1668, Magiſtrates of *contra* Earl of *Finlator*.

Replyed for the Purſuer. The Diſtinction betwixt a Witneſs not deſigned, and one not inſert, is imaginary, without any Foundation, Statute, or Deciſion: And if the inſerting were to be divided from the deſigning, the latter is by far the more important; ſeing Deſignation affords Means of Inquiry into the Hability, Faith, Fame and Condition of the Witneſs, whereas the bare inſerting of his Name would contribute nothing thereto; nor will the inſerting of a Witneſs prove that he was preſent at the ſubſcribing of the Writ. But then again, the Witneſs quarrelled is inſert by his ſubſcribing of the Writ; and 'tis no Matter what Place of the Writ he be inſert in: For albeit the Act of Parliament requires the Writer of a Paper to be inſert and deſigned in the Body thereof, before inſerting the Date and Witneſſes Names, Cuſtom hath ſuſtained the inſerting of the Writer in any Part of the Writ. 2. A Condeſcendence upon the Inſerter of the Witneſſes was ſuſtained, tho' himſelf was neither inſert nor deſigned; *November* 30, 1683, obſerved by my Lord *Newtoun*: Which furniſheth a good Argument for the ſupplying of a Witneſs not inſert.

Duplyed for the Defender. The Filler up of the Date and Witneſs is neither in the Letter, nor in the Reaſon of the Law, and uſeth not to be diſtinguiſhed from the Witneſſes, whereof one ordinarly fills up the Date and Witneſſes Names and Deſignations, tho' he may ſometimes forget to mark the ſame.

The Lords ſuſtained the Nullity.

Eodem Die. John Cuninghame *of* Enterkin, *againſt his Curators*.

Enterkin's Curators who ſuffered him, during their Office to intromet with his own Rents, being purſued at his Inſtance to compt and reckon; The Lords, *July* 23, 1707, found that the Minor's uplifting a Part of his Rents did only make him liable for his actual Intromiſſions, and did not exoner the Curators from compting for the whole Rents, deducing what the Minor uplifted. The Curators now alledged that *Enterkin* compted with and diſcharged the Tenants, and thereafter retired theſe his Receipts, giving new ones in Place thereof, and applying former Payments in Satisfaction of ſubſequent Rents due to himſelf: Which uncontroulable acting by himſelf without adviſing with the Curators, was ſufficient to exoner them, who never meddled further than to authorize him when required, knowing his Activity and Application. Eſpecially conſidering, that he continued his Management after Majority, and fitted Accompts with the Tenants as to preceeding Reſts; ſo that the Curators could not know what he received, the Receipts being retired and renewed.

Anſwered for Enterkin. That his diſcharging after Majority ſome Tenants, could not hinder to charge his Curators for the Rents of other Tenants never intrometted with by him, and ſuffered to periſh by the Defenders Negligence. Again, ſeing both the Tenants and the Curators were liable to *Enterkin*, he might take what he could get from either, and ſeek what he wants off the other: For a Minor getting after Majority Decreet for his Relief of Cautionry, was not excluded from the Benefit of reducing his Bond upon Minority, *February* 20, 1668, *Farquhar* contra *Gordon*; and the homologating one Article, doth not infer Homologation of another Article in the ſame Writ, *November* 22, 1662, *Primroſe* contra *Dun*.

The Lords ſuſtained the Defence, to exoner the Curators only as to what *Enterkin* actually intrometted with.

December 9, 1707. *The Lord and Lady* Pitmedden, *againſt Sir* Robert Gordon *of* Gordonſtoun.

ALexander *Farquhar* Merchant in *Aberdeen*, having aſſigned to Mr. *Robert Forbes* one of the Regents of the College there, a Backbond granted to him by Sir *Ludovick Gordon* of *Gordonſtoun*; Mr. *Robert* by his Backbond owned that he was only a Truſtee for the Behoof of the Cedent's Creditors, and obliged himſelf to imploy what Sums he ſhould recover, in Satisfaction of the Expences to be deburſed in proſecuting the Affair *primo Loco*, and for Payment of Mr. *William Lauder*, &c. *ſecundo Loco*, and to the Cedent's other Creditors, according to their reſpective Ranking in the Backbond; And in Caſe he ſhould refuſe to do Diligence, obliged himſelf to denude in Favours of any Perſon named by the major Part of the foreſaid Creditors. Mr. *Robert Forbes* obtained in his Cedent's Name a Decreet againſt Sir *Ludovick Gordon*, for Implement of his Backbond, who raiſed Suſpenſion and Reduction thereof. During the Dependence of this Proceſs, both Mr. *Forbes* and *Farquhar* having dyed, it was transferred at the Inſtance of the Lady *Pitmedden active*, as Heir and Executor to Mr. *William Lauder* the Creditor preferred in Mr. *Forbes*'s Backbond, and transferred *paſſive* againſt Sir *Robert Gordon* of *Gordonſtoun*, as repreſenting Sir *Ludovick* his Grandfather.

At the calling of the Cauſe, it was alledged for the Defender, That the Proceſs could not go on in the Lady *Pitmedden*'s Name: Becauſe Mr. *William Lauder* had no direct Right to the Subject in Queſtion, Mr. *Robert Forbes* not being denuded by the Backbond in Favours of *Alexander Farquhar*'s Creditors, but only under a perſonal Obligement to denude in their Favours. So a Backbond was not found equivalent to a Retroceſſion, *January* 18, 1706, *Chaplain* contra *Henderſon*. For, as the Creditors contained in a Donatar of Eſcheat's Backbond, have an Intereſt in any Proceſs carried on by him for recovering the Eſcheat Goods; who yet could not at their own Inſtance proſecute any ſuch Action: So Mr. *Robert Forbes*'s Backbond not being equivalent to a Tranſlation to *Farquhar*'s Creditors; And the Lady *Pitmedden* in the Right of Mr. *Lauder*, not being the major Part of theſe Creditors by whoſe Conſent Mr. *Forbes* was to denude; ſhe is not the proper Contradictor in this Proceſs, and no Sentence againſt her could terminate the Plea, or ſecure the Defender as a *Res judicata* againſt the Repreſentatives of *Farquhar* and *Forbes*, or ſuch of the other Creditors mentioned in his Backbond, as ſhall make up a Right thereto by Confirmation or other habile Diligence. Beſides, her Intereſt being only ranked in the ſecond Place, the preferred Intereſt muſt be firſt ſatisfied.

Anſwered for the Purſuer. Seing Backbonds qualifie all perſonal Rights, the Caſe here is the ſame, as if the Names of Mr. *Farquhar*'s Creditors and Mr. *William Lauder* in the firſt Place had been expreſly ingroſſed in the Aſſignation to *Forbes*, and he declared only Manager, with the Burden of paying the deburſed Expences. Yea, Mr. *Lauder* being *nominatim* inſert in the Backbond, had Right to the Subject without any Aſſignation, *February* 5, 1678, *Mackenzie* contra *Watſon*, where the Backbond was found to exclude a third Party arreſting, whoſe Caſe was more favourable: As Proceſs and Diligence at the Inſtance of an Executor, do accreſce to, and may be carried on by any of the Creditors or Legators. Again, to plead no Proceſs againſt a Creditor upon an Eſtate, becauſe all the reſt are not concurring, or to ſay that becauſe the Executors of Mr. *Robert Forbes* do not inſiſt for the Expence of his Proceſs, none of the Creditors in the Backbond could purſue thereon for Payment of their Debts, is moſt abſurd: And the Defender may ſecure himſelf againſt any Danger that Way, by a multiple Poinding. 2. There is no Affinity betwixt the Prattick of *Chaplain* and *Henderſon*;

ſon, which relates to a Competition of Rights, and the preſent Queſtion, Whether a Perſon having Intereſt in a Subject litiſconteſted betwixt two Parties, may compear and repete his Intereſt in that Proceſs, and crave Preference in the Terms of a clear Backbond.

The Lords ſuſtained the Lady's Intereſt as ſufficient to intitle her to inſiſt in the Proceſs: She finding Caution to pay what ſhall be found due to the Repreſentatives of Mr. *Robert Forbes*.

Eodem Die. *The Magiſtrates of* Aberdeen *and others, againſt* John Irvine *of* Kincauſſie.

THE Magiſtrates of *Aberdeen* and others, ſtanding infeſt as Patrons and Adminiſtrators of the Salmon Fiſhing of the Barony of *Murtle* on the North Side of the Water of *Dee*, mortified by *Katharine Rolland* Relict of Doctor *William Guild*, to certain Burſars and Scholars, purſued an Action of Moleſtation and Declarator againſt *John Irvine* of *Kincauſſie*; for declaring the Property, and that *Kincauſſie* might be decerned to deſiſt from moleſting them therein, or drawing or drying his Nets on a Place called *the Hollens*.

Alledged for Kincauſſie. That he had preſcribed a Right by Fourty Years Poſſeſſion of Fiſhing alongs *the Hollens*, and drying his Nets thereon.

Replyed for the Magiſtrates. That Preſcription could not run againſt the Right of Mortification to pious Uſes, as was decided betwixt *Heriot*'s Hoſpital and *Hepburn* of *Beirfoord*; *Stair's Inſtit. Lib.* 2. *Tit.* 12. §. 18.

Duplyed for Kincauſſie. The Interloquitor in Favours of *Heriot*'s Hoſpital was recalled upon a Hearing in Preſence, and the Decreet went out in the 1693, in Favours of *Beirfoord*; finding that Preſcription might run againſt the Hoſpital, the Adminiſtrators and Truſtees being Majors. But then, the Purſuers are not in the Caſe of *Heriot*'s Hoſpital, which is founded in Favours of Minors: For, the Burſars of their Foundation may be, and often are Majors; And the Patrons being infeſt in the Fiſhing mortified, Preſcription runs againſt them without Regard to the Deſign of the Mortification; And *June* 30, 1671, the Beadmen of *Magdalen*'s Chappel againſt *Dryſdale*, Preſcription was found to run againſt pious Mortifications.

The Lords repelled the Objection againſt Preſcription, *viz.* That the Fiſhing belonging to the Purſuers is mortified for maintaining of Burſars.

December 10, 1707. James Lees *Merchant in* Glaſgow, *againſt* Robert Dinwoodie *Merchant there*.

IN the Action at the Inſtance of *James Lees*, as Executor Creditor to *Ninian Glaſs*, againſt *Robert Dinwoodie*, and *Elizabeth Kelburn Ninian*'s Relict, for the Value of their Intromiſſion with ſome Goods belonging to the Defunct: The Lords the 18 of *July* 1706, found the confirmed Teſtament at *Lees*'s Inſtance null, in Reſpect that before the Date thereof, the Defunct's Relict was confirmed Executrix to him, and ſhe was not called in *Lees*'s Confirmation, who is alſo confirmed a principal Executor, and not *ad Omiſſa*.

Mr. *Lees* yet inſiſted and urged, That tho' the Teſtament confirmed in his Favours be found null, it is *Jus Tertii* to Mr. *Dinwoodie* to found upon the firſt Confirmation, which he has no Right to, in Order to quarrel the Purſuer's Title by the ſecond.

Alledged for Dinwoodie. That he having been conveened before the Commiſſars of *Glaſgow* for the Value of the Goods intrometted with by him, at the

Inſtance of *Elizabeth Kelburn* the principal Executrix, upon an Eik thereof made to her Confirmation; He obtained Decreet of Abſolviture upon a Ground of Compenſation for a liquid Debt reſting to him by the Defunct. By which Abſolviture he hath Intereſt to found on the Relict's Confirmation, as preferable to the Purſuers.

Replyed for Lees. He being Creditor as well as Executor, and having cited both the principal Executrix, and *Robert Dinwoodie* Debtor for the Goods confirmed, was thereby preferable to theſe Goods. Which Preference by the firſt Citation and Diligence againſt the Executrix, could never be excluded upon any Ground of Compenſation founded on by *Dinwoodie*; otherwiſe, it were in the Power of any Creditor of a Defunct to prefer himſelf, and diſappoint another's Diligence. Nor could there be any Concourſe of Debit and Credit in the Perſon of the Executrix, to give Riſe to the Compenſation: Becauſe, ſhe could in no Event be Debtor to *Dinwoodie*, except for the unexhauſted free Gear, not affected by the preferable Diligence of other Creditors. And the uſing habile Diligence againſt Executors, is the legal Way of giving Preference to the Defunct's Creditors: In ſo far as a Debtor's taking Aſſignation to his Creditor's Debt after his Deceaſe, could not thereon found Compenſation againſt the Executor, *February* 8, 1662, *Crawford* againſt the Earl of *Murray*; *February* 14, 1662, the Children of *Mouſwal* contra *Lawrie*. And if a legal Aſſignation of the Defunct's Debt could not ſecure the Debtor againſt the Executor; far leſs could *Dinwoodie*'s unwarrantable Intromiſſion with *Ninian Glaſs*'s Goods, prefer him to the Payment of Debt due to him by the Defunct, upon the Pretence of compenſing the ſaid Intromiſſion, to the Prejudice of habile Diligence uſed by other Creditors.

Duplyed for Dinwoodie. The Relict as Executrix dative, being Debtor to the Defunct's Creditors *quoad Vires Inventarii*, and *Dinwoodie*, who was Creditor to the Defunct by Bond, falling to be Debtor by Intromiſſion with his Goods; there was a clear *Concurſus Debiti & Crediti*: And ſeing he was not Aſſigny, but Creditor to the Defunct *proprio Nomine*, the Deciſions adduced concerning Aſſignies not having the Benefit of Compenſation againſt an Executor, are not applicable to this Caſe. 2. No Reſpect to *Lees*'s firſt Citation: Becauſe, 1. It was given at his Inſtance as Executor to the Defunct; And the Teſtament being found null, the Citation and all that followed thereon, muſt fall in Conſequence to all Intents and Purpoſes. Nor could he as Creditor purſue for the Debt he had confirmed as Exectuor, in Regard *qua talis* he was Debtor, and ſo his Debt was extinguiſhed *Confuſione*. 2. The Citation at *Lees*'s Inſtance was given to the Relict before the Goods purſued for were eiked to her confirmed Teſtament.

Triplyed for Lees. Elizabeth Kelburn's principal Teſtament is null, for that it does not bear, that at the Confirmation ſhe made Faith and gave her Oath upon the Inventory, which is indiſpenſibly required by the Commiſſars Inſtructions: And the Teſtament being null, there was no Neceſſity to call her to *Lees*'s Confirmation. 2. Tho' her Teſtament were valid, and *Lees*'s Confirmation null as to the Office, in ſo far as exceeds the Payment of his juſt Debt, it ought to be ſuſtained at leaſt as a Security for that: As the Lords are in Uſe to ſuſtain the Diligence of Creditors *ad talem Effectum*, tho labouring under greater Defects.

Quadruplyed for Dinwoodie. It's true, by the Inſtructions to the Commiſſars, Executors are to make Faith upon the Inventory, That nothing is omitted or male-appretiated, which is done before giving out the Confirmation: But the making Faith is never carried further, or expreſt in the Confirmation, than by theſe Words in the Beginning, *Faithfully made and given up by ſuch a Perſon Executor*. 2. *Lees*'s Confirmation being found null, and the principal Executor having eiked the Debt due by *Dinwoodie*, and purſued him, and he being aſſoilzied upon Compenſation; This is a ſufficient *medium Impedimentum* to hinder *Lees*'s Confirmation to have any Effect.

The Lords ſuſtained the Defences proponed for *Dinwoodie*, and aſſoilzied him from the Proceſs at *James Lees*'s Inſtance.

Thereafter, *February* 12, 1708, it was alledged for *Lees*, That he offered to improve the Execution of the Edict whereupon the Relict was confirmed, and craved that *Dinwoodie* might abide by the ſame *ſub Periculo Falſi*: And the Execution of the Edict being taken away as falſe, the Confirmation following thereon, and *Dinwoodie*'s Abſolviture muſt fall in Conſequence; And *Lees*'s Confirmation as the next valid Deed muſt take Place. For Improbation ſtates the Relict in the ſame Caſe, as if ſhe had never been confirmed, a falſe Confirmation and no Confirmation being *paria in Jure*. Nor can it be pretended that Improbation is not competent *hoc Ordine*: Seing the Writs craved to be improved, and all Parties concerned are in the Field; and *Lites non ſunt multiplicandæ*; And Improbation is proponed by Way of Reply by the Purſuer himſelf, who cannot be thought to do it *Animo protelandi Litem*.

Anſwered for Dinwoodie. If the Execution of the Relict's Edict be falſe, *James Lees* may inſiſt againſt her as he may be ſerved: But Mr. *Dinwoodie* is no Way concerned therein, whoſe Abſolviture would ſtand good to him, as if he had *bona Fide* paid the Executrix, albeit the Execution of the Edict were improved. 2. The Relict is not compearing, and ſo all concerned in ſuch an Improbation, are not in the Field.

Replyed for Lees. There is a great Difference betwixt *bona Fide* Payment, and an Abſolviture upon Compenſation: For in the laſt Caſe, the Perſon aſſoilzied is at no Loſs by being reconveened, which cannot be ſaid of him who hath *bona Fide* paid, and wants his Mony. And if Improbation ſhould not be received *Incidenter* againſt *Dinwoodie*, there could be no Safety againſt Falſhood. For how eaſie is it to get a mean Perſon to make up a falſe Right to the moſt conſiderable Debt, and to cauſe him diſcharge the Debtor; Whereby the true Proprietar would have but an unprofitable Action againſt the Forger, who perchance is gone off for his Safety.

The Lords found that *Dinwoodie* is not bound to abide by the Verity of the Relict's Teſtament, and that the Improbation is not competent in this State of the Proceſs; And therefore adhered to their former Interlocutor aſſoilzieing *Dinwoodie* from the Proceſs: Reſerving to *Lees* to purſue his Improbation againſt the Executions of the Relict's Teſtament, as accords.

December 12, 1707. Mary Fergus *againſt* Iſobel Birrel *and* Alexander Swyntoun.

BY Contract of Marriage betwixt *William Fergus* and *Agnes Birrel* Heireſs of *Freuchie*, ſhe diſponed her Land to him and her ſelf in Liferent, *and to* the Heirs betwixt them; which failzieing to her own Heirs and Aſſignies whatſoever: And it was agreed, that what happened to be conqueſt during the Marriage, ſhould go to the longeſt Liver, and the Heirs betwixt them; And failzieing theſe, ſhould be equally divided betwixt both their Heirs and Aſſignies whatſoever. Thereafter, *ſtante Matrimonio*, *Agnes Birrel* having, for onerous Cauſes, diſponed her Land to the ſaid *William Fergus* his Heirs and Aſſignies whatſoever, failzieing Heirs of the Marriage, reſerving her own Liferent, and he being infeft; there aroſe after the Death of both a Competition for the Land, betwixt *Mary Fergus*, who claimed it by the Diſpoſition as Heir to the Husband, and *Iſobel Birrel*, who, as Heir to the Wife, pretended to the Half of the Subject thereby diſponed, as being conqueſt during the Marriage.

Alledged for Mary Fergus. The Diſpoſition made *ſtante Matrimonio*, could not be called Conqueſt or *Feudum novum.* In Reſpect *William Fergus* was Liferenter by the Contract of Marriage, and the Diſpoſition gave him only a *remote Spes Succeſſionis*, or a Right of Subſtitution to the Heirs of the Marriage, who, had there been any, would have got the Lands as Heretage, and not as Conqueſt. So that the Subſtitution of *William Fergus*'s Heirs whatſoever to the Heirs to be procreated betwixt him and *Agnes Birrel*, is but a completing of his former Liferent Right; like an Heretor purchaſing Appriſings affecting his Lands, in Order to complete his former Right, which the Lords found to be no Conqueſt betwixt *Wauchop* of *Nidderie* and his Brothers, and betwixt the Lady *Caſtlehaven* and the Lord *Collingtoun*.

Anſwered for Iſobel Birrel. It's abſurd to pretend that the Diſpoſition to the Husband in Fie, whereby he might have diſponed the Land to any other at Pleaſure, did only make him an Heir of Proviſion, who needed no Service: Nor doth it follow, That becauſe the Husband had a Liferent, the ſupervenient Fie was not Conqueſt. The Deciſions cited are not to the Purpoſe, where Acquiſitions of Fie for ſecuring and completing former Rights of Fie, were not interpreted to be Conqueſt. But how can a Fie be acceſſory to a Liferent which it abſorbs, or Property be acceſſory to Servitude? And it is not ſtrange in our Law, to ſee a Right made over one Way, come back to the Granter in Whole or in Part another Way.

The Lords found, That, by the Clauſe of Conqueſt in the Contract of Marriage, the Lands diſponed by the Wife to the Husband during the Marriage, are Conqueſt to him, and that the Fie of the one Half thereof falls to the Heirs of the Wife.

Eodem Die. Patrick Coltran *and* Simeon Gullen *Merchants in* Wigtoun, *againſt* John Matthie *Merchant in* Preſtounpans.

PAtrick *Coltran* and *Simeon Gullen* having charged *John Matthie* upon a Decreet before the Admiral for the Sum of 1575 Pound *Scots*, as Three Fourth Parts of 2100 *lib.* intruſted by the Chargers to *Thomas Matthie* Skipper in *Preſtounpans*, upon his Receipt, as a Stock purſe for buying of Timber and Tar in *Norway*, effeiring to *John Matthie*'s Shares *qua* Owner of the Ship fraughted by the Chargers, whereof *Thomas Matthie* was Skipper: *John Matthie* raiſed Suſpenſion and Reduction of the Decreet upon this Ground, That the Judge committed Iniquity in finding the Owners liable for the Stock-purſe, albeit the Skipper was not *huic Rei præpoſitus*; and Owners can only be liable upon Contracts entred into with the Skipper in the Terms of his *Præpoſitura.* For if a Skipper ſhould undertake to negotiate Bills, buy Cargos, or carry Mony abroad, his own Faith is only followed for the Performance, and not his Owners, who put him not in for that Effect: Owners being only liable for the Contracts of the Maſter of the Ship in Relation to the preſumed Subject of his Truſt, as the taking Goods on Board, refitting and victualling the Ship, and paying the Seamens Wages, *L.* 1. §. 7. *ff. de exercitoria Actione*; whereas the Buying or Selling of Merchandize, and ſuch a Truſt as *Thomas Matthie* had from the Chargers, falls not under the general Truſt of a Skipper's Office, but requires a particular Commiſſion, *L.* 1. §. 3. & 12. *ff. Eod. Stair, Inſtit. Lib.* 1. *Tit.* 12. §. 18. *in Fine.*

Anſwered for the Chargers. By the Edict *Nautæ Caupones Stabularii* (which regulates all Caſes betwixt Owners, Fraughters and Skippers) Action is competent to Fraughters againſt the Owners, for any Damage ſuſtained through the Fault or Fraud of the Skipper or Maſter; *Quod minus Fidelium & Negligentium opera utuntur, L. ult.* §. 4. *ff. Eod.* §. *ult. Inſtit. de Oblig. quæ quaſi ex*

Delicto: And the Suſpender having intruſted *Thomas Matthie* to navigate his Ship, and to Let her out to Fraught, he is obliged for his Fidelity, and muſt anſwer for his Imbezilments, and running away with the Stock-purſe. Nor doth it alter the Caſe, that the Skipper's Receipt mentioned a particular Sum received and obliged him to hold compt therefore: Eſpecially conſidering, That Mony, in the Caſes of *Norway* and *Indian* Voyages, is reputed Merchandize, as well as other Fungibles; and the moſt Part of Cargos carried from *Europe* to the *Indies* conſiſt of Dollars; and the *Lex Rhodia* brings Mony as well as other Goods in Contribution upon groſs Average. Again, the Skipper's Receipt was truly a Bill of Loading, *mutatis mutandis, ſecundam ſubjectam Materiam*; tho' it bear not, *That the Stock Purſe was ſhipped in good Order, and well conditioned, and to be delivered in the like good Order*, which had been incongruous: And tho' the Receipt obliges only the Granter to be comptable for the Mony at Meeting, that did not free him of his Duty of *Vectura* as a Skipper; And not to find the Suſpender liable in this Caſe, would have an evil Conſequence upon Commerce.

Replyed for the Suſpenders. The *Roman* Edict of *Nautæ Caupones Stabularii, &c.* cannot take Place here, in Reſpect the Skipper was not *tali negotio præpoſitus* by the Exercitors: And the Chargers who followed his Faith as to the Mony given him to buy Goods, muſt purſue him not as *Nauta*, but *tanquam Quilibet* as accords. 'Tis but trifling to extend a Receipt of Mony for which the Granter was comptable, to a Bill of Loading by which the *individuum Corpus* is to be delivered *in Specie*: It might with the like Reaſon be contended, That a Perſon may alienate his Heretage by Teſtament as well as by Diſpoſition, there being little Difference but *mutatis mutandis.* The ſuſpending of the Letters will not diſcourage Commerce, but only be a Rule to Merchants how to fraught Ships fairly hereafter, by not exporting Mony contrary to Law, *Act* 11. *Seſſ.* 3. *Parl.* 1. *Ch.* 2. or endeavouring to ruin Owners of Ships by private Pactions with the Skippers.

The Lords ſuſtained this Reaſon of Suſpenſion and Reduction, That the Skipper was not *huic negotio præpoſitus*, and that the Receipt for the Mony was not granted by him as Skipper, but as one whom the Charger truſted with ſo much Mony, which could not oblige the Owners.

December 18, 1707. John Dickſon *of* Hartrie *and Captain* William Murray, *againſt* Alexander Mill *of* Carriden.

ROBERT *Kennoway*, in his Contract of Marriage with *Agnes Crawford*, being obliged as Principal, and *Walter Kennoway* his Brother as Cautioner, to provide and imploy 8000 Merks for the Heirs and Bairns of the Marriage; *Jean Kennoway* only Child of the ſaid Marriage, and Captain *William Murray* her Husband, aſſigned the ſaid 8000 Merks to *John Dickſon* of *Hartrie*, who adjudged an heretable Right that *Walter Kennoway* Cautioner in the Contract had upon the Eſtate of *Clackmannan*, then ſtanding in the Perſon of *Alexander Mill* of *Carriden*, and purſued him upon his Father's Backbond to denude.

Alledged for the Defender. That the ſaid *Jean Kennoway* as Heir or Bairn of the Marriage was liable to relieve her Father's Cautioner; as the Lords had found, *November* 23, 1677, *Crawford* contra *Kennoway*.

Replyed for the Purſuer. The Proviſion purſued for being conceived in Favours of Heirs and Bairns, *Jean Kennoway* became not thereby univerſally liable as repreſenting her Father, but had Right thereto as a Creditor without a Service: Nor could even the Service of an Heir of a Marriage infer an univerſal paſſive Repreſentation, *July* 10, 1677, *Carnegie* contra *Smith.* If Heirs in a vulgar Senſe were not underſtood *Bairns*, it were impoſſible to provide Execution to paſs at the Inſtance of any Perſon in Favours of the Heirs or Bairns of a Marriage, againſt their Father: Seing the Intereſt of an Heir emergeth only upon the Predeceſſor's Death. Yea, if Heirs and Bairns of a Marriage could not purſue for their Portions without repreſenting, all ſuch Proviſions would be ſuperfluous, eluſory and uſeleſs. By Heirs procreated of a Marriage, we can only from the natural Import of the Word mean *Bairns*; ſeing none are born Heirs, but become ſuch, eſpecially in this Caſe, where the Words *Heirs* and *Bairns* are conjoined. Again, tho' the Cautioner be Creditor to the Father for his Relief, it were againſt common Senſe to ſay, that he could operate his Relief againſt the Bairns to whom he is Cautioner. 2. As to the Deciſion 1677, which ſeem'd to run in Favours of the Cautioner, that being yet in the Terms of a ſimple Interlocutor, cannot alter our Law, which provides Action to Bairns as ſuch upon perſonal Obligements conceived in their Favours, without Neceſſity of a Service, tho' they muſt be ſerved Heirs in ſpecial for tranſmitting Infeſtments into their Perſon. Again, perhaps that which influenced the Interlocutor 1677, was the Tutor's purſuing in *Jean Kennoway*'s Name as Heir of the Marriage, whereas the 8000 Merks is provided to Heirs and Bairns. 2. 'Tis *Jus tertii* for *Carriden*, who is conveen'd as having the Cautioner's Effects in his Hands, to propone any Defence *in Jure* for the Cautioner, which is diſclaimed by the Cautioner's Repreſentatives.

Duplyed for the Defender. Bairns are unqueſtionably Heirs of Proviſion to their Father, tho' the Deſignation of Bairns may be ſuſtained in Place of a Service: And whether the Proviſion be claim'd as Heir or Bairn, it makes the Receiver liable to the Creditors of the Father *in Valorem*; and the Relief of a Cautioner for the Father muſt have the ſame Effect. As to the alledged Inconvenience, that if Heirs or Bairns of a Marriage were obliged to relieve their Father's Cautioner, there would be no Security for Proviſions in Contracts of Marriage: Suppoſe it were ſo, *Incommodum non ſolvit Argumentum*; and yet they have this Security, that Implement may be purſued in the Father's Life, when the Defence of Relief is not competent.

The Lords found, That *Jean Kennoway* the Heir and Bairn of Proviſion is not bound to relieve the Cautioner for her Proviſion; and ſuſtained the Purſuer's Alledgeance of *Jus tertii.*

December 23, 1707. Alexander Brown *Merchant in* Edinburgh, *againſt* Hary Dow *Writer there.*

Alexander Brown, as Aſſigny by *Thomas Wordie* Merchant in *Stirling*, having purſued *Hary Dow* for an Accompt of Mony received by him from the Cedent, and referred the ſame to his Oath; He deponed acknowledging Receipt of the Mony, but added, that as he received it, ſo he expended the ſame upon *Wordie*'s Law Affairs before the Seſſion, and in Payment of his Creditors.

Alledged for the Purſuer. The Quality of the Oath is extrinſick, and the Defender ought to give a particular Condeſcendence of his Depurſements on the Purſuer's Affairs, that it may be conſidered if they ought to be allowed; and as to what was paid to Creditors, the Bonds or Bills ſatisfied muſt be given up to *Wordie* with their Diſcharges, that he may be out of Hazard of being diſtreſſed again for theſe Debts: Till all which be done, it cannot be known whether Mr. *Dow* hath taken Diſcharges, or Aſſignations to the Debts.

Anſwered for the Defender. No Quality of an Oath can be intrinſick, if Payment is not. An Agent's Depurſements in Law Affairs, requires no Inſtruction but his Accompt: And the Quality muſt alſo prove the Payment to Creditors; ſeing where there is no other Mean of Probation againſt a Perſon but his Oath, he may thereby exoner himſelf of his Acknowledgement, by the circumſtantiate Quality of Payment, 28 *March* 1629, *Gall* contra *Eviot*, 10 *July* 1632, Lord *Fentoun* contra *Drummond*.

The Lords found the Quality extrinſick, and that *Hary Dow* muſt inſtruct otherways than by his own Oath, what he paid to *Wordie*'s Creditors.

Eodem Die. John Crawford, John Gay, *and* John Fife *Indwellers in* Newark, *contra* Robert Cunninghame *Writer in* Edinburgh.

Robert Cunninghame being accuſed at the Inſtance of *John Crawford*, *John Gay* and *John Fife*, for giving out an Extract of a Bond granted by them to his Father, bearing the Two Witneſſes inſert in the Body to be ſubſcribing, whereas only one of them ſubſcribed, induſtriouſly to validate the null Bond: He alledged for his Exculpation, That he could have no evil Deſign in ſo doing, ſeing, 1. The Bond was valid without any Witneſſes, the ſubſcribing Parties being in Effect Witneſſes to one another; As was decided betwixt Sir *Thomas Kennedy* and Sir *Alexander Brand*: And if *Robert Cunninghame* had had any fraudulent Deſign to ſupply a Defect, he would have made the principal Writ conform to the Extract. 2. Many have fallen in the like, and greater Miſtakes by raiſing Horning againſt Perſons inſert in the Body of a Bond and not ſubſcribing, and Adjudication againſt ſuch; regiſtrating the Copy of a Paper for a Principal, and raiſing Diligence thereon againſt the deſigned Granter, as in the Caſe of *Sanderſon* contra *Dougalſtoun*, for which no Puniſhment was inflicted.

Anſwered for the Accuſers. The worſt Actions are not accompanied with the greateſt Prudence: And 'tis but weak reaſoning, to infer either Innocence or Fraud from Effects and Conſequences; The Nature of Actions being diſtinguiſhed by the preſumed Intention of the Actors. But that *Robert Cunninghame*'s giving out an Extract diſconform to the Principal, was not an innocent Miſtake, appears from his ingiring himſelf to write that Extract in Favours of his Father, albeit he was not an ordinary Writer of Extracts. Fifty ſeveral Debtors ſubſcribing a Bond granted by them would not ſupport the Writ without Witneſſes, tho it be otherways in mutual Contracts, which was Sir *Thomas Kennedy*'s Caſe with Sir *Alexander Brand*; Becauſe there every Contracter is a Debtor for his own Performance.

The Lords diſcharged the ſaid *Robert Cunninghame* for ever to meddle in any Buſineſs in the Clerks Chambers, or about the Parliament Houſe; and ordered him to Priſon during their Pleaſure.

December 26, 1707. John Cleghorn *late Baillie of* Edinburgh, *and* Alexander Cleghern *late Baillie of* Portsburgh, *contra* Agnes Yorſtoun *Relict of* James Inglis *Brewer in* Edinburgh.

Alexander Wood, *James Henderſon*, *James Inglis*, *John* and *Alexander Cleghorns*, having granted Bond of Co-principals, and full Debtors to Sir *Robert Chieſly* for 5400 Merks, and *Alexander Wood* and *James Henderſon* having broke and died; *John* and *Alexander Cleghorns* payed the Mony to Sir *Robert*, from whom they got a Diſcharge of their own Proportions, and an Aſſignation to 3/5 Parts for their Relief againſt the other Three *Correi debendi*, and thereupon purſued *Agnes Torſtoun* as repreſenting *James Inglis* her Husband for Payment of the ſaid 3/5 of the whole Sum, in Reſpect the other Two principal Obligants were *lapſi*.

Alledged for the Defender. That ſhe could only be liable *pro rata* of a Fifth Share of the Debt, her Husband being but one of Five *Correi debendi*, who were not bound conjunctly and ſeverally, but as Co-principals and full Debtors.

Replyed for the Parſuer. Full Debtors, are Debtors *in ſolidum*, or *in totum*, in Contradiſtinction to partial Debtors or Debtors in Part; and *qui totum dicit, nihil excipit*: Therefore the *Correi* being bound as full Debtors, were all liable to the Creditor *in ſolidum*, as if they had been bound conjunctly and ſeverally, and as if they had expreſly renounced the Benefit of Diviſion. Yea, the Word *Full Debtor* hath been extended to exclude even a Cautioner from his *Beneficium Ordinis*, *July* 1665, *Dunbar* contra the Earl of *Dundee*, obſerved by Preſident *Gilmore*: And *a fortiori* in this Caſe, where all the *Correi* are bound as Co-principals and full Debtors, the Defender ought to be liable in the Terms of the Bond and Aſſignation for $\frac{3}{5}$ Parts of the Sums paid by the Purſuers; Becauſe, the Two Shares of the inſolvent *Correi* muſt burden the Defender.

Duplyed for the Defender. The ordinary Clauſes of Stile (whereof the due Obſervance is ſeſſionly recommended to the Writers by the Lords) are not to be ſupplyed by Equivalents; And our Law knows no other Clauſe importing Debtors to be liable *in ſolidum*, than when they are bound conjunctly and ſeverally. Nor can the Words *full Debtors* import any more than, That all jointly are Debtors for the full Sum: As if they had granted Receipt of all and haill a certain Sum, and bound themſelves to repay the ſaid haill or full Sum. This is cleared from the civil Law, *L.* 11. *§.* 1. and 2. *ff. de duobus Reis Conſtitit. Nov.* 99, And the Opinion of Lawyers, *Vinn. ad Tit.* 17. *Lib.* 3. *Inſtit.* Beſides, had it been deſigned that the Debtors ſhould be liable *in ſolidum*, they had obliged themſelves *as full Debtors each for others*: And ambiguous Clauſes are to be interpreted in Favours of the Defender.

The Lords found, That the Debtors in the Bond were all liable to Sir *Robert Chieſly* the Creditor *in ſolidum*, but that the Defender would have been liable in a Fifth Part only for the Purſuer's Relief, had all the *Correi* been ſolvent; But Two of them being Bankrupt, the Defender was found liable in a Third Share of the Debt.

January 2, 1708. James *Lord* Montſtuart, *contra Dam* Elizabeth M‘kenzie *and Sir* James M‘kenzie *of* Royſtoun *her Husband.*

THe deceaſt Sir *George M‘kenzie* of *Roſehaugh*, Lord Advocate, “ Diſponed his Eſtate, failing Heirs-male of his own and his Son's Body, to the ſecond Son of *Agnes M‘kenzie* his eldeſt Daughter, married to the Sheriff (now Earl of *Bute*) and the Heirs-male of his Body, which failing, to her third, fourth and remanent Sons, and the Heirs-male of their Bodies, in Order after others, according to the Priority of their Birth; Which failing, to the ſecond, third, fourth and remanent Sons of *Elizabeth M‘kenzie* Sir *George*'s ſecond Daughter, then Spouſe to *Archibald Cockburn* younger of *Langtoun* (now to Sir *James M‘kenzie* of *Royſtoun*) and the Heirs-male of their Bodies *ſucceſſive* according to their Brith-right; Which failing, to the eldeſt or only Son of the ſaid Lady *Bute*, and after his Deceaſe, to his ſecond, third and fourth, *&c.* Sons, and the Heirs-male of their Bodies *ſucceſſive*; Which failing, to the eldeſt or only Son of Sir *George*'s ſecond Daughter, and after his Deceaſe, to his ſecond, third, *&c.* Sons, in the Order above-mentioned; And failing of theſe, to the other Heirs mentioned in the Tailzie. *George M‘kenzie* only Son and Heir to Sir *George* having died without Heirs of his Body, and neither of the Daughters having a ſecond Son; My Lord *Montſtuart* the eldeſt Daughter's only Son raiſed Brieves out of the Chancery for ſerving himſelf Heir of Tailzie to his Uncle. Sir *James Mᶜkenzie* and his Lady applyed to the Lords for a Stop to the Service, till they were heard for their Intereſt: and a Hearing in Preſence being appointed, It was alledged for the Lady *Mᶜkenzie*, That my Lord *Montſtuart* cannot be Heir ſo long as there is any Hope or Poſſibility of a ſecond Son of her Body.

Replyed for my Lord Montſtuart. My Lady *Mᶜkenzie*, having no ſecond Son in Being, had no Intereſt to quarrel his Service: For by the common Law, the Capacity of an Heir muſt be conſidered *Tempore devolutæ Succeſſionis, L. 5. ff. de Vulg. et Pupil. ſubſtit. L. 28. ff. ad L. Falcid.* And the Word *Failing*, or *Deficiens*, by all the Rules of *Grammar* and common Senſe, is only applicable to the preſent Time. 2. It was never heard that a remoter Heir was to delay his imbracing the Succeſſion dovolved upon him, till all the poſſible Events of a nearer were diſcuſſed, and purified. On the contrary, by our Practice the neareſt Heir in Being when the Succeſſion falls, is preferred: As a Father will be ſerved Heir to his own Son, albeit he the Father be in a Capacity of getting Children, who if exiſting at the Brother's Death would exclude him. 3. This would be contrary to the preſumed Intention of Sir *George*, who is not to be ſuppoſed to have deſigned his Eſtate to be at any Time without a Proprietar, or his Family unrepreſented, whereby many Rights and Debts, for Want of one having Title to purſue for them, might be loſt by Preſcription; Or to counteract his declared Opinion in his *Idea Eloquentiæ Forenſis*, and in his Treatiſe of Tailzies. Beſides, that he has expreſly determined the Point by two Clauſes in the Tailzie, whereof one provides, *That if the Eſtate ſhould fall to the ſecond or younger Son of the ſecond Daughter, while the eldeſt Daughter has no ſecond or younger Son, he ſhall have Right to the Mails and Duties thereof, till the Exiſtence of a ſecond Son of the eldeſt Daughter*: Whence it is clear, That Sir *George* deſigned the neareſt exiſting Heir to ſucceed in the *interim*, notwithſtanding of a Nearer *in Spe*. The other Clauſe runs thus, *That if the ſecond Son of either of the Daughters or their Deſcendents happen to ſucceed to the Eſtate of* Bute *or* Langtoun, *or the Eſtate of* Roſehaugh *fall to either of their eldeſt Sons, the Perſon ſo ſucceeding and his Heirs ſhall be holden to denude of the ſaid Eſtate of* Roſehaugh, *in Favours of his ſecond Son whenever he ſhall have one*: Which argues Sir *George* to have had in his View the Succeſſion of the eldeſt Son of either Daughter, when a younger did not exiſt at the Time of the laſt Heir's Deceaſe. 4. The Chancery is bound to give out Brieves to any apparent Heir applying; And the Judge competent and Inqueſt to whom theſe are directed, are under a legal Neceſſity to ſerve the Bearer Heir *affirmative*, he proving himſelf to be *legitimus et propinquior* of Line, Tailzie, or Proviſion at the Time, which my Lord *Montſtuart* certainly is, ſeing *Proximus eſt quem nemo antecedit*. For the Inqueſt cannot look back to theſe Things *quæ in Jure tantum conſiſtunt*, nor look forward to Poſſibilities, which are not the Subject of their Cognition. 5. 'Tis a Principle in the Law of all other Nations, That the immediately exiſting Heir ſhould be entred, that Property hang not in an Uncertainty. For Example, in *France le mort ſaiſi le vif*, the Heir ſucceeds as ſoon as the Predeceſſor's Breath is out. 6. Upon the Suppoſition of making the Succeſſion pendent, and hanging up the Property in the Clouds, many great Inconveniencies would follow: Creditors could not be anſwered, Law having provided no Rule in that Caſe for carrying on Diligence; Superiors would want a Vaſſal, and the Caſualities thereby ariſing, and Vaſſals would want a Superior to be entred by.

Duplyed for my Lady Mackenzie. Our Tailzies and Subſtitutions are ſo many
radual Inſtitutions. By the common Law there are conditional as well as
mple Inſtitutions, whereof the Condition and Quality kept the Succeſſion in
uſpence till the Condition exiſted or ceaſed to be Poſſible: And where Chil-
ren to be procreated were inſtituted, they were underſtood to be called con-
itionally becauſe of the Uncertainty of their Exiſtence. Nor doth the Succeſ-
on *medio Tempore* devolve to the next Heir, but is Pendent: Which is alſo
greeable to the Opinion of Lawyers, particularly *Peregrinus de Fide-commiſſis*,
ag. 309, 310. and *Voet. Comment. ad ff. Tit. de Hæred. Inſtit.* §. 12. 2. The
ords Deciſions have fully cleared and determined this Point, in the Caſe of
e Succeſſion of the Earl of *Levin*, betwixt the Lords *Rotheſs* and *Melvill*;
here no Place was found for a remoter Subſtitute, ſo long as there was Hopes
a nearer: And in the Prattick betwixt *Weir* and the Laird of *Corehouſe*.

As to my Lord *Mountſtuart*'s Objections, it is anſwered, 1. The Rule of
nſidering the Heir's Capacity at the falling of the Succeſſion, had only Place
Succeſſion *ab Inteſtato*, where Law calls every one according to the Prox-
ity of Blood: But in the Inſtitution of Heirs, or tailzied Succeſſion, the Ca-
city of Perſons inſtitute or ſubſtitute conditionally, is only conſidered at the
iſtence of the Condition. Nor doth any Nation allow a greater Latitude
Perſons in the free Diſpoſal of their Eſtates, than our Law doth in Tailzies;
hereby moſt of our ancient Families ſtand, and wherein we regard not the
btleties of the civil Law concerning the Heir's Capacity the Time of the
edeceſſor's Death: The ſuperſtitious Obſervance whereof would carry away
ens Eſtates from their Children and Deſcendents, to very remote Relations;
d perhaps to the Sovereign as *ultimus Hæres*. 2. As to the Alledgeance upon
e preſumed Intention of Sir *George*, it may be more rationally urged,
at his Choice ſhould rather be obſerved, tho' with the Inconveniency of a
all Surceaſe of a Repreſentative, than that the Order of Succeſſion preſcribed
him ſhould be inverted. It can't be underſtood an Argument of his pri-
te Sentiment, that when in his *Idea Eloquentiæ Forenſis* he ſets down the
eading betwixt *Rotheſs* and *Melvill*, he inlarges more upon that Side for
hich himſelf was Advocate, which is an uſual Thing. As to the Clauſes in
e Tailzie founded on by my Lord *Mountſtuart*, it is anſwered, That as Sir
eorge was moſt anxious to have his Family diſtinctly repreſented, and not
nfounded with either of the Families of his Sons in Law: So by the firſt
lauſe it is plain, he deſigned not a general Rule; the ſame not being expreſt
general Terms, but only in the Terms of a particular Inſtance, carrying
s own Reaſon of Speciality, *viz.* That his Eſtate might not be in Suſpence,
hile the Competition runs betwixt two ſecond Sons, whoſe Preference per-
aps was indifferent to him, his Family being diſtinctly repreſented by either
f them. But 'tis a quite different Caſe here, where a ſecond Son, and the
deſt of another Family are competing, whereof the later would confound his
randfather's Eſtate with his own. As to the other Clauſe, Sir *George*'s
nxiety that the eldeſt Sons ſhould denude in Favours of their younger Sons,
oth inforce his Intention of keeping the Succeſſion diſtinct where it was poſſible:
nd here there is even a Probability of a diſtinct Repreſentative. 3. The
ancied Inconveniencies, by keeping *Dominium in Pendenti ſine Domino*, are
ot real: For in many Caſes the Exerciſe of Property is *in Pendenti*; as in all
uſpenſive Conveyances, and where a *Naſciturus* is inſtituted. Have we not
nſtances of a Tailzie made upon Condition that the Heir ſhould marry ſuch a
erſon, whereby the Succeſſion behoved to be Pendent till the Event of the
Condition? In all which Caſes Law conjoins the Entry of the Heir conditi-
onally inſtituted with the Predeceſſor's Death, who during the Interval is re-
preſented in ſome Meaſure by the *Hæreditas jacens*. As to the Prejudice drawn
from the Caſe of Creditors, Superiors and Vaſſals, and the Loſs of Rights

through Preſcription for Want of one intituled to purſue: There is a Remedy for all this, by a *Curator Bonis dandus*, who finds Caution, and acts as the Proprietar, ſave that he cannot alienate; as a Tutor acts for a Pupil. And as Creditors may be thus paid; ſo there is no Queſtion but they might affect the Eſtate it ſelf by declaratory Actions and Adjudications. For tho' the uſual Form doth not exactly quadrate with this, our Law is not ſo barren, but it may be adapted to Exigencies. The Caſe of the Superior's wanting a Vaſſal, is but what frequently occurs: His Nonentry Duties or other annual Preſtations may be ſatisfied by the Adminiſtrator. As to the greater Caſualities of feudal Delinquency, no Objection can be drawn from theſe, ſeing what ariſes from the Nature and Condition of the Fie, is conſented to by the Superiors in their granting Infeſtment.

Triplyed for the Lord Mountſtuart. No manner of Reaſon can be aſſigned for the leaſt Difference as to this Point, in the tailzied, from the legal Succeſſion: ſeing the *which failzieing* expreſſed in the one, is nothing elſe than the actual Failzure in the other, according to the Degrees appointed by Law. Nor is it ſo much the Preference of one Heir of Tailzie to another, that the Diſponer regards; as the having himſelf repreſented, and his Memory preſerved: And tho' a Man may project whom and what Degrees of Perſons he would have to ſucceed him, GOD alone diſpoſes of theſe Events. It chokes Religion, as well as Law, to interpret the Will of Defuncts ſo preciſely, as to wait ſtill for the Heir called and marked out by their Tailzie, tho' it ſhould not pleaſe the LORD to beſtow ſuch an Heir. It is alſo certain, That the general Rules by which the legal Succeſſion is regulated, muſt take Place in the tailzied, *Menoch. Conſil.* 198. N. 14. And the Reaſon of the Law, *viz.* That the Defunct ſhould not want a Repreſentative and Manager of his Eſtate, or that Creditors may have a Perſon to purſue for their Debts, is equally concluding in both Kinds of Succeſſion. It is granted, that where it appears to have been the manifeſt will of the Tailzier to have the Fie in Pendency, it may be Pendent; but where no ſuch Evidence appears as can exclude all Manner of Doubt, *Præſumitur pro Lege.* As to the Authority of the Lawyers adduced for the poſſible Heir, *Peregrinus* decides nothing in this Matter, but only relates the different Opinions of ſeveral Lawyers. Beſides, it is a General to be obſerved, That the Authority of any foreign Lawyer is not to be regarded, in ſo far as he recedes from the general Principles of the civil Law: Otherwiſe we might introduce the Cuſtoms and Deciſions of other Nations as our Law, which were abſurd. Nor doth the Citation from *Voet* meet this Caſe, for the *Species Facti* propoſed by him, is where the Heirs to ſucceed *ab Inteſtato*, were ſubſtituted to a Poſthumous Child, which, before its Birth, was not ſuch a ſimple Poſſibility, as a ſecond of the Lady *Mackenzie*'s Body. As to the Deciſion betwixt *Weir* of *Blackwood* and the Laird of *Corehouſe*, narrated in my Lord *Melvill*'s Caſe by my Lord *Stair*, *Inſtit. Page* 476, the ſame makes for the Lord *Mountſtuart*; for there the Service proceeded, and the Point of denuding afterwards upon the Exiſtence of an Heir of *Marion Weir*'s Body, came to an Arbitration; But here the Point of denuding is not the Caſe, for which Diſpute there will only be Place, when the poſſible Heir exiſts. As to the Earl of *Levin*'s Caſe, it may be ſaid with all Reſpect, That it was ſingle and ſingular, and attended with the Speciality of a Donatar in the Right of the Superior. Beſides, the Matter was in Effect tranſacted: For the ſmall Complement to the Chancellor of the Eluſory Retour-duties was not grudged, nor reclaimed againſt, where the full Rents came to the preſent Heir, and there was no great Hopes of his ever being diveſted by the poſſible Heir. Nor is it to be imagined, that the Chancellor's Lawyers would have adviſed to take a Gift of the Nonentry, had they thought it practicable to oppoſe the Service. 2. The Inconveniencies of waiting for the poſſible Heir are not obviated by a *Curator Bonis*; For ſuch a

Curator cannot ſafely pay, or tranſact Debts; Neither is his Perſon liable to the Creditors; Nor would Preſcription run againſt him as repreſenting the poſſible Heir; nor yet could he advance Proviſions to Heirs Female, in Order to their Marriage. So that innumerable Inconveniencies would remain, ſuppoſe a Curator ſhould be forced upon the Eſtate, whom it cannot be imagined the Tailzier had ever in his View: Seing otherwiſe he would have provided one or more by his own Nomination.

The Lords allowed my Lord *Mountſtuart*'s Service as Heir of Tailzie to the late *Roſehaugh* to proceed, notwithſtanding the Poſſibility of the Lady *Mackenzie*'s having a ſecond Son.

Eodem Die. Martha Wright *and Enſign* David Kinloch *her Husband, againſt* Alexander Lindſay *Merchant in* Edinburgh.

IN a Proceſs at the Inſtance of *Martha Wright* and her Husband, againſt *Alexander Lindſay*, for Payment of Eight hundred and thirteen Pound *Scots*, contained in a Bond granted by him to the deceaſt *Alexander Wright* Merchant, and aſſigned by him to the ſaid *Martha Wright* his Daughter: *Alexander Lindſay* proponed Compenſation for the Sum of Five hundred and fourty one Pound, acknowledged by the Cedent to be due by him to Mr. *Lindſay*, in his Oath given before Sir *William Calderwood* and Mr. *William Forbes* Advocates, Arbiters choſen by both Parties, for clearing of Merchant Dealing betwixt them, conform to a Submiſſion bearing a Conſent to take their Oaths; Which Oath is ſigned by the Deponent and Arbiters.

Alledged for Martha Wright. An extrajudicial Oath cannot found a Reaſon of Compenſation.

Replyed for Mr. Lindſay. 1. 'Tis laid down as a Principle by my Lord *Stair*, *Inſtit.* 4. *Tit.* 44. §. 7. That even extrajudicial Oaths of Verity afford both Action and Exception, whether ultroniouſly emitted, or upon Tranſaction or Reference of Parties: Yea, 'tis only ſince the *Act* 19. *Parl.* 3. *Ch.* 2. that Minors could be reſtored againſt their extrajudicial Oaths; And *Caſus omiſſus habetur pro Omiſſo.* 2. This may be termed a judicial Oath, being emitted before Arbiters authorized by Law, and expreſs Conſent of Parties in the Submiſſion, to take the Oath: And there is a great Difference betwixt a Conſent to take an Oath of Party as in this Caſe, and the taking of Witneſſes Oaths. 3. Tho' ſuch an Oath of Party taken by Arbiters were not probative as an Oath, it is a ſufficiently probative Acknowledgement of the Debt, being ſubſcribed by the Deponent and Arbiters, who were as good as Witneſſes. And if a ſimple extrajudicial ſubſcribed Declaration would be probative againſt the Granter: Such a Declaration upon Oath ſubſcribed by the Deponent and two Arbiters, cannot be leſs Obligatory.

Duplyed for Martha Wright. The Oath having been emitted upon a View of ending all Debates by the Submiſſion, and the Submiſſion having broke up without taking Effect; the Oath as *Acceſſorium* muſt fall in Conſequence. 2. The Diſtinction betwixt taking Oaths of Witneſſes, and the Oaths of Parties, is groundleſs; For the taking Oaths being *Actus Juriſdictionis*, ſuch a Power granted by private Parties, is *a non habente Poteſtatem*.

The Lords found that the Oath emitted before the Arbiters is probative.

Eodem Die. *Mr.* David Ramſay *Writer to the Signet, againſt* William Nairn *of* Dunſinnen, *Commiſſar Clerk of* Edinburgh.

WIlliam *Nairn* having, as Execuutor Creditor to *Thomas Young*, confirmed and got Payment of Fourty Bolls Bear and Malt belonging to him at his Deceaſe; Mr. *David Ramſay*, within Six Months of *Young*'s Death, did alſo confirm himſelf Executor dative *qua* Creditor, and purſued *Dunſinnen* for Payment of a proportional Part of the Price of the Subject confirmed, as having an Intereſt therein by doing Diligence within the Six Months, in the Terms of the *Act of Sederunt, February* 28, 1662.

Alledged for the Defender. That he ought to be preferred, in regard he firſt confirmed the Bolls, and the poſterior Confirmation is null: Becauſe, there cannot be two Principal Teſtaments, and Goods once confirmed can only be purſued for at the Inſtance of other Creditors *Via Actionis* againſt the Executor Creditor confirmed. Nor can there be two diſtinct Executors confirmed upon the ſame Subject, more than there can be two Services of Heirs; an Executor being *Hæres in Mobilibus*: And the *Act of Sederunt* relates only to more Executors conjoined in one Teſtament, who are but as *Cohæredes*.

Replyed for the Purſuer. Tho' two Teſtaments ſimply Dative as to the ſame Subject, or one ſimply Dative, and another wherein the Executor is confirmed *qua Creditor*, would be inconſiſtent; two Executors Creditors may be confirmed upon the ſame Subject, as well as two Heirs Portioners may be ſerved. Becauſe, a ſimple Executor dative is obliged to give up Inventory of the Defunct's whole Goods, and it is good Defence to one purſued as vitious Intrometter with the Defunct's Goods, that a third Party is confirmed Executor dative, albeit the Intrometter derive no Right from him: Whereas an Executor *qua* Creditor needs only to confirm as much of the Defunct's Goods and Gear as he thinks fit; And his Confirmation would not purge vitious Intromiſſion, unleſs the Intrometter derive Right from him, as is clear from the Act of Parliament 1696; For that a Creditor by confirming deſigns only his own Security, and not to repreſent the Defunct. The *Act of Sederunt* bringing in all Creditors confirming themſelves Executors within Six Months of the Defunct's Deceaſe *pari Paſſu*, is not to be reſtricted to ſeveral Executors in one Teſtament: As is clear both from the Tenor of the Act, and from my Lord *Stair* and Sir *George Mackenzie's* Obſervations thereon, and the Analogy of our Law in other Caſes. Doth not the Act of Parliament 1661, upon the ſame Ground bring in Appriſers within Year and Day *pari Paſſu*?

Duplyed for the Defender. As to the Point in Controverſie, there is no Diſtinction betwixt an Executor Dative who has the whole Office, and an Executor Creditor: Seing as to the Subject confirmed, both equally repreſent the Defunct. And tho' different Executors Creditors may, one after another, confirm different Subjects, they connot confirm one and the ſame Subject; according to the conſtant Practice of the Commiſſar Court of *Edinburgh*. The Parallel of Appriſers or Adjudgers within Year and Day doth not hold: For Appriſing or Adjudication is no Title of Repreſentation; and two Perſons may very well have different Securities upon the ſame Subject, who could not be different Repreſentatives.

The Lords found that the Purſuer and Defender ſhould come in *pari Paſſu*: The former paying always a Proportion of the Charges wared out by the latter, as Executor Creditor firſt decerned and confirmed.

January 6, 1708. Francis Sinclair *Son to* Thomas Sinclair, *Brother to the Laird of* Roſline, *againſt* Francis Maxwell *of* Tinwall.

I*ſobel Wauchop* having Right to a Bond of One thouſand nine hundred Merks, bearing Annualrent, ſhe left the ſame in Legacy to *Francis Maxwell* of *Tinwall*, who had been imployed as a Friend by *Thomas Sinclair* Husband to *Elizabeth Wauchop* the ſaid *Iſobel*'s Heir, to influence *Iſobel* to diſpoſe of that Mony in Favours of her Siſter. *Tinwall* ſometime after the Teſtatrix's Death, wrote to *Thomas Sinclair*, " That he had anſwered his Commands ſo far as in him lay, in injoining her to diſpoſe of what ſhe had to his Wife, which the Defunct refuſed: And that, rather than another ſhould get it, he took a Right in his own Favours, but to ſhew that what he did was purely for *Francis Sinclair*'s Profit, he promiſed him Repetition of the ſame whenever he paſſed his Minor Years; always reſerving the Property to himſelf, in Caſe he *Francis*, either diſobliged his Father *Thomas*, or took any irregular or unadviſed Shifts. *Francis Sinclair* raiſed upon the foreſaid Letter a Declarator of his Right to the One thouſand nine hundred Merks Bond againſt *Tinwall*.

Alledged for the Defender. That *quoad* the principal Sum *non facit vim*: But ſeing Repetition is only promiſed at *Francis Sinclair*'s Majority, *Tinwall* ſhould have the Sum till that Time, and cannot be debarred from uplifting thereof. Eſpecially conſidering, that *Francis*'s Right is clogged with ſeveral Conditions which may happen not to exiſt; and in the Event of their not Exiſtence, *Tinwall* reſerves the Property to himſelf.

Anſwered for the Purſuer. That the Defender was previouſly obliged by the Truſt, to take the Right for the Purſuer's Behoof: And in all Events, the Annualrents are preſently due to him, the Conditions being adjected only to the Fie and Property.

The Lords found that both the principal Sum and Annualrents ought to be ſecured to *Francis Sinclair* at his Majority: And preferred *Tinwall*, he finding ſufficient Caution to make both Principal and Annualrents, in ſo far as he uplifts the ſame, furthcoming to the ſaid *Francis* at his Majority, upon the Conditions contained in the Miſſive. But that *Tinwall* ſhould be free in Caſe *Francis Sinclair* either diſoblige his Father, or take any irregular Courſes, or in Caſe he die before he be Major.

Eodem Die. Alexander Sands *and other Seamen in* Preſtounpans, *againſt* Walter Scot *Merchant in* Dalkeith.

A*Lexander Sands* and others, having obtained Decreet before the Admiral, againſt *Walter Scot* as Owner of the Cargo of a Ship navigated by them, and not having paid the Fraught; he raiſed Suſpenſion and Reduction thereof upon this Ground, That the Judge committed Iniquity in finding him liable for the Seamens Wages. Becauſe our Law knows no Hypothecation that Seamen have for their Wages, on Goods aboard belonging to other Perſons than the Skipper and Owners of the Ship, with whom they Contract. And *eſto* they had ſuch a Hypotheck, yet, the Suſpender having received and diſpoſed of the Goods brought Home unaffected by Diligence, the Seamen can have no Intereſt therein: Otherwiſe Merchants and Traders might be ruined by Proceſſes at the Inſtance of ſuch Seamen for their Wages out of Cargos Thirty nine Years back.

Anſwered for the Chargers. By the Law of all Nations, Goods imported in Ships upon Charter-Party, are liable for Payment of the Fraught; And ſuch as are imported without a Charter-Party (as in this Caſe) are ſtill liable for the Seamens Wages. Which is founded on material Equity: In regard the Seamen take the Goods aboard, place them where they may be ſafeſt, and are liable for any Damage ariſing to them in the Ship, without extraordinary Streſs of Weather; they navigate the Ship, bring her to the deſigned Port, and deliver out the Goods ſafe. The Seamen did indeed ſuffer the Goods to be unloaded before they craved their Wages: Becauſe, they thought they were dealing with an honeſt Man, who would not defraud them; And they could not claim Wages till after Delivery of the Goods. But after all, tho' the Cargo were not affectable for the Seamens Wages, the Suſpender *qua* Merchant cannot refuſe to pay them: Seing he ſtill owes the Fraught to the Skipper.

The Lords were clear that the Seamens Wages were no Debt of Bottomry affecting either the Keel of the Ship, or the Cargo: But found the Fraught liable for the ſaid Wages, and therefore repelled the Reaſon of Suſpenſion.

January 8, 1708. Mungo Cochran *Merchant in* Glaſgow, *againſt my Lord* Bargany.

MY Lord *Bargany* being charged on a Bond for 1000 Pound *Scots*, granted by him to *Mungo Cochran*, as the College of *Glaſgow*'s Tackſman of the Vicarage Teinds of the Pariſh of *Calmonel*; which Mr. *Cochran*'s Backbond of the ſame Date bears to have been a Graſſum for a Tack of my Lord's Teinds in the ſaid Pariſh, to which he pretended to have a better Right; which if his Lordſhip produced betwixt and *Whitſunday* thereafter, the Bond for the 1000 Pound ſhould be null; and if no better Right were produced againſt that Term, the Backbond ſhould be null: My Lord ſuſpended upon this Reaſon, That his Lands within the Pariſh of *Calmonel* did never pay any Vicarage Teind to the College of *Glaſgow*; conſequently he could neither be liable for a Graſſum, nor a Tack-duty.

Alledged for the Charger. The Reaſon not being inſtantly verified, is not receiveable in a Suſpenſion. 2. The Suſpender having homologated the College's Right, by taking a Tack, and giving Bond for the Graſſum, which by the Quality of the Backbond was to ſtand in full Force againſt him, if a diſtinct and poſitive preferable Right in his Perſon were not produced againſt a preciſe Term; the Setter is not now obliged to regard the vagrant general Alledgeance of Immunity Three Years and a Half after elapſing thereof, eſpecially conſidering, That by the Act of *Sederunt*, *November* 27, 1592, the Lords declared they would decide in all Clauſes irritant, according to the expreſs Words and Meaning thereof.

Anſwered for the Suſpender. He offers to prove that no Vicarage Teinds have been paid for his Lands within the Years of Preſcription; and the Alledgeance being *Facti*, he muſt get a Term for that Effect, even in a Suſpenſion. 2. Tho' the Backbond had never been granted, the Bond charged on falls *Condictione indebiti Chirographi Errore Facti dati*: It being granted upon Suppoſition that the Suſpender had no Right of Immunity from Vicarage Teinds, which is now diſcovered to be an Error in Fact; and where a Man through ſuch a Miſtake gives either Mony or Bond, Law allows him Repetition. 3. The Suſpender may purge the Irritancy in the Backbond before Declarator: And it has been found that a probable Excuſe exempted from Irritancies more favourable than this, *July* 14, 1675.

The Lords found, That if the Suſpender do as yet inſtruct a better Right to the Teinds of his Lands in the Pariſh of *Calmonel*, it is receiveable; And remitted to the Ordinary to hear the Parties upon the alledged Immunity.

Eodem Die. *The Repreſentatives of Major* Chieſly *of* Dalry, *againſt Sir* Alexander Brand.

BY a Minute of Sale of the Lands of *Dalry* betwixt Major *Chieſly*, and Sir *Alexander Brand*; the Major being obliged to give Sir *Alexander* a ſufficient Right to Stock and Teind; And Sir *Alexander* having afterward queſtioned the Major's Right to the Teinds as not ſufficient: Both Parties in *May* 1700 ſubmitted to the Duke of *Argyle* what Right the Major ſhould give of the Teinds ſold to Sir *Alexander*. The Arbiter conſidering that the Major had only Right by Progreſs to a Tack of the Teinds of *Dalry*, granted by the

Commendator of *Holy-rood-houſe* in *September* 1598, to *James Ballenden* of *urghtoun*, during the Lifetime of himſelf and Heirs therein mentioned, and Nineteen Years after the Deceaſe of the laſt of theſe Heirs; did, upon a miſ-aken Suppoſition that the late Lord *Ballenden* was the laſt Heir, ordain Major *hieſly* to grant to Sir *Alexander* a ſufficient Diſpoſition of the ſaid Tack for e ſaid Lord *Ballenden*'s Lifetime and Nineteen Years after his Deceaſe, and o purchaſe from the Commiſſion a Prorogation thereof for Two Nineteen ears further in Favours of the ſaid Sir *Alexander*, who was ordained upon erformance, to diſcharge any Thing he could crave in Relation to theſe Teinds.

The Repreſentatives of the Major finding upon Inquiry, That the Lord *allenden* was none of the Heirs mentioned in the Tack, and that the Nineteen Years after the Failure of the laſt Heir were expired before pronouncing of the Decreet Arbitral, ſo that the Tack could not be prorogated: They took a new Tack from Her Majeſty, as come in Place of the Biſhop of *Edinburgh*, who was Titular of the Teinds of *Dalry*, for Four Nineteen Years, commencing from *Lammas* 1707; and offered the ſame to Sir *Alexander* as an Equivalent to a Decreet of Prorogation in the Terms of the Minute; and inſiſted againſt him for Payment of the Price of the Land.

Alledged for the Defender. 1. The Decreet Arbitral muſt be implemented in the preciſe Terms thereof, and not by an Equivalent. 2. The Tack offered is not ſo ſufficient as a judicial Prorogation of the former would have been: Becauſe, a Purchaſer might ſafely rely on a Decreet of Prorogation, which could not be quarrelled, the Authors of the former Tacks being therein called: Whereas a Tack of Teinds granted by Her Majeſty may happen to be excluded by ſome others pretending a better Right, it being *in Dubio* if the Queen has Right to the ſaid Teinds; and tho' She had Right as come in Place of the Biſhops, She cannot grant a Tack for a longer Space than they could have done.

Anſwered for the Purſuers. The Queen having now all the Right to theſe Teinds which the Commendator had, a Tack from Her Majeſty for Four Nineteen Years, muſt be thought at leaſt as good and ſufficient a Right as the other's for Three Nineteens only. And ſeing to implement the Decreet *in Forma ſpecifica* is abſolutely impreſtable, not through any Fault of them or their Author, but by the Tacks being expired before the Date of the Decreet; *Loco Facti impreſtabilis ſubit Damnum & Intereſſe.* 2. King *Charles* the Firſt having acquired theſe Teinds, and annexed them to the Biſhoprick of *Edinburgh*, and the Queen by the Suppreſſion of Biſhops having come in their Place, Her Right to ſet Tacks cannot be doubted. For She may *Jure Coronæ* diſpoſe of ſuch abſolutely at Her Pleaſure: As *de Praxi* She has not only granted long Tacks, but even heretable Rights to ſeverals; She being reſtrained in that Matter by no ſuch Law, as the Biſhops were.

The Lords found, That the Tack of Teinds offered by Major *Chieſlie*'s Repreſentatives, was equivalent to the Right decerned to be given by the Decreet Arbitral, and that Sir *Alexander* ought to accept thereof as ſuch.

January 15, 1708. Henry Crawford *Merchant in* Crail, *againſt* Alexander Piper *of* Newgrange.

ALexander Piper having accepted a Bill for 347 Pound, payable to *James Arbuthnot* Skipper in *Montroſe*; and thereafter upon clearing Accompts with *Arbuthnot*, having procured from him a general Diſcharge of all Bills except another Bill ſpecially therein mentioned: Mr. *Arbuthnot* indorſed the 347 Pound Bill, for his own Behoof, to *John Auchterlony* his Truſtee, by whom it was indorſed Blank and left with *Arbuthnot*, who filled up *Henry Crawford*'s Name therein. Mr. *Piper* being charged by *Crawford*, he ſuſpended, upon *Arbuthnot*'s general Diſcharge, which, he offered to prove by *Crawford*'s Oath, was anterior to the Indorſation in his Favours.

Alledged for the Charger. The Indorſation to him for an onerous Cauſe, cannot be prejudiced by any ſuch private ſeparate Diſcharge: No Objection being competent againſt the Payment of a Bill tranſmitted to ſingular Succeſſors for onerous Cauſes; except upon Qualities ingroſſed therein, or Receipts and Diſcharges on the Back thereof. And if it were otherwiſe, the Currency of Bills would ſtop: For no Man would take an Indorſement of a Bill, leſt it might be rendred ineffectual by the Indorſer's ſeparate Receipts and Diſcharges.

Anſwered for the Suſpender. To advance this Doctrine, That Bills of Exchange cannot be extinguiſhed by a Diſcharge, were to lay an Embargo on the moſt valuable Branch of Commerce; and to enervate, if not deſtroy, the chief Vehicle thereof: Seing it is impoſſible that the vaſt Number of Bills of Exchange that go out of the Hands of Merchants and Factors on all Occaſions, can be returned to them, and cancelled before their Eyes, before a final clearing with their ſeveral Conſtituents and Correſpondents in the remoteſt Corners of the World. 2. Suppoſing ſuch a Diſcharge could not exclude an accepted Bill, but that the ſame were to be conſidered as a Bag of Mony which Third Parties might *bona Fide* acquire: Yet *Crawford* not having paid Sums of Mony for obtaining the Indorſation, which was made by *Auchterlony* for Payment of a Debt due by *Arbuthnot* to him leſs than the Sum in the Bill, and taken in Security of the ſaid Debt, and of what Expences *Crawford* ſhould be at in recovering Payment thereof; ſuch a Conveyance by *Auchterlony* the Truſtee, is not relevant to elide *Arbuthnot*'s anterior Diſcharge.

Replyed for the Charger. There is no Diſtinction in the preſent Caſe whether the Indorſation be for downtold Mony, or in Satisfaction of anterior juſt Debts, the Diſcharging thereof *Fictione brevis Manus* is equivalent to the paying Mony: And to make a Difference, would occaſion Confuſion in Commerce; for where One Bill is indorſed for Mony payed down, Twenty are tranſmitted in Satiſfaction of bygone Debts or Accompts.

The Lords ſuſtained the Reaſon of Suſpenſion founded on the general Diſcharge: In Regard the Indorſement to *Crawford* was not for an adequate onerous Cauſe; nor for Value given at the Time, but only in Security of bygone Debt; and the taking it in Security of what Expences might be deburſed, implied the View of buying a Plea, which deſerved no Favour.

January 16, 1708. *Sir* Alexander Cuming *of* Culter, *againſt Sir* Andrew Kennedy *of* Clowburn.

IN the Reduction and Declarator at the Inſtance of Sir *Alexander Cuming* againſt Sir *Andrew Kennedy*, for reducing Sir *Andrew*'s Right to the Office of Conſervator, upon Grounds of Malverſation, the Lords the 19 *November* 1707, having ſuſtained his Defence founded on the Queen's Indemnity in *March* 1703, to exculpate for any Malverſations before that Time: Sir *Alexander* alledged that Sir *Andrew* ſince then, had been guilty of Malverſations in Office ſufficient to deprive him. And particularly inſiſted upon this, That tho' by Acts of the Royal Burrows, and the Third Article of the Staple Contract, the Product of this Nation only, ſhould be Staple Goods free from all Duties and Cuſtoms, and by the Thirteenth Article of the ſaid Contract, none are allowed to trade in Staple Goods but thoſe of the *Scots* Nation, and by the Act of Burrows 1699, Factors are ſtrictly diſcharged to give the Benefit of the Staple to Strangers

or

r to cover any Staple Goods belonging to Strangers as *Scotſmens* Goods, which Act the Conſervator is to ſee executed. Yet Sir *Andrew Kennedy* had betrayed he Truſt repoſed in him, by allowing, conniving at, and being acceſſory to he Importation of *Iriſh* Goods, ſuch as Butter, Hides and Tallow, and for Gratification to himſelf, allowed them to be entred by *Scots* Factors at the taple Port as *Scots*, and thereby injoy Immunity from Cuſtom and Duties, to he great Loſs of the Manufactory and native Product of *Scotland*. And albeit t might have been expected, that one who had been under Proſecution for Abuſe of his Office, and neceſſitate to lay Hold on the Benefit of an Indemnity n that Account, would have behaved himſelf with that Care and Conduct as ot to expoſe himſelf a ſecond Time obnoxious to legal Puniſhment; ſeing *um Lex in præteritum quid indulget, in futurum magis vetat*, L. 22. *ff. de egibus*: Yet neither Indulgencies, Admonitions nor Indemnities have been ble to reclaim Sir *Andrew*, who has ſo far ſlighted the Grace of Pardon, as o give neighbouring States Occaſion again to complain, That ſince that ime Things are worſe than ever. Yea, ſo incorrigible has he approved imſelf, that he would not eſcape, even in *Turkey*, where Offices are moſtly ather calculated for the Profit of the Governour, than of the governed.

Alledged for Sir Andrew. 1. It was not in his Power to communicate Privi- des and Exemptions: Nor did the Immunity of the *Scots* from Cuſtoms and uties, hinder the States of *Zealand* from conferring the like Privileges upon thers. 2. No material Prejudice did ariſe to the Royal Burrows, or Trade f the Nation by Importing the Staple Goods of Butter, Hides and Tallow om *Ireland* to *Camp-vere* by *Scotſmen* as Staple Goods; but on the contrary, *otland* was Gainer thereby: Seing we have not theſe Goods in ſuch Abundance, as to be able to export them to the *Netherlands*, or any where elſe, to y Advantage. 3. Sir *Andrew* had done no more, than had been the Practice f former Conſervators: And *communis Error facit Jus*. 4. He had repreſented o the Commiſſioners of the Burrows, that Factors covered Goods belonging o Strangers as *Scottiſh* Goods; whereof no Notice was taken, nor any contrary Injunction given: And he had all the Reaſon in the World to believe, That, ſeing the Factors complained of were connived at, himſelf could be in o worſe Condition for intrometting with the Conſervator-dues of ſuch Goods.

Anſwered for Sir Alexander. 1. *De Jure* indeed it was not in Sir *Andrew*'s Power to communicate our Privileges to Foreigners, but *de Facto* he did it. If ur Privilege by the Staple Contract imported not ſomething more than other Nations had, it would be pernicious to us, who, in Confidence thereof, are onfined and thirled to ſuch a Port, be the Markets high or low: For Strangers, having the ſame Advantage with Liberty to go where the Markets offer beſt, would have much the better of us. But whatever Privileges the States of *Zealand* might give other Nations, *de Facto* they never gave any; and till ſuch Time as they beſtow them alſo on others, they are ſolely ours. If Strangers had any ſuch Privilege, *quorſum* do they make uſe of falſe Cocquets, falſe Entries, bribe the Conſervator, Waiters and Licent-maſters, to let them paſs as *Scots*? It's ſtrange that we ſhould draw in Queſtion among our ſelves a Point concerning our Privileges, that has always been yielded by the States of *Zealand* and Town of *Camp-vere* who contracted with us! 2. If Staple Goods of the Product of *Ireland* were privileged to come to *Camp-vere* free of Duty, it would intirely deſtroy our native Product: For the *Iriſh* would be able to underſell us. And the other Provinces would allow thoſe to be tranſported among them free of Cuſtom upon Inland Paſs-ports, as they do *Scots* Staple Goods: Becauſe, that would not only diminiſh the publik Revenue, but prejudice the other trading Towns in the *Netherlands*, by drawing the Trade and Shipping from their Harbours to *Zealand*. 3. If the iniquous Practice of Sir *Andrew*'s Predeceſſors could operate his Excuſe for a Malverſation contrary to ſtanding Laws, publick Utility, yea, and common Honeſty: By the ſame Argument, a Waiter or Cuſtom-houſe Officer taking Mony, and permitting Goods to be run without paying the Queen's Cuſtoms; or a Colonel making falſe Muſters, and keeping a great many Men in his Pocket; or a Governour in the Plantations ſuffering Strangers to Trade and Ship off the Tobacco, Sugar, and Spices of the Iſlands, to foreign Markets; might all come off on Pretence of their Predeceſſors having done the like. Did not the Lords of Seſſion deprive Sir *William Primroſe* of his Liferent Office of Clerk to the Notaries, for his Omiſſion to call in their Prothocals: Albeit he alledged that his Predeceſſors in Office had been Guilty of the like Neglect; and there was no poſitive Law injoining ſuch a Thing? *Nam quod non Ratione Introductum, ſed Errore Primum, deinde Conſuetudine obtentum eſt, non debet obtinere, L. 39. ff, de Legibus.* 4. As to the Alledgeance that Sir *Andrew* had exonered himſelf to the Burrows, by laying the Matter before them, who did not reprehend it, or give new Inſtructions about it; the ſame is not relevant: For whatever might have been ſaid for his Exoneration now, had the Burrows proceeded to Cognoſce, Cenſure or Pardon the Tranſgreſſion, no ſuch Thing being done by them, he cannot bottom his Excuſe upon that Topick. But then again, it was not in the Power of the Royal Burrows, to diſpenſe with the Communication of our Privileges, in Prejudice of Burghs of Barony, who by Act of Parliament have an Intereſt in Trade; or in Prejudice of Heretors, who have the chief Intereſt in the native Product and Manufacture of *Scotland*.

The Lords found Sir *Andrew Kennedy*'s receiving ſince the Indemnity Conſervator-dues for Butter, Hides, Tallow and other Staple Goods, coming directly from *Ireland* to the Staple-port, to be a Malverſation, relevant to infer Deprivation of his Office of Conſervator: Notwithſtanding of what is repreſented concerning the Practice of former Conſervators, and the ſtating the Matter before the Commiſſioners of the Burrows, without any new Injunction from them.

Thereafter, *January* 29, 1708. Sir *Andrew Kennedy* alledged, That, by his Commiſſion, he was both Reſident and Conſervator, which are diſtinct Offices: And tho' his Right to the one be reduced, it ſtands good as to the other, wherein he hath behaved himſelf well and faithfully.

Anſwered for Sir Alexander Cuming. Not to mention the many Particulars wherein Sir *Andrew* alſo abuſed his Character of Reſident, who was a Reſident without reſiding, as he was a Conſervator without conſerving; How can he pretend to act in that Sphere, contrary to Her Majeſty's Pleaſure? And what Imputation would it be to Her Majeſty, to have a Miniſter palm'd upon Her after he hath rendred himſelf unacceptable abroad, and obnoxious at home? Eſpecially conſidering, that the ſending and recalling Reſidents and foreign Miniſters at Pleaſure, is Her Majeſty's royal Prerogative.

The Lords repelled Sir *Andrew*'s Defence upon his Office of Reſident.

January 20, 1708. *The Kirk Seſſion of* North Leith *and* William Williamſon *their Tackſman, againſt* Thomas Brown *and* Andrew Skeen *Merchants.*

IN the Action at the Inſtance of *William Williamſon*, as having Right by Tack from the Miniſter and Kirk Seſſion of *North Leith*, to the Teind of Fiſhes imported to *Leith* and *Newhaven*, againſt *Andrew Skeen* and *Thomas Brown*; for Payment of the Teind of ſeveral Kinds of Fiſhes taken in the North Seas, and imported to *Leith* in Order to be exported to the *Straits*, upon this Ground, That the Miniſter of *North Leith* had been in immemorial Poſſeſſion of Twenty Shillings for each Laſt of Herring, and one of each Twenty dry

Fiſh imported to *Leith*, conform to a Right flowing from the Lord *Holy-rood-ouſe*: For inſtructing whereof, the Purſuer produced ſeveral Decreets *in Foro* gainſt ſeveral Merchants for Payment of ſuch a Teind, with a Ratification of heſe Decreets in Parliament.

Alledged for the Defenders. 1. The Decreets produced were *Res inter alios uoad* them, and cannot exclude their Defence, *viz.* That the Teind of the iſhes imported was already paid at the Place where they were taken in the North, and they cannot be liable to a ſecond Teind. 2. The Fiſhes for which he Teind is now claimed were brought to *Leith* to be put aboard a Veſſel for xport to the *Straits*, and nothing could be claim'd for them but the ordinary Shore-dues.

Anſwered for the Purſuers. They have Right to the Teind of what is imported, without Exception of what is re-exported: Which Diſtinction would ake the Execution inextricable, afford a Seed of unbeſeeming Differences and eas, and diſturb the Miniſter from attending his Cure. There needed a articular Statute in the Matter of Cuſtoms and Exciſe upon Goods imported, r a Drawback of the Duty of what ſhould be re-exported within a limited ime: And the Purſuers Right is affected with no ſuch Quality or Statute. So hat their *Jus quæſitum* by the Importation, cannot be taken away by the ubſequent Exportation.

The Lords ſuſtained the Defence, That the Fiſh whereof the Teinds are urſued for, were taken in the North Seas, and paid Teind where they were aken, and were imported into *Leith* in Order to be exported only.

anuary 21, 1708. John Ballantine *Merchant and late Provoſt of* Air, *againſt* Robert Muir *preſent Provoſt thereof.*

IN the Cauſe at the Inſtance of *John Ballantine* againſt *Robert Muir*, for Payment of 2000 Merks, in a Bond granted to *John Ballantine* by the ſaid *obert Muir* and other Three Perſons as Co-principals bound conjunctly and everally, and obliged to relieve each other *pro rata*: *Robert Muir* was found able for the whole Sum, tho' no Diligence had been done upon the Bond ithin ſeven Years of the Date. In Reſpect he was not a Cautioner in the erms of the Act of Parliament 1695: Which correctory Law extends not to onds bearing Clauſes of mutual Relief, which is implied, tho' not expreſt; t only to Bonds where one of more *Correi* is obliged to relieve the reſt of the hole Debt.

Eodem Die. *The Lady* Ormiſtoun *and the Lord Juſtice Clerk her Husband for his Intereſt, againſt* John Hamilton *of* Bangour *and his Tutors.*

IN the Action at the Inſtance of the Lady *Ormiſtoun* againſt *John Hamilton* of *Bangour*, as Heir to the Lord *Whitelaw* her firſt Husband, for Payment of 7000 Pound *Sterling*, which the Defunct by his Bond obliged his Heirs and Succeſſors not deſcending of his own Body, to pay to her in Caſe ſhe ſurvived him, at the Term of *Whitſunday* or *Martimas* ſubſequent to his Deceaſe: The Defender repeated a Reduction and Declarator of Extinction of the Bond pon this Ground of Nullity, That the Witneſſes inſert ſaw not, at their ſubſcribing, the Body of the Writ, or the Lady's Name inſert therein. So that it might have been half a Sheet of Blank Paper: Seing *non eſſe & non apparere paria ſunt, de non apparentibus & non exiſtentibus idem in Jure eſt judicium*; and by the 25 *Act*, *Parl.* 1696, Bonds blank in the Receiver's Name, or not filled up therewith, at leaſt before Delivery, in Preſence of the Witneſſes to

the

the Granter's Subſcription, are declared null. For if a holograph Bond, ſo folded up as the Witneſſes thereto could ſee no Writ above the Granter's Subſcription were ſuſtained, the careful Proviſion made by Acts of Parliament concerning blank Writs, Reduction of Deeds *in Lecto*, and fraudulent Conveyances in Prejudice of Creditors might eaſily be eluded.

Anſwered for the Purſuer. Tho' in other Places, as in *England*, a Writ is not probative till the Witneſſes make *Affidavit* upon the Verity thereof: With us Writs formally ſigned before Witneſſes are valid and receive preſent Execution, until they be improved or reduced. Witneſſes are only adhibited to aſcertain the Date and the Verity of the Parties Subſcription, without being obliged to know the Contents of the Body of the Paper: Yea, oft-times that is induſtriouſly concealed from their View, as particularly in Teſtaments. The Defender cannot found any Thing upon the Act *1696*, unleſs in the Terms thereof he ſubſume and prove that the Lady's Name was blank at the Subſcribing of the Bond.

The Lords repelled the Reaſon of Reduction and Extinction of the Bond. Tho' ſome were of Opinion that it could not be quarrelled ſo much upon the Act of Parliament *1696*, as upon this Ground, That the Witneſſes, who ſaw nothing of the Writ above the Partie's Subſcription, could not be held as Witneſſes to a Subſcription; that being a relative Word implying *Aliquid ſuper*, which they did not ſee.

January 23, 1708. George Livingtoun *of* Midfield, *contra* Miſtreſs Margaret Menzies, *and the apparent Heirs of Line of* George Livingtoun *of* Saltcoats.

George Livingtoun of *Saltcoats*, having a Matter of three Months before his Death, tailzied his Eſtate, paſſing by the Lady *Waliford* and *Anna Livingtoun* Spouſe to Mr. *James Baillie* his two Siſters, in Favours of *James Aikenhead* and the Heirs of his Body, Which failing, to *George Livingtoun* of *Midfield*, &c. with a reſerved Power and Faculty to alter at any Time in his Life, by a Declaration under his Hand: did ſometime after tear away his Name and Side-ſcription from the Margin joining the firſt and ſecond Sheets of that Tailzie, in which firſt Sheet the Obligement to reſign, Procuratory of Reſignation and Lands were contained; And upon Death-bed made a new Tailzie to Miſtreſs *Margaret Menzies* his Niece, and her Subſtitutes; And of the ſame Date wrote a holograph Declaration upon the Back of the firſt Tailzie, whereby he revoked and annulled it, except in ſo far as concerned the Faculty therein to alter, which he would have ſubſiſt for ſupporting the ſecond Tailzie. After *Aikenhead*'s Deceaſe there aroſe a triple Competition betwixt *George Livingtoun* the next Subſtitute in the firſt Tailzie, Mrs. *Menzies* and Mrs. *Baillie* the Defunct's Siſter. Mrs. *Baillie* alledged, That the taking the Side-ſcription from the firſt Tailzie did annul the ſame *in totum*; And that the ſecond Tailzie granted on Death-bed could not ſubſiſt in Prejudice of her one of the Heirs of Line, notwithſtanding the Defunct's exercing the Faculty reſerved in the firſt Tailzie, by his Declaration on the Back thereof.

Mrs. *Menzies* pleaded that the Cancellation might both concur to ſtrike out *George Livingtoun*, and be effectual to validate the Tailzie in her Favours, according to the holograph Declaration.

Alledged for George Livingtoun. 1. The Tearing the marginal Side-ſcription from the firſt Sheet of the firſt Tailzie, doth not annul the ſame, nor derogate therefrom in the leaſt. Becauſe, 1. No Law or fixed Cuſtom requires Side-ſcribing of obligatory Writs, as an indiſpenſible Solemnity. In evidence whereof, the Lords made an Act of *Sederunt* for ſide-ſcribing of Decreets, Inhibitions and other Diligences, without Mention of private voluntary Rights: and *Caſus omiſſus habetur pro omiſſo*. Nor can the tearing one marginal Side-ſcription be interpreted to annul the Writ, where all the reſt re intire, and the ſubſequent Sheets have an inſeparable Connection with he firſt, and the Obligement to reſign, Procuratory and Lands fell to be in he firſt Sheet, only by the accidental Cloſneſs of the Writ. 2. Taking away one of the Side-ſcriptions, could not evacuate or prejudice the Tailzie, nleſs it were clearly inſtructed to have been done by the Defunct *eo Animo*, that his Succeſſion might go to Heirs *ab inteſtato*, which is not done: On the contrary, in token that, notwithſtanding thereof, he conſidered the irſt Tailzie as valid, he ſigned a Revocation thereof ſeveral Days after the Cancellation; And further declared it to ſubſiſt for a particular Effect. Which Diſtinction betwixt a deliberate and caſual Cancelling of Writs is uthorized in the common Law, *L.* 12. *and L.* 30. *C. de Teſtam. L.* 1. *pr.* §. 1. *L. ult. in Fine ff. de his quæ in teſt. del.*

Anſwered for Miſtreſs Baillie. (For Mrs. *Menzies* ſeem'd not very ſolicitous o debate this Point) 1. It is the conſtant and uniform Practice with us to Side-ſcribe Writs conſiſting of different Sheets, for ſecuring againſt Fraud y ſubſtituting one battered Sheet in Place of another in different Terms: nd Cuſtom prevails as Law, in matter of Form, as well as in Point of ight. 2. Whatever might have been ſaid before the Act of Parliament 1696, appointing every Page of Securitys written Book-ways to be ſigned, the Margines were before; It cannot be pretended that Side-ſcribing is a Matter of Indifferency ſince that Act, which equalleth the Side-ſcription to the Page-ſubſcription; And the firſt Tailzie was framed long after the ſaid Statute. 3. There is a great Difference betwixt a Writ not ſide-ſcribed om the Beginning, and the taking away a Side-ſcription once adhibited, hich certainly inferreth a Deſign to invalidate the Writ. 4. Accidental ncellation is not to be preſumed, but muſt be proved by the Aſſerter. nd if the Taking away of that which joined the Leaves of a Teſtament ong the *Romans*, did annul it, notwithſtanding of the remaining Subiptions and Seals of the Teſtator and ſeven Witneſſes, *L.* 1. §. *pen. ff. de* *. poſſ. ſec. Tab.* much more muſt the Taking away Side-ſcriptions with us ſo material a Part of the Writ, be ſuſtained ſufficient to annnul the ſame.

It was further alledged for George Livingtoun. That *Saltcoats* had no Power revoke and cancel the firſt Tailzie upon Death-bed: For the reſerved aculty to alter muſt be underſtood civilly *in Terminis Juris*, and could not exerced on Death-bed; unleſs at leaſt the Words *etiam in Articulo Mor-*, or *in Lecto Ægritudinis* had been added, which are not in the ſaid Rervation. The Reaſon of the Law of Death-bed, *viz.* That Perſons in a eak and dying State might not be impoſed on by the Importunity and fluence of thoſe about them, to do things they would abhor in perfect ealth, or be diſtracted, or diverted thereby from the main Work of prepar- themſelves for their laſt Change, takes Place as well in the Caſe of ſuch Faculty reſerved in *Liege pouſtie*, as where there is no ſuch Reſervation all: And this Death-bed Tailzie in Favours of Mrs. *Menzies* was contrary what the Defunct intended, when he was in perfect Health. 3. A rerved Power conferred *in Tempus inhabile* cannot be then exerced, *L.* 39. *de Manumiſſ. Teſtam. quia devenit in Caſum a quo incipere non potuit*: o that tho' the Reſervation had born an expreſs Faculty to alter upon Death-bed, the Faculty could not have been exerced *in Lecto*; ſince *Pactis rivatorum non derogatur Juri communi*; and far leſs ſhould we preſume that a Perſon deſigned to impinge upon the common Law, where the Words of the Clauſe are not expreſs. 4. 'Tis clear from the Current of Deciſions, That the

Defunct could not upon Death-bed innovate the firſt Tailzie, by Virtue of the reſerved Power to alter at any Time during Life, *February* 25, 1663, *Hepburn* of *Humby* contra *Hepburn*, 24 *July* 1672, *Porterfield* contra *Cant*, 22 *June* 1678, *Birnies* contra L. of *Polmais*, and in the Year 1687, *Davidſon* contra *Davidſon* cited in the 150 *Page* of *Dirltoun*'s Doubts. 5. The Note upon the Back of the firſt Tailzie, whereby the Defunct annuls the ſame, except as to the reſerved Faculty, cannot be ſuſtained as a Revocation; becauſe it implies a Contradiction, to declare the Tailzie null, and to ſubſiſt for the ſupporting of another Tailzie: for one and the ſame Writ cannot ſubſiſt as to one Part, and be null as to another.

Anſwered for Miſtreſs Margaret Menzies. Males have indeed ſucceſſively of a long Time injoyed the Eſtate of *Saltcoats*; but by Inveſtitures in Favours of Heirs whatſoever, and ſo not as Heirs-male, but as Heirs of Line. The Granter's Power to alter the firſt Tailzie on Death-bed, is not only clear from the reſerved Faculty whereby it was to have no Effect during his Lifetime, and he was impowered to innovate and make it void at any Time in his Life; but alſo from this Circumſtance, that the Diſpoſition was never completed or delivered to the Heirs of Tailzie, but remained in the Cuſtody of the Granter till his Death. So that it was in his Power to have burnt or deſtroyed it, and conſequently he might alter: ſince *qui poteſt plus, poteſt minus.* Nor is a reſerved Power to alter contrary to Law, which only allows the quarrelling of ſuch Rights as are made without Conſent of the Heir; Whereas the Heir accepting of a Diſpoſition with a Quality of this Nature, is underſtood to conſent thereto. The old Law of *The Majeſty* and Statutes of K. *William* are not diſputed as to the Caſe of Death-bed: But theſe as to the Queſtion in Hand how far Lifetime includes Death-bed, are as little Pertinent, as any Part of *Wallace*'s Book. Nor are the ancient feudal Conſtitutions to this Purpoſe. The Words *during Life* do in *Grammar* and Law include every Moment of Life, and are contradiſtinct to Death; as Death-bed is to *Liege Pouſtie*: For, as Lawyers obſerve, *Momentum Mortis vitæ annumeratur*; and *Vita eſt Spiraminis Fruitio, et Morti opponitur.* 2. If People on Death-bed are under a natural Incapacity to diſpoſe, upon the Account of Weakneſs and Want of Judgment, then how comes it that they can make Teſtaments, and diſpoſe of vaſt moveable Sums? 3. The general Story that the Faculty is *Collata in Tempus inhabile*, is a Begging of the Queſtion. For the only Subject of Debate here is, if a Faculty contained in a Writ *in Liege Pouſtie*, can be exerced on Death-bed: And tho ſuch Reſervations were not at firſt currently received, they are now become ordinary Clauſes in Tailzies. The Difficulty, if Men could provide *ne Leges in ſuo Teſtamento valeant*, or by a reſerved Faculty prejudice the Law of Death-bed, is now quite over, and 'tis no longer doubted but they may. 4. This Opinion is confirmed by Deciſions, *June* 22, 1670, *Douglaſs* of *Lumſdean* contra *Douglaſs*; *June* 28, 1662, Dam *Margaret Hay* contra *Seaton* of *Barns*: In both which Practicks the Faculty was exerced in Prejudice of the Heir of Line; Whereas here it is exerced in Favours of the only Daughter of the eldeſt Heir Female, who by the Tenor of the ancient Infeſtments would fall to be Heir-portioner of Line. There are likeways other Deciſions to this Purpoſe, *February* 1686, *Brown* contra *Congletoun*; *February* 1687, Lady *Keith* contra *Congletoun*: *February* 8, 1706, *Bertram* of *Nisbet* contra *Weir* of *Stonebyers*. As to the Deciſions adduced for Mr. *Livingtoun*, they may be eaſily taken off, for that of *Humby* contra *Hepburn* was tranſacted; and in the Caſe of *Porterfield* and *Cant*, there was no ſuch reſerved Faculty as here; Nor was the Diſpoſition in that of *Birnies* contra *Polmais* completed till after the contracting of Death-bed Sickneſs; And 'tis eaſie to diſcover, that my Lord *Dirletoun*, who obſerves the Practick of *Davidſon* contra *Davidſon*,

was

vas of a different Opinion. 5. The Alledgeance upon the Inconſiſtency and neffectualneſs of the Note indorſed upon the Tailzie, is *Jus Tertii* to Mr. *Li-ingtoun*, who has no Benefit if the Tailzie fall *in Totum*. But then what hinders Tailzie to be altered in Whole or in Part, or to be declared void as to one lauſe and to ſubſiſt as to another?

Replyed for Livingtoun: All the Deciſions adduced in Derogation of the ex-ellent Law of Death-bed, are to be ſtrictly interpreted, and conſidered only as rivileges indulged in favourable Caſes; Such as the burdening Heretage upon eath-bed with Proviſions in Favours of Relicts and Children, or the doing of Deeds conſented to, or homologated by the Heir. Again, there is a Difference be put betwixt burdening the Eſtate on Death-bed, and altering the Succeſ-on from its natural Channel: And there is a Difference betwixt Faculties con-ſtent with the Exiſtence of the Right, and thoſe inconſiſtent with it, as that efore us, whereby the firſt Tailzie is pretended to be quite evacuated.

Duplyed for Miſtreſs Menzies. The Diſtinction betwixt burdening Eſtates n Death-bed in Favours of Wives and Children, and the burdening them Favours of Strangers, and the Difference of burdening an Eſtate with Debts, from the Alteration of the Courſe of Succeſſion, are altogether groundleſs d arbitrary: Seing, if the Matter be decided by the Law of Death-bed, all ienations, whether to Children or Strangers, and any Diminution of the He-age, as well as Alteration of the Courſe of Succeſſion are reprobated; For ere are no Degrees in Things forbidden as to the Effect of Nullity, all is null at is done *Lege probibente*. Again, it were of dangerous Conſequence to di-nguiſh upon the Favourableneſs of Caſes, except where Favour has an expreſs d clear Rule in Law for it: The Pretences of Specialities and Favour being re pernicious to the Courſe of Law, than any other Art or Pretence whatſo-er.

Albeit Miſtreſs *Menzies* and Miſtreſs *Baillie* concurred in their Pleading to pport the Faculty of altering on Death-bed, yet they differed in this, Miſtreſs *illie* contended that the Quality in the Revocation of the firſt Tailzie, is not evant to ſuſtain it for conveying the Right of Succeſſion by the ſecond Tailzie Miſtreſs *Menzies*, in Prejudice of the Defunct's Heirs of Line. To which ſtreſs *Menzies* anſwered, That the Heirs of Line cannot plead the Benefit of Revocation, which muſt be taken with its Quality in Favours of the ſecond ilzie; For ſuch a qualified Revocation on Death-bed hath been ſuſtained as ctual in our Law, *January* 25, 1677, *Ker* contra *Kers*.

The Lords found, that the firſt Tailzie was not annulled by the Cancelling of *ltcoats*'s Side-ſcription from the joining of the firſt and ſecond Sheets there-; but was revocable and revoked on Death-bed by the Revocation written on e Back thereof. And found, that the Quality in the Revocation is not relevant ſuſtain the firſt Tailzie, for ſupporting the ſecond, and conveying thereby e Right of Succeſſion in Favours of Miſtreſs *Margaret Menzies*: And there-re reduced both Tailzies, and declared in Favours of Miſtreſs *Baillie* one of the eirs of Line.

January 27, 1708. Robert Scot *of* Harden, *againſt* Dam Jean Niſbet, *Relict of Sir* William Scot *of* Harden.

N the Competition for the Office of Executor to Sir *William Scot*, betwixt Dam *Jean Nisbet* his Relict, and *Robert Scot* his Heir and neareſt of Kin: he Lady founded her Preference on a general Diſpoſition in the Year 1688, herein, by a mutual Agreement betwixt Sir *William* and her, the Surviver, failing Children of the Marriage, is to enjoy and have the abſolute Diſpoſal of all moveable Goods and Gear, and Executory, belonging to the other, with the Burden of Debts contracted, or to be contracted.

Alledged for Harden. The moveable Eſtate being ſtill in *Bonis Defuncti*, notwithſtanding the general Diſpoſition which infers only *Jus ad Rem*, or an Obligement upon the Succeſſor to perform, and doth not intitle the Receiver to purſue, without confirming, the Debtors and Havers of the Defunct's Goods: There is evidently Place for the neareſt of Kin, who, as Succeſſor in Law, is liable to all the Defunct's juſt Debts, and to the Haver of the general Diſpoſition, if it ſhall be found valid. This is agreeable to the Inſtructions given to the Commiſſars who firſt confirm the Executor Teſtamentar; And if there be no Nomination in Teſtament, or the Perſon named refuſe to accept, confirm the neareſt of Kin, and next to them Creditors, *&c.* So that the Haver of a general Diſpoſition doth only come in to confirm as a Creditor, upon the neareſt of Kin's neglecting the Office: And the Heir, who here is neareſt of Kin, has Intereſt to be relieved of moveable Debts with which the general Diſpoſition is burdened.

Anſwered for the Lady. 1. Her Right to the Office of Executor is founded on the expreſs Will and Deſign of the Defunct, who cannot be imagined to have given his whole Executory, and the abſolute Diſpoſal of his Moveables to his Lady; and yet to have allowed his neareſt of Kin to be Executor and Diſpoſer of all his Moveables. Muſt not the Power of diſpoſing upon, include a *Jus Retentionis*? Were it not ſuperfluous in Law to give the Office to one who muſt reſtore what he meddles with: Seing *fruſtra petit, quæ mox eſt Reſtituturus*? The Lady can't properly have Right to the Executory, without being Executrix: That Denomination being only Competent in a proper Senſe to the moveable Eſtate, in the Interval betwixt the Defunct's Death and the complete Execution of the Teſtament, which can be no where lodged but with the Executor; Conſequently ſhe muſt carry the Office, by Virtue of her Right to the Goods. 2. By the Act of Parliament 1690, a general Diſpoſition with Confirmation is as good as any ſpecial Aſſignation, which excludes the Intereſt of the neareſt of Kin: Now, in all Competitions *de acquirenda Poſſeſſione* upon incomplete Rights, the greateſt Intereſt is ever preferable; And in this Caſe the neareſt of Kin, by being preferred to the Office, would only get his Pains for his Reward. Again, the Intereſt of Creditors is ſufficiently ſecured by the Inventory given up upon Oath, and the Caution to be found by the general Aſſigny: In whoſe Cuſtody the Moveables will continue more valuable to be made furthcoming to all concerned, than if the Adminiſtration were lodg'd in one who in the Event can have no Intereſt in a fair Way; And conſequently cannot be preſumed ſo careful and vigilant. 3. The Lady's Intereſt is confirmed by the Practice of all other Nations: For as *Swynburn Part* 4. *Sect.* 4 obſerves, the conſiſtorial Law regards not ſo much the Words, as the Meaning of Parties; Among the *Romans*, who were very nice about the Inſtitution of Heirs, a Man was underſtood to be inſtitute Heir, being made *Dominus Bonorum L.* 48. *ff. de Hæred. Inſtit. Mantica de Conjectur. ult. Volunt. Lib.* 4. *Tit* 3. And the Canon Law, in this Matter looks more to the Subſtance of Things and the Defunct's Meaning, than to the Sound of Words, and the Scrupuloſity of Forms. 4. This is conſonant to the Analogy of our own Law, *January* 31, 1667, *Henderſon* contra *Henderſon*, and *Dirletoun* obſerves, That *July* 2, 1667, a ſimple Aſſignation to Mails and Duties in all Time coming was ſuſtained as importing an Obligement to diſpone heretably and irredeemably. 5. 'Tis needleſs to object, that a general Aſſignation doth not denude the Defunct, without confirming: For the Lady pleads not Exemption from confirming, but that her Right intitles her only to be confirmed. By the Commiſſars Inſtructions, the neareſt of Kin are indeed ordinarily preferred, unleſs excluded *ab Officio* as well as *a Beneficio*, by the Defunct's naming another: But here the Lady has Right to the Office by the general Diſpoſition, which is equivalent to a Nomination of her to be Executrix; and conſequently the Laird muſt drop his Pretenſions thereto. Tho' all Heirs have Intereſt to be relieved of their Predeceſſors moveable Debts, it doth not follow that all Heirs ſhould be Executors or preferred to the Office: Their Relief being ſufficiently ſecured, as the Intereſt of other Creditors, by the Inventory and Caution found at confirming. And by a late Deciſion betwixt *William Oliphant*'s Relict and neareſt of Kin; The Lords preferred the Relict's general and univerſal Right, tho' nothing ſo expreſs as the Lady *Harden*'s, which would prefer her to the Defunct's Creditors.

Replyed for Harden. 'Tis frivolous to alledge that the general Diſpoſition is a virtual Nomination: For as an Evidence of the contrary, the Commiſſars never confirm a general Aſſigny *qua* Executor nominate, but only *qua* Executor Creditor, and Creditors are never admitted where the neareſt of Kin offer to confirm. Beſides, *Harden* hath not only Right as neareſt of Kin to the Office, but he hath good Intereſt as Heir to ſee the Effects applied for Payment of the Debt. And it cannot be inferred that the Office of Executor ſhould fall to the Perſon who has Right to the Executory; the Right and the Office being diſtinct. But it is more preſumable, that the Defunct did not intend that his Lady ſhould have the Office, ſeing he hath not expreſt ſo much by naming her Executrix, which is ordinary in ſuch a Caſe; and a Diſpoſition *omnium Bonorum* is but an univerſal Legacy which only takes Place after Payment of Debt. 2. *Quid inde* that a general Diſpoſition with Confirmation is equivalent to a ſpecial Aſſignation: When the neareſt of Kin has Right to obſtruct the Confirmation. 3. The Caſe of *Oliphant*'s Relict is not to the Purpoſe, for there the neareſt of Kin were expreſly excluded: And the other cited Deciſions are foreign to the Caſe in Hand.

The Lords preferred the Laird of *Harden* to the Office of Executor; notwithſtanding of the Lady's Pretenſions upon the general Diſpoſition.

Eodem Die. Robert Glendinning *of* Partoun, *againſt* John Irving *of* Drumcoltran.

IN the Reduction and Improbation at the Inſtance of *Robert Glendinning* of *Partoun*, againſt *John Irving* of *Drumcoltran*, for reducing a Wadſet Right of the Lands of *Borland*, granted by the Purſuer's Father to *Mary Maxwell*, from whom, and *Robert Thomſon* of *Kirkland* her Husband, when under Diſtreſs for Debt at the Inſtance of *Alexander Chriſty*, *Drumcoltran* purchaſed the Wadſet, and paid the Debt, upon a Letter from the Purſuer, deſiring him earneſtly to agree with *Kirkland* anent the *Borland*, which would be a Kindneſs done to the Purſuer: The Defender having produced only an Extract of the Wadſet out of the *Stuart* Court-books of *Kirkcudbright*, the Purſuer crav'd Certification againſt the Principal.

Alledged for the Defender. The Extract cannot be quarrelled for not Production of the Principal: Becauſe, the Defender had acquired the Right at the Deſire of the Purſuer, and to do him a Favour, whoſe Letter was not only a Homologation of the Reality of the Wadſet, as if it had been diſponed with his Conſent, but alſo a Mandate to advance Mony for ſuch a Right *ſuiipſius & tertii Gratia*, the Purſuer being Debtor for the Mony. And as the exacteſt Man could not doubt the Verity of a Debt acknowledged by the Debtor; ſo it was *contra bonam Fidem* to quarrel the ſame after the Right thereto was acquired at his own Deſire.

Anſwered for the Purſuer. The Letter cannot hinder him to quarrel the

Right of Wadſet upon Pretence of Falſhood, becauſe, *hoc non agebatur* thereby, that the Writer ſhould be bound for the Validity of the Right to be acquired: And Men ought not to be inſnared by ſuch general Letters of Friendſhip, which import no Mandate, but only what Lawyers call *Commendation.* For as *Voet Comment. in Pandect. Tit. Mandat. N.* 1. obſerves, *Mandatum dicitur a Datione Manus*, &c. *ac differt a Commendatione in eo, quod qui Commendavit non obligetur; L.* 12. §. 12. *L.* 8. *ff. mandati, quali Commendanti non abſimilis videtur qui amicabilem tantum Affectionem in Negotio gerendo præſtitit, L.*10. §.7. *ff. Eod.*

The Lords refuſed to allow the Purſuer the Benefit of Certification againſt the principal Wadſet, and found the Production ſatisfied by the Extract, in Reſpect of the Letter recommending to the Defender to purchaſe that Right.

Eodem Die. *Sir* Hugh Dalrymple *of* Northberwick, *Preſident of the Seſſion, againſt Sir* John Inglis *of* Cramond.

MY Lord Preſident having given in a Bill to the Lords, repreſenting, that he had tranſacted with all the Creditors upon the Eſtate of *Northberwick* purchaſed by his Lordſhip at a publick Roup, except Sir *John Inglis* of *Cramond*, againſt whom he had obtained a Decreet of Declarator of Extinction of his Debt, and therefore craving up his Bond for the Price according to the Act of Parliament *1696*: Sir *John* preſented a Counter-bill, upon which a Hearing was allowed to both Parties.

Alledged for Sir John Inglis. He had raiſed Reduction of the Decreet againſt him upon this Ground, That the ſame was not only in Abſence, but null in Reſpect there was a depending Proceſs at the Inſtance of his Father againſt the Tenants of *Northberwick*, wherein the Lord *Balmerino*, my Lord Preſident's Author was compearing, and an Act extracted, which ought to have been wakened and transferred againſt Sir *John*: And my Lord Preſident, an Aſſigny to a litigious Right, who is in no better Caſe than his Author, could raiſe no new ſeparate Proceſs neglecting the former. For *Lite pendente nihil innovandum:* And it would occaſion Confuſion and Multiplicity of Pleas, if one Party were allowed to relinquiſh a depending Proceſs, and raiſe a new one at his Option.

Replyed for my Lord Preſident. That tho' he had no other Title but as Aſſigny by my Lord *Balmerino*, he may repete, as he does, a Reduction of that Act upon which Sir *John* ſummarly quarrels his Decreet: But as Purchaſer at the Roup he has a ſpecial and unqueſtionable Intereſt to bring the Competition to to a Deciſion; without being concerned in any former Queſtion about Mails and Duties before the Sale. Nor is it of any Moment to object, That the Purſuer's Title of the Sale, was a Diſpoſition from the Lord *Balmerino*: For any Perſon may Purchaſe, whoever purſues the Sale, and the Purchaſer gets a diſtinct Right as the higheſt Offerer; and any Purchaſer, before the Regulations appointing Rankings to precede Sales, might acquire what Rights he pleaſed upon his Peril, and then purſue the other Creditors for declaring the Price exhauſted, as was done in this Caſe.

Duplyed for Sir John Inglis. He having produced the Act in the former Proceſs, in Order only to inſtruct the Reaſon of Reduction of the Declarator againſt him, my Lord Preſident could not be allowed to repete a Reduction of the ſaid Act inſtantly; but muſt waken and transfer the former Proceſs, or elſe go on in his Reduction as accords *Via ordinaria*, that Sir *John* may have the *Induciæ legales.* 2. A Decreet of Sale being but a judicial Alienation for the Behoof of Creditors, it cannot prejudice them, or afford any new Title to quarrel their Rights: So that the Preſident could only quarrel Sir *John*'s Right upon the Intereſt of Creditors conveyed to him, which were all in the Field in the former Proceſs at old *Cramond*'s Inſtance.

The Lords repelled the Dilatory Defence proponed for Sir *John Inglis*: And found, That my Lord Preſident might repete his Reduction of the Act of Litis-conteſtation ſummarly, without a Wakening or Transferring.

January 29, 1708. Andrew Fulton *Merchant in* Edinburgh, *againſt* George Johnſtoun *Merchant in* Lockerbie.

ANdrew Fulton, as Aſſigny by *James Stuart* to a Bill of Exchange, drawn by *George Johnſtoun* upon *John Scot* and *John Foreman* in *Hawick*, payable to the Drawer, and accepted by *Scot* ſimply, and by *Foreman* as Cautioner for *Scot*; purſued *George Johnſtoun* for Payment after the Accepters had been diſcuſſed by a regiſtred Horning at the Inſtance of *Stuart*, who, before the Aſſignation in Favours of *Fulton*, had executed an Admiral Precept by Recourſe againſt *Johnſtoun*, upon his refuſing to pay the Bill.

Alledged for the Defender. *Foreman* the Cautionary Accepter of the Bill, had paid the Contents to him, who ſubſcribed a Blank on the Back thereof to be filled up with a Diſcharge or an Aſſignation for Relief againſt *Scot* the principal Accepter: But *Foreman*, inſtead of making Uſe of the ſubſcribed Blank for that Effect, filled up therein an Indorſation to *Stuart*. Which Bill, being once extinct by Payment, could not revive to afford Recourſe againſt the Drawer: More than Action would be ſuſtained againſt a Cautioner, upon a Bond paid and retired by the Principal, and given back after he was *lapſus* in Order to diſtreſs the Cautioner. The Defender offered to prove his Alledgeance, by the Oath of *Stuart* the Cedent, which muſt be received againſt the Aſſigny in this Caſe of Fraud *in Re*, which, as *Vitium reale*, affects the Bill in whatever Hand it come: Eſpecially conſidering, That *Fulton* knew the Sum contained in the Bill was rendred litigious by a Proceſs before the Admiral betwixt *Johnſtoun* and *Stuart* before the Date of his Aſſignation.

Anſwered for the Purſuer. The Cedent's Oath is not receiveable againſt him an Aſſigny for an onerous Cauſe, notwithſtanding of the Pretence of Fraud, unleſs it could be alledged that he was acceſſory to it: More eſpecially in the Matter of Bills, whereof the Courſe ought not to be ſtopp'd, in Prejudice of an innocent Poſſeſſor, upon extrinſick Stories of Fraud, of Drawer, Accepter or Indorſer. Nor is the Matter to be judged litigious from the Cedent's executing an Admiral Precept againſt the Drawer, upon his refuſing Payment: Whereby the Debtor's ſhifting of Payment would operate to him the Privilege of having the Cedent's Oath to the Ruin of Commerce, and Incouragement of litigious Debtors. For a Matter in Law becomes only litigious by Suſpenſion, Reduction or Litis-conteſtation.

The Lords found, That *Fulton* knew the Sum contained in the Bill was rendred litigious betwixt *Johnſtoun* and *Stuart*, before *Stuart*'s Aſſignation to *Fulton*; And therefore ordained *Stuart* to depone upon the onerous Cauſe of his getting the Bill from *Johnſtoun*, and of his Knowledge, if *Foreman* paid any Part of the Contents, or had the Precept in his Hands any Time indorſed Blank.

Eodem Die. *Mr.* Alexander Arbuthnot *Factor to* Meſſieurs Burgh *and* Arnold *Merchants in* London, *againſt* Walter Scot *Merchant in* Kelſo.

WAlter Scot having by his Note obliged himſelf to pay to *Meſſieurs Burgh* and *Arnold* or Order Fifteen Pound *Sterling* at *London*, or at *Edinburgh* with the current Exchange ; and the Note being indorſed to Mr. *Arbuthnot*, who purſued *Scot* for Payment: The Lords found, That it was not of the Nature of a Bill of Exchange, nor did partake of the Privileges thereof, but was a ſimple Ticket; in Reſpect there was not a Drawer and Accepter; And therefore found the ſame null and not probative for Want of the Names and Deſignations of Writer and Witneſſes.

February 3, 1708. Arnot *of* Woodmill, *againſt the Commiſſioners of the Equivalent.*

THE Commiſſioners of the *Equivalent* being charged at the Inſtance of *Arnot* of *Woodmill*, as pretending Right to a Share in the *African* Company, they preſented a Bill of Suſpenſion upon Multiple-diſtreſs by Arreſters; and executed a Summons of Multiple-poinding againſt all the Competitors; And the Charger having obtained a Warrant to diſcuſs ſummarly: The Lords found, That the Commiſſioners of the *Equivalent* were not obliged to debate, until their Summons of Multiple-poinding came in by Courſe of the Roll; and that the Charger having applied for, and obtained a Warrant for a ſummar Diſcuſſion, could not thereafter paſs therefrom, ſo as to oblige the Commiſſioners to expede their Suſpenſion in common Form.

Eodem Die. Andrew Malice *elder and younger, and* Donald Malice *Butchers in* Coupar, *againſt Mr.* John Ogilvie *Baillie of the Regality there, his Clerk and Fiſcal.*

IN the Action at the Inſtance of *Andrew* and *Donald Malices* againſt Mr. *John Ogilvie*, for reducing a Decreet pronounced by him againſt them as Contraveeners of the *Act* 7. *Parl.* 1703. by keeping a Wadſet of ſeveral Acres of Land in Graſs for paſturing of Cattel, tho' they be Butchers. Seing the ſaid Statute *diſcharges all ſuch Perſons to take, brook or poſſeſs by themſelves or others for their Behoof, directly or indirectly, any Lands exceeding an Acre untilled and unſown with Corns yearly, under the Pain of* 100 *Pound* Scots toties quoties, *beſides the Forfeiture of the Beaſts graz'd thereon, and the Contraveeners Burgeſs-ſhip in all Burghs.*

The Lords ſuſtained this Reaſon of Reduction, That the Lands on which the Purſuers graze their Cattel is their own Property by a Wadſet Right ſtanding in their Perſon: And the Act of Parliament diſcharging Butchers to be Graziers concerned only Tackſmen Graziers. Albeit it was alledged that the general Words, *Brook* and *Poſſeſs* comprehended Rights of Property; and the Prohibition might be eluded if reſtricted to Tackſmen, by Butchers taking Wadſets in Place of Tacks. And that there was no Hardſhip in hindering a Fleſher from grazing on his own Land to prevent his foreſtalling the Market by fatten'd Cattel at Hand, to the Diſcouragement of Drovers from coming to ſerve the Liedges at cheaper Rates; than there is in the Policy of Burghs hindering a Merchant to be a Tradeſman, or a Tradeſman to be a Magiſtrate. But yet this Deciſion ſeems to be founded in Law and Reaſon: Becauſe, a penal Statute ought to be ſtrictly interpreted, and it were out of Meaſure hard to debar Butchers from the common Benefit of ſecuring their Mony by taking heretable Rights into their own Poſſeſſion, when perhaps Tenants cannot be had, and the Nature of the Ground is only proper for Graſs.

February 5, 1708. Alexander Scot *Writer in* Edinburgh, *againſt Mr.* George Seton *of* Gardinroſe.

MR. *George Seton* having, for Love and Favour to *Janet*, *Margaret* and *Mary Setons* his Siſters, obliged himſelf by Bond to pay them 1000 Pound at the Term therein-mentioned, with this Proviſion, That, in Caſe he were decerned to pay 3000 Merks to *Jean Kennedy* for which there was a Proceſs depending againſt him, the Bond in Favours of his Siſters ſhould be void and null: The ſaid Proceſs came not to a Deciſion *in Jure*, but being ſubmitted, Mr. *George* was decerned to pay the 3000 Merks to *Janet Kennedy* by a Decreet Arbitral. The Siſters aſſigned their Bond to *Alexander Scot*, who purſued Mr. *George* for Payment.

Alledged for the Defender. That the Bond was null, in ſo far as he was not aſſoilzied from *Janet Kennedy*'s Proceſs, but forc'd to pay her the 3000 Merks.

Anſwered for the Purſuer. The Bond ſtands good; ſeing the Defender was not decerned to pay the ſaid Sum by a Decreet in the then depending Proceſs, in the Terms of the Bond. Payment by Virtue of the Decreet Arbitral, is not relevant to irritate the Bond: Becauſe, the Submiſſion entred into without the Purſuer's Conſent was unwarrantable, and cannot prejudice them whoſe Bond was to take Effect according to the judicial Event of the Proceſs before the Lords.

The Lords found, That Payment by Virtue of the Decreet Arbitral did irritate the Bond, as if Mr. *George Seton* had been decerned to pay by their Lordſhips Decreet; And that he was under no Reſtriction by the Clauſe in the Bond from ſubmitting his Proceſs, to evite the Expence of a Plea.

February 10, 1708. Anna Muirhead *and* Robert Leith *Writer in* Edinburgh *her Husband for his Intereſt*, *againſt* George Lockhart *of* Carnwath.

IN the Charge at the Inſtance of *Anna Muirhead* as Heir ſerved to *Robert Muirhead* Writer in *Edinburgh* her Father, and Executrix confirmed to *Martha Lindſay* her Mother, for Payment of 4000 lib. reſting of 9000 lib. contained in a Bond ſecluding Executors, granted by *George Lockhart* of *Carnwath* to the ſaid *Robert Muirhead*, who diſponed all his Effects heretable and moveable in Favours of the ſaid *Martha Lindſay*, not mentioning her Executors, with this Proviſion, *That ſhe ſhould be bound and obliged to pay to* Anna Muirhead *their only Daughter the Sum of 7000 Merks at her Age of Fifteen Years, or Marriage, and the Superplus of his Eſtate, reſerving* Martha's *own Liferent thereof*: *Carnwath* ſuſpended upon this Reaſon, That he was neither *in Tuto* to pay to the Charger as Heir to her Father, becauſe he was denuded by the Diſpoſition in Favours of his Wife; nor yet as Executrix to her Mother, becauſe the Bond granted to the Father expreſly ſecluded Executors, and the Diſpoſition to the Mother was only to her ſelf, and not to her and her Executors. So that the Debt continued heretable in her Perſon, as it was heretable in the Father's Perſon, and the Charger could not have Right thereto without being ſerved Heir to her Mother.

Alledged for the Charger. 1. The Mother having no abſolute Right, but only a naked Truſt of Adminiſtration for the Behoof of the Charger *nominatim*, which *Fidei-commiſſum* ceaſed by the Mother's Death; a general Service as Heir to the Father, who was Creditor in the Bond, was ſufficient to eſtabliſh the Right in the Charger's Perſon. 2. The Bond tho' heretable in the Father's Perſon, was moveable in the Mother's, whoſe Executors were not excluded, as his were. For by the Act of Parliament 1661, an expreſs Secluſion of Executors is neceſſary to make a Bond that is moveable *quoad Debitorem*, become heretable as to the Creditor. And as a Bond to a Perſon without mention of his Aſſignies, is aſſignable: So muſt a Bond without the Adjection of Heirs or Executors, fall under Confirmation.

Anſwered for the Suſpender. The Proviſions not being real affecting the Diſpoſition, but only perſonal Obligements upon the Mother, notwithſtanding whereof, the Right of the Subject diſponed remained with her Heirs until they be habily denuded by a Sentence. 2. Tho' the Bond had been diſponed to the Mother, her Heirs and Executors *per Expreſſum*, it would not thereby have been rendred moveable in her Perſon: Far leſs can the Deſtination be preſumed altered from heretable to moveable, by the Diſpoſition to her, without mention of Executors. Becauſe, a Bond ſecluding Executors is in a Manner more heretable than one upon which Infeftment hath followed: In ſo far as a Charge of Horning would render the latter moveable, and not the former.

The Lords found, That in Reſpect the Aſſignation to *Martha Lindſay* bears *in Gremio* to be for the Charger's Behoof, there is no Neceſſity for ſerving the Charger Heir to her Mother. That which ſeem'd to influence the Lords in this Deciſion was the Prattick, *9 June 1669*, *Street* contra *Home*.

February 11, 1708. Æneas M'kay *Tutor of* Bighouſe, *againſt* James Sinclair *of* Stempſter.

IN the Proceſs at the Inſtance of *Æneas M'kay* againſt *James Sinclair* of *Stempſter*, for Payment of 4000 Merks reſting to the Purſuer by *William Sinclair* of *Stempſter*, whom the Defender repreſents as Heir: The Defender alledged that he was ſerved Heir *cum Beneficio Inventarii*, and could only be liable *ſecundum Vires*, according to the 24 *Act*, *Parl.* 1695.

Replyed for the Purſuer. The Defender could not have the Benefit of being only liable *ſecundum Vires Inventarii*: Becauſe, Inventories were not made in the Way and Manner preſcribed by the Act of Parliament. In ſo far as, 1. They were only given in to the Sheriff Court of *Edinburgh* and recorded in the Books thereof, albeit the Defunct's Heretage lies in *Caithneſs*, where by the Act of Parliament the Inventory ſhould been recorded. 2. The Defender's Inventory bears the Sum of 7487 ℔ 5 ſh. to be due to the Defunct by Bonds ſecluding Executors, without condeſcending on the particular Bonds and Debts therein-contained: Whereas the Act of Parliament appoints the Inventory to be full and particular as to all Lands, Houſes, Annualrents or other heretable Rights whatſoever to which the apparent Heir may, or pretends to ſucceed. For when the Extent of the Defunct's Debts is only mentioned in the Inventory, the Heir being charged as having intrometted with any particular Debt, might, by pretending it was included in the Total given up in the Inventory, fruſtrate the Deſign of the Act of Parliament.

Duplyed for the Defender. Any innocent Error in making up the Inventory cannot deprive him of the Benefit thereof made in due Time: Seing he cannot be charged as guilty of fraudulent Omiſſion or Intromiſſion; however the Lords may regulate the Matter by an *Act of Sederunt* in Time coming; as was done in the Caſe of Adjudications irregularly led for a Fifth Part more, and other Inſtances. *Voet Comment. in Pandect. Tit. de Jure deliberandi, N.* 16. inſinuates, That the Benefit of Inventory is loſt only by the Neglect to make Inventory, and not by any Informality in the upmaking thereof. As to the particular Informalities condeſcended on by the Purſuer; they are not of Moment. For 1. An Inventory is not annulled for not being made before the Sheriff where the Subject of it lies, when the Subject of the Inventory (as being

Conqueſt) could not fall to the Defender who is Heir of Line, and never intrometted with it. Nor could inſerting by Miſtake what belonged not to the Heir ſerving, evacuate his Benefit by the Inventory formally completed as to other Subjects: More than if *Poland* or *Newchatel* had been inſert in the Inventory; ſeing *utile per inutile non vitiatur*. 2. The Words of the Act, *Full and particular as to all Lands, Houſes, Annualrents*, &c. are to be taken, *applicando ſingula ſingulis, viz.* Full as to the Extent, and Particular as to the Species or Kinds, whether Lands, Houſes, Annualrents, *&c.* For as Lands may go under a general Deſignation, without mentioning every particular Room: So heretable Bonds are ſufficiently demonſtrated *Relatione ad Creditorem*, whereby any Perſon having Intereſt may have a ſufficient View of the Eſtate; and perhaps the Heir knew not, at giving up of the Inventory, who were Debtors in the Bonds.

The Lords refuſed to ſuſtain the Inventory founded on by the Defender to give him the Benefit of being liable only *ſecundum Vires*, in Reſpect of the Informalities thereof: And therefore found him liable ſimply as Heir.

Eodem Die. ACT *of* SEDERUNT, *Declaring* STAFF *and* BASTON *the only Symbols to be uſed in Reſignations of Lands in the Superior's Hands.*

THE Lords of Council and Seſſion conſidering, That the fixed and conſtant Symbol of Surrender uſed in Reſignations of Lands in the Superiors Hands, is by *Staff* and *Baſton*; and yet, finding by ſome Infeſtments produced before them, of Tenements lying within the Town of *Edinburgh*, the Reſignation in the Magiſtrates Hands bears not the foreſaid Symbols, but Delivery of *Earth* and *Stone*; and that the Alteration of Stiles may be of a bad Conſequence; tho' they are unwilling to annul Seaſins heretofore expede in that Manner: Therefore, The Lords Diſcharge in Time coming the uſing any other Symbols in Reſignations, except *Staff* and *Baſton*; and, with Certification, That if Reſignation be made hereaſter in the Superiors Hands, by any other Symbol than *Staff* and *Baſton*, That they will not ſuſtain ſuch Reſignations or Seaſins following thereupon, but that the ſame ſhall be void and null: And, they appoint this Act to be Recorded in their Books of *Sederunt*. And, that none may pretend Ignorance, They ordain theſe Preſents to be proclaimed and publiſhed at the Market Croſs of *Edinburgh*; and thereaſter, to be printed and affixed upon the Walls of the Parliament Houſe, and other Places needful.

Nota, This *Act* of *Sederunt* was made upon a Competition betwixt *Calderwood* of *Pittedie* and Sir *Thomas Young* of *Roſebank*, whoſe Infeſtment in a Tenement of *Edinburgh* the Lords, 7 *February* Inſtant, ſuſtained; albeit it carried Reſignation to have been made in the Magiſtrates Hands by the Symbols of *Earth* and *Stone*, and the Procuratory bore Warrant to reſign by *Staff* and *Baſton*: In Reſpect upon ſearching the Town Records, that appeared to have been an ordinary Practice.

Eodem Die. Archibald Ker *Son to* Archibald Ker *Apothecary in* Edinburgh, *and his Father as Adminiſtrator in Law to him, againſt* Jean Howiſon *Spouſe to Mr.* John Lookup *Miniſter at* Mid-Calder, *and him for his Intereſt.*

MR. *Richard Howiſon* Miniſter at *Inveraſk* having taken a Diſpoſition of ſome Acres of Land in the Eaſter Croft of *Briſto*, to himſelf in Liferent, and to *William Howiſon* his eldeſt Son, his Heirs and Aſſignies in Fie, which failing, to *Richard* his ſecond Son, his Heirs and Aſſignies, *&c.* upon which Diſpoſition all were Infeſt, by Symbols given to the Father for himſelf in Life-rent, and as Procurator for his two Sons, who are named in the Inſtrument of Seaſin. After the Death of the Father and *William* the eldeſt Son, *Richard* ſerved himſelf Heir in general to his Brother, and then diſponed the Land to *Jean Howiſon* his eldeſt Siſter, and died. *Archibald Ker* the ſecond Siſter's Son being ſerved Heir to *William* his Uncle and Infeſt, purſued a Mails and Duties againſt the Tenants: Wherein Compearance was made for *Jean Howiſon* and her Husband, who crav'd Preference upon *Richard*'s Diſpoſition.

Alledged for Archibald Ker. That he had raiſed Reduction of that Diſpoſition, as being granted *a non habente Poteſtatem*: In ſo far as, *Richard* was only a Subſtitute to his Brother *William* the inſtitute Fiar, and could tranſmit no Right to Lands that *William* died infeſt in, without being ſerved and infeſt as Heir in ſpecial to him. For the Symbol of Infeſtment given to *Richard* when *William* was infeſt was ſuperfluous and ineffectual: Seing two Fiars in the ſame Subject at one Time are inconſiſtent in Law. Nor was the general Service ſufficient to carry a Subject whereupon Infeſtment had followed: So that *Jean Howiſon*'s Right being null; *Archibald Ker* as infeſt upon a ſpecial Service, has undoubted Right to the Acres.

Anſwered for Jean Howiſon. That the Father by the Strain of the Diſpoſition, and his taking Infeſtment in Name of both his Sons, deſigned not a Subſtitution but a ſucceſſive Fie, for preventing the Neceſſity of a Service in Caſe of *William*'s Deceaſe: And *Archibald Ker* could not, paſſing by *Richard*, ſerve Heir to *William*, whom *Richard* was ſerved Heir to.

The Lords found, That *William* was Fiar and *Richard* only Subſtitute, and without being ſerved Heir in ſpecial could not diſpone: And therefore the Diſpoſition is *a non habente Poteſtatem*; and found that the Purſuer is not obliged to ſerve Heir to *Richard*, who was only ſerved Heir in general to *William*.

Eodem Die. John Balfour *Skipper in* Kirkaldy, *againſt* William Hutton *Tenant in* Kilgraſtoun.

JOhn *Balfour* having charged *William Hutton*, who was Cautioner and took Burden on him for *James Menzies* Apprentice to the Charger in his Calling of Navigation, for Payment of the Penalty in the Indentures; in Reſpect the Apprentice had deſerted the Charger's Service: *William Hutton* ſuſpended upon this Reaſon, That he was but a Cautioner, and could not be diſcuſſed before the Principal.

Anſwered for the Charger. A Cautioner in an Indenture taking Burden upon him for the Apprentice's dutiful Behaviour, was never allowed to plead *Beneficium Ordinis* in the Point of diſcuſſing: For Apprentices being ordinarily Minors, their Obligement is principally relied upon; which would ſubſiſt tho' the Principal's Obligement ſhould fall, upon the Account of ſome ſpecial Privilege.

Replyed for the Suſpender. There may be many Defences competent to the Principal, which cannot fall under the Cautioner's Knowledge: Upon which Account the Benefit of Diſcuſſion was never denied to Cautioners taking Burden upon them for others, who ſtand bound *ad Factum præſtandum*.

The Lords found, That the Cautioner in the Indentures had not *Beneficium Ordinis*, but might be inſiſted againſt without diſſcuſſing the Apprentice.

February 12, 1708. *Mr.* Robert Bundie *Merchant in* London, *contra* John Kennedy *of* Culzean.

JOhn *Kennedy* of *Culzean* having by his Note promiſed to pay to *David Crawford*, or Order 35 Pound 11 ſhil. *Ster.* the firſt of *September* 1706, Value received by him; and the ſaid Note being indorſed to Mr. *Robert Bundie*, who purſued *Culzean* for Payment: The Lords found the ſaid Note was not a *B*ill of Exchange, and therefore the Sum therein was compenſable by the Indorſer's Debt.

February 13, 1708. *The Marqueſs of* Tweddale, *contra* Alexander Orrock *of of that Ilk.*

THe Marqueſs of *Tweddale* having obtained from the late King *William* a Tack for ſeveral Nineteen Years, of the Feu and Teind-duties of the Abbacy of *Dumfermling*, charged the Laird of *Orrock* to pay 295 Pound 9 Shilling 8 Penies as the Price of rental Bolls, payable by him for the Teinds of his Lands the Cropt 1706: who ſuſpended upon this Ground, That the Charger and his Father had theſe Fourty Years bygone intrometted with the whole Teind-duties of the Suſpender's Lands, without diſcounting the Queen's yearly Annuity of Twenty Pound, to which the Suſpender has Right for onerous Cauſes from the Earl of *Lowdoun*, who had Commiſſion from King *Charles* the firſt to diſpoſe of the Annuities due out of the whole Teinds in *Scotland*; And the Annuity will more than compenſe the Sum charged for.

Alledged for the Charger. The Teind-bolls charged for belonged to the Queen in Property, and to the Marqueſs only as Tackſman: Therefore no Annuity out of them was or could be conſtituted; ſince *Res ſua Nemini ſervit.*

Anſwered for the Suſpender. Annuity is no Servitude: Not a perſonal Servitude, as being neither *Uſus-fructus, Uſus,* nor *Habitatio*; Nor yet is it a real Servitude, becauſe, the Teinds out of which it is payable, can in no Senſe be called a *Prædium*, and it may be due to ſuch as have no *Prædium.* Beſides, to pay ſo much Mony for each Boll of Teind is *aliquid facere*, which agrees not with the common Nature of a real Servitude, that conſiſts in an Obligement *aliquid non facere, aut pati in ſuo.* 2. It is very conſiſtent, that the Teinds of the Suſpender's Lands, may pertain to the Queen in Property, and yet Her Majeſty's Tackſman be liable to pay Annuity. For, 1. It being clear from the Acts of Parliament 1633, about the Annuity and Valuation of Teinds, the preceeding general Submiſſion, with the King's Decreet-arbitral, and Act of Commiſſion following thereon; That the King, reſolving to eſtabliſh an univerſal Order, ordained all Perſons except Biſhops, Miniſters, *&c.* to denude of the Right to other Men's Teinds, and even Teinds belonging to His Majeſty were to be ſold: Now the King was to have His Annuity out of all Teinds whether ſold or not, unleſs what belonged to Biſhops, Miniſters, *&c.* without excepting the Tackſmen of the King's Teinds; *et Exceptio firmat Regulam in non exceptis.* Nor is it conceiveable how the Annuity could have been (as was deſigned) a conſtant Rent, or certain Patrimony of the Crown, if Teinds pertaining to the King in Property, or falling in His Majeſty's Hands by Succeſſion, Forfeiture, Baſtardy, *ultimus Hæres*, &c. could not be burdened with Annuity while in the Hands of Tackſmen, and Poſſeſſors thereof. 2. Tackſmen of the Queen's Teinds are bound to pay a Share of Supply, Miniſters Stipends and all publick Burdens: Conſequently are liable for Annuity, which was calculated to be a publick Burden upon all Poſſeſſors of Teinds, and a Branch of the Patrimony of the Crown.

Replyed for the Charger. 1. What is inferred from the Acts of Parliament 1633, Decreet-arbitral, *&c.* is nothing to the Purpoſe: For the Annuity being given to King *Charles* the firſt, as a Gratification for paſſing from the Severity of his general Revocation, cannot be thought to extend to Teinds that were in His Majeſty's Perſon *Jure privato.* The Clauſe appointing Annuity to be paid out of all Teinds except thoſe belonging to Biſhops, Miniſters, *&c.* muſt be underſtoood *in Terminis habilibus* of Teinds whereof His Majeſty had not the Right, but Lords of Erection and other Titulars. Now as the Annuity could not ſubſiſt as a Burden upon the Teinds in the Queen's Perſon, neither can Her Tackſman be obliged for Annuity. Becauſe, if Annuity was not a Burden upon the Sovereign's Property *ab Initio*, it could not emerge, or become due by the ſubſequent Grant of a Tack without any new Law; Beſides, the Tackſmens Poſſeſſion is Her Majeſty's Poſſeſſion. Again, there is a manifeſt Diſparity betwixt Teinds of the Queen's Property when the Annuity was impoſed, which could not be burdened with it, and Teinds which, being once liable to Annuity, fell afterwards in the Sovereign's Hands by Forfeiture, Baſtardy, *ultimus Hæres*, &c. And yet even in theſe, the Property would abſorb the inferior Right of Annuity. 2. It is not material to alledge, That the Queen's Teinds bear a Share of publick Burdens: For the Annuity and Supply are differently compted for in Exchequer, and differently applyed. The Supply is not granted to the Queen to be diſpoſed of as the Patrimony of the Crown, but for certain ſpecial publick Uſes; Upon which Account Her Majeſty's proper Lands bear a Proportion with the reſt of the Shire.

The Lords found, That the King having Right to Annuities, and to the Suſpender's Teinds, the Time of the Act of Parliament 1633; the Annuity could not burden theſe Teinds: Notwithſtanding that the King had Right to the Annuities *Jure Coronæ*, and to the ſaid Teinds *Jure privato.*

February 14, 1708. *Mr.* Patrick Strachan *Servant to Sir* Francis Grant *Advocate, againſt the Magiſtrates of* Aberdeen.

ANdrew Skeen of *Rutherſtane* granted to *James Skeen* his Brother, a Bond for 1000 Pound dated *July* 1, 1671, and the 11 of *November* thereafter became Cautioner for him, to the Town of *Aberdeen* for a Year's Tack-duty of the Exciſe at 53 Pound *Sterling* Monthly: For Security whereof, upon Diſtreſs in *December* 1672, he granted a Diſpoſition of his Lands to the Town. In *May* 1672, *James Skeen* aſſigned the 1000 Pound Bond to his Brother in Law *Alexander King*, who in *June* 1673, transferred it to *Janet Lumſdean James Skeen*'s Relict, who in *April* 1674, got from *Andrew Skeen* an heretable Bond of Corroboration, and her Right is conveyed to the Town of *Aberdeen.* But prior to the ſaid Bond of Corroboration Mr. *Patrick Strachan*'s Father being Creditor to *Andrew Skeen*, did both Inhibite him in *Auguſt* 1673, and got an heretable Security for 2784 Pound out of his Lands in *March* 1674, made publick by Infeſtment. Mr. *Patrick* as Heir to his Father, purſued a Mails and Duties of theſe Lands of *Rutherſtane*, wherein Compearance was made for the Town of *Aberdeen*, who claimed Preference upon the 1000 Pound Debt, to which they have Right by Progreſs.

Alledged for the Purſuer. The Town can found no Preference on the 1000 Pound Bond, becauſe compenſed while it ſtood in the Perſon of *James Skeen*:

Skeen: In ſo far as *Andrew Skeen* being ingaged as his Brother's Cautioner for the Tackduty, and diſtreſſed by granting an Infeſtment in his Lands for the ſame to the Town, who are paid by their Intromiſſions with the Rents; The Purſuer, as Creditor to *Andrew Skeen* by a real Right in theſe Lands, doth juſtly found upon Compenſation, or Retention of the Thouſand Pound, as the common Debtor might have done againſt the Town's Authors for Relief of the ſaid Tackduty.

Anſwered for the Defenders. By the common Law, *Jus Retentionis* was indeed competent even againſt ſingular Succeſſors of Species and Things in the Cuſtody of others than the Proprietar, for what had been neceſſarly expended upon the Account thereof: But Retention was never allowed to a Debtor in a liquid Sum, againſt an Aſſigny upon the Account of ſome other Deed performable by the Cedent, which came not under the preciſe Terms of Compenſation. *Ex Æquitate*, the Exception of Retention may ſometimes be competent againſt a liquid Debt; as to a Cautioner purſued by the principal Debtor for a liquid Debt due by him to the Principal, tho' he cannot formally compenſe, he being Debtor to pay a Sum, and the other only obliged *ad Factum præſtandum*, viz. to relieve the Cautioner, which Debts are not comenſurable *de Liquido in Liquidum*. But then this Exception is only competent againſt the Creditor himſelf, and not againſt an Aſſigny for an onerous Cauſe: Becauſe, it is a ſimply perſonal Exception, that doth not extinguiſh the Debt, ariſing from the Creditor's Dole in ſeeking Payment from his Cautioner, before he relieve him of his Ingagement for the Principal. 2. *Eſto* Retention had been competent, it was paſt from by *Andrew Skeen*'s granting the Bond of Corroboration in *April* 1674, long after the Ingagement of Cautionry. 3. *James Skeen* was denuded of the Bond before the Term of Payment of the Tackduty, and ſo before *Andrew* was or could be diſtreſſed as Cautioner, or any Debt liquidated againſt him upon that Head; conſequently the Aſſigny cannot be concerned therewith.

Replyed for the Purſuer. Albeit the Tackduty had not been liquid, Retention was competent to *Andrew Skeen* for Security of his Relief, and conſequently is competent to his Creditor Mr. *Patrick Strachan*: But *ita eſt*, that by the heretable Security granted to the Town of *Aberdeen* in *December* 1672, *Andrew Skeen* was diſtreſſed, and the Tackduty therein liquidated to Fifty three Pound *Sterling* Monthly for one Year, which liquid Debt muſt be drawn back to the Date of the Tack of the Exciſe. 2. Prior to the Bond of Corroboration, Mr. *Strachan* had both inhibited *Andrew Skeen*, and got Infeſtment in his Lands, which *Jus quæſitum* could not be prejudiced by *Andrew*'s granting a poſterior Corroboration. 3. Tho' at the Date of the Aſſignation by *James Skeen* to *Alexander King*, the Term of Payment of a Part of the Tackduty was not come, that could not hinder Retention; Becauſe, 1. *Dies ceſſerat, licet non venerat*, and a Debt *in Diem* is due from the Date, tho' Execution for Payment be ſuperſeded to a Day. True, a Cautionry may be thought an Obligement *in Pendenti* for a Time, when the Exiſtence of the principal Obligement depends upon the elapſing of Terms; as in the Caſe of a Cautioner for a Liferent, where *non conſtat* if the Liferenter will outlive ſubſequent Terms, or a Cautioner in a Tack for more Years than one, which commonly goes not to Heirs or Aſſignies, unleſs expreſly conceived in their Favours. But *Andrew Skeen* was Cautioner for one Year's Tackduty, which Tack would have ſubſiſted whether the Tackſman had lived or not; And the Obligement of Cautionry was the ſame Thing upon the Matter, as if a liquid Bond for a Sum equivalent to the Tackduty payable at ſeveral Terms had been granted: In which Caſe, the Cautioner would certainly have had Retention till he were relieved of Moyeties due before, tho' payable after Aſſignation of the Cautioner's Bond. Becauſe, in perſonal Rights all Exceptions competent againſt the Cedent, are competent

againſt

againſt his Aſſigny, except as to Probation by the Cedent's Oath. And where a Man has a Right in his Perſon to another's Behoof, whatever he expends or obligeth himſelf for that other, is a real Burden upon the Subject affecting ſingular Succeſſors, as preſumed to be undertaken upon the Faith thereof, *February* 18, 1662, the Lord *Balmerino* againſt the Earl of *Bedford*: Juſt as when one having another's Mony in his Hand, becomes Cautioner for that other in Contemplation thereof. Beſides, one of the Reaſons why our Cuſtom allows Retention in a Man's own Hand, to have the ſame Effect with Arreſtment of a Subject in the Hands of another, is, for that a Perſon cannot affect, directly by Arreſtment or otherways, Mony in his own Hand, and *pro Facto habetur, per quem non ſtetit quo minus fieret*. The Lords have alſo frequently ſo decided, even in the Caſe where there was no Diſtreſs at the Time of the Principal's aſſigning his Cautioner's Bond.

Duplyed for the Defender. If one to whom Compenſation is competent, Corroborate the Bond in Favours of the Aſſigny, the Benefit of objecting Compenſation againſt the Aſſigny, is loſt; Seing Compenſation not applyed operates nothing: And it will not be pretended, that a Right of Retention is better than Compenſation. Inhibition may indeed ſtop the Conveyance of Heretage, but it was never heard to diſcharge an Exception ariſing upon a perſonal Deed, ſuch as the Obligation of Relief: And tho' the Infeftment in the Lands, would be a Ground to reduce poſterior Rights on theſe Lands; What doth that ſignifie to hinder the Diſcharge of an extrinſick perſonal Exception, when *Andrew Skeen* was of intire Credit? 2. It's true in the Caſe betwixt the Lords *Ballantyne* and *Sinclair*, Retention was allowed to my Lord *Sinclair* for Relief of his Cautionry for Sir *James Cockburn*: But then this was carried very narrowly, and the Point was not fully heard in Preſence. Beſides, there was a Speciality in my Lord *Sinclair*'s Caſe: For Sir *James Cockburn* was broken and fled before the Arreſtment in the Lord *Sinclair*'s Hands, ſo that in Effect the Cautioner was under Diſtreſs; whereas *James Skeen* was Solvent and in good Condition when he aſſigned the Bond to *Alexander King*.

The Lords found that *Andrew Skeen* being ingaged as Cautioner for his Brother *James* in the Tack of the Exciſe, before he aſſigned the One thouſand Pound Bond founded on to *Alexander King*, had thereby Right of Retention of the Sums contained in the ſaid Bond due by him to *James*, till he were relieved of his Cautionry. And found the ſaid Defence competent to Mr. *Patrick Strachan* the Purſuer in this Competition, for the Mails and Duties of *Andrew Skeen*'s Lands, whereon the Purſuer is a real Creditor, and uſed Inhibition againſt *Andrew* before he granted the Bond of Corroboration to the Town of *Aberdeen*'s Cedent. And therefore preferred Mr. *Strachan*'s Right, to the Town's Claim upon the ſaid Bond of One thouſand Pound, and Diligence done thereon.

February 17, 1708. Ludovick Grant *of that Ilk, againſt the Earl of* Sutherland.

IN a Proceſs at the Inſtance of the Laird of *Grant* againſt the Earl of *Sutherland*: The Lords did not ſuſtain the Privilege of a Member of the *Britiſh* Parliament, which exeems from legal Purſuits in the Time of Parliament, to hinder Circumduction of the Term againſt the Earl of *Sutherland*, for not reporting a Commiſſion which an Advocate compearing for his Lordſhip took a Day for; But they ſuperſeded Extract till the firſt of *June*.

Eodem Die. William Haliday *and* Arthur Temple, *againſt* Alexander Cuninghame *Writer to the Signet.*

IN the Proceſs at the Inſtance of *William Haliday* Aſſigny by *Arthur Temple* Liferenter of a Tenement of Houſes in *Edinburgh*, againſt *Adam Garden* of *Greenhill* the Fiar, for declaring the ſaid Tenement affected with, and adjudged for the Expence wared out by the Cedent in repairing and rebuilding thereof, after it was demoliſhed by Occaſion of Fire: The Lords *February* 20, 1706, found the Fie of the ſaid Tenement affected with Sums imployed for Reparation thereof. The Purſuer now inſiſts againſt *Alexander Cuninghame*, as come in Place of *Greenhill* by a Right from him, for Payment of the Annualrent of the ſaid Sum, expended on Reparations during the Liferenter's Lifetime.

Alledged for the Defender. 1. *De Jure* Fiars or Proprietars are not obliged to uphold or repair Lands or Tenements liferented: It being incumbent on the Liferenter both by the civil Law and ours, to uſe the liferented Subject *ſalva Rei Subſtantia*; and to find Caution that they ſhall leave the ſame in as good Condition as they got it. And tho' there be a Difference betwixt ordinary Reparations, and extraordinary Damages happening by fortuitous Calamity of Fire, or the like: Yet it is reaſonable even as to theſe, that both Parties ſhould bear the Loſs *pro rata*, effeiring to their Intereſt in the Subject: Seing the Proprietar has no Advantage by the repaired Tenement during *Arthur Temple*'s Lifetime, it were abſurd to burden him with Annualrent for the Reparations during his Lifetime, or to affect the Fie of the Tenement with the ſame: For *quem ſequitur Commodum, eum ſequi debet Onus.* Eſpecially conſidering, how in Tenements within Burgh the Intereſt of Lifrenters and Fiars are eſtimated: The Fie or Property, tho' unliferented, being ordinarly valued at Ten, and rarely at Twelve Years Purchaſe, and the Liferent valued at Seven, and ſometimes higher. 2. By the *Act* 10. *Art.* 5. *Parl.* 4. *Q. Mary*, the Executors of a Lifrenter get only a Third after his Death of profitable and neceſſary Reparations, without any Annualrent for the Interval of the Liferenter's Lifetime: And by the preſent Cuſtom of *Edinburgh*, the Liferenter of a burnt Tenement pays two Parts, and the Fiar a third of the Expences of Reparations.

Anſwered for the Purſuer. Tho' Liferenters are bound to uphold and preſerve the Subject liferented, and may be charged to find Caution for that Effect: It was never pretended that a Liferenter was obliged to rebuild or repair a Houſe when burnt *Caſu fortuito.* Nor is the Fiar at any more Prejudice by paying Annualrent to the Liferenter for the Reparations expended by him, than if a third Party had been at theſe Expences, which no doubt would have affected the Fie, as *in Rem verſum.* 2. Queen *Marie*'s Act of Parliament was only an *interim* Regulation, when the Town was burnt by the *Engliſh*, and never ſince obſerved, as Sir *George Mackenzie* tells us.

The Lords found that the Annualrent of the Reparations could not affect or burden the Fie during *Arthur Temple*'s Lifetime, while he or his Aſſigny enjoy the Rent of the Tenement.

Eodem Die. *Mr.* William Hall *Advocate, Againſt Dam* Mary Campbell *and Sir* William Gordon *of* Aſtoun *her Husband.*

SIR *George Campbell* of *Ceſſnock*, having diſponed his Intereſt in the Capitall Stock of the *African* Company of *Scotland*, to Dam *Mary Campbell* his eldeſt Daughter, Sir *William Gordon*'s Lady, reſerving his own and Dam *Anna M'morran* his Lady's Liferent, and full Power to himſelf during his

Lifetime to alter, and with Power to the ſaid Dam *Anna*, if the longeſt Liver, to diſpoſe of the Mony as ſhe ſhould think fit: He, Sir *George*, thereafter made a general Diſpoſition of all Debts and Sums of Mony belonging to him the Time of his Deceaſe, in Favours of his ſecond Daughter Dam *Margaret Campbell* married to Sir *Alexander Campbell* (now of *Ceſſnock*) one of the Senators of the College of Juſtice, wherein he reſtricted Dam *Anna M'morran* his own Lady to the Proviſion in her Contract of Marriage, revoking all other additional Proviſions and Rights made in her Favours, and conveying them to the ſaid Dam *Margaret*. My Lord *Ceſſnock* having confirmed Dam *Margaret* his Lady Executrix Creditrix to her Father upon the general Diſpoſition, and given up the Share in the *African* Stock in the Inventory, they aſſigned the ſame to Mr. *William Hall*, who competes with Sir *William Gordon* and his Lady in a multiple Poinding raiſed by the Commiſſioners of the Equivalent.

Alledged for Mr. William Hall. He ought to be preferred, in Reſpect that the old Lady *Ceſſnock* had a Right to the *African* Share, which was revoked and given to his Cedent by the general Diſpoſition: And ſuppoſe the old Lady had had no Intereſt in the Subject, the ſame is validly conveyed in Favours of Dam *Margaret Campbell*, by Sir *George*'s exercing the reſerved Faculty in Dam *Mary*'s Right, by the general Diſpoſition to the other, which neceſſarly implys a Revocation of the Aſſignation in Favours of Dam *Mary*.

Anſwered for Dam Mary Campbell. A general Diſpoſition cannot take Effect to alter a prior Aſſignation to a particular Subject, more than an univerſal Legacy would be underſtood a Revocation of a prior ſpecial Legacy: Yea, the Argument holds ſtronger in Deeds *inter Vivos*, than in teſtamentary Deeds; ſuch general Conveyances being only extended to what remains not ſpecially diſpoſed of. For a Man is underſtood to diſpone his Goods only as he had them: And ſo it is that Sir *George* had no Right to that which he had ſpecially aſſigned to his eldeſt Daughter, but only a Faculty which he did not exerce. 2. The old Lady had but a Faculty to alter and otherwiſe diſpoſe of the Sum, which could only be exerced by her ſelf: And Sir *George*'s taking the Faculty from her by his Revocation, left the Writ in the ſame State as if ſuch a Faculty had never been in her Perſon: And the general Diſpoſition to the ſecond Daughter, cannot be interpret a Conveyance of what was formerly ſpecially aſſigned to the eldeſt.

The Lords found the Diſpoſition and Deſtination by Sir *George Campbell* of his Intereſt in the *African* Company in Favours of Dam *Mary Campbell* and her Husband, and Dam *Anna M'morran*, revoked and conveyed to and in Favours of the Lord and Lady *Ceſſnock*, by the Revocation and general Diſpoſition therein mentioned; And therefore preferred Mr. *William Hall* their Aſſigny.

February, 18, 1708. *Sir* Hugh Dalrymple *Lord Preſident of the Seſſion, againſt Sir* John Inglis *of* Cramond.

SIR *William Dick* and his Sons, having granted a Wadſet of their Lands of *Northberwick*, to Mr. *John Inglis* of *Cramond*, and *John Jouſſie* of *Weſtpans*, equally, redeemable for Twenty thouſand Pound, containing a Backtack for Payment of the Annualrent thereof, and a Clauſe that no Redemption ſhould be held till the whole Backtack Duties, termly Failzies and all other Sums wherein theſe Wadſetters ſhould be Creditors to Sir *William*, were ſatisfied, together with the principal Sum. Sir *William* alſo granted a Declaration apart thereafter in *July* 1651, bearing, "That *Cramond*, *Jouſſie*, and others therein ' mentioned, were ingaged to Mr. *James Whitehead* of *Park*, for the Sum of ' Ten thouſand Pound borrowed and applyed for Sir *William*'s Uſe and Behoof:

And declaring, "That the Wadſet Right ſhould not be Redeemable upon Repayment of the foreſaid Twenty thouſand Pound, Annualrents and Expences thereof, unleſs they were freed of their Ingagement for the Ten thouſand Pound, Annualrent and Expences. This Declaration bears only a Clauſe of Regiſtration in the Books of Council and Seſſion, that Letters and Executorials may paſs thereon; But is regiſtred in the Record of Seaſines and Reverſions. *Cramond* and *Jouſſie* in *Auguſt* 1652, obtained upon the Wadſet and Declaration, a Decreet of Mails and Duties in Abſence, and thereby poſſeſſed the Wadſet Lands. Sir *Hugh Dalrymple* Lord Preſident, who purchaſed theſe Lands as the higheſt Offerer at a publick Roup, inſiſts now againſt Sir *John Inglis*, in a Declarator of Extinction of the Wadſet, by his and his Predeceſſor's Intromiſſion with the Rents of the Wadſet Lands.

Alledged for Sir John Inglis. That his and his Author's Intromiſſions muſt be aſcribed in Payment of the principal Sum and Annualrents, in the Eik to the Reverſion, as well as to the Sums in the principal Wadſet.

Replyed for the Preſident. What Sir *John Inglis* pretends to be an Eik, is but a Declaration bearing Regiſtration for Execution, which cannot become an Eik by the Creditors thinking fit to record it in the Regiſter of Seaſines and Reverſions, without any ſpecial Conſent, Paction, or Deſign on the Debtor's Part to make it real; Which did not in the leaſt alter the Nature of the Obligement, more than regiſtrating a perſonal Bond in the Regiſter of Seaſines could make a real Right; And is of no more Effect, than the uſual Clauſe in the Wadſet it ſelf, That Expences termly failzies, and all other Sums ſhall be paid before Redemption, which was never pretended to afford any Title to Mails and Duties, or an additional Backtack Duty to the Wadſet. An Eik to an improper Wadſet, or to an Annualrent, ſignifies nothing, unleſs the Backtack be declared void, conform to the irritant Clauſe in the Wadſet; Or it contain a new Backtack Duty; or unleſs the Infeſtment of Annualrent contain a new Annualrent. For what imports it, that the Granter of an Annualrent, or an improper Wadſet, obliges himſelf that there ſhall be no Redemption till an additional Sum be paid? It's a Matter of Indifferency to a Debtor, whether the Annualrent or Wadſet Right be redeemed or not. If this pretended Eik had the real Effect to ſtop Redemption, the Preſident would chuſe rather not to redeem, but ſtill to ly ſubject to the Backtack Duties. And tho' Cuſtom hath introduced Eiks to proper Wadſets, which generally are more valuable than the Sums therein contained: An Eik to the Reverſion of an Annualrent, or an improper Wadſet, was never ſuſtained to have any real or legal Effect.

Duplyed for Sir John Inglis. Eiks adjected to Reverſions, and duly regiſtred have the ſame Effect, as if contained in the principal Wadſet; And the Infeſtment unredeemed is a real Burden upon the Ground, and a Title of Mails and Duties for Payment of Sums in the Eik, as well as thoſe contained in the principal Wadſet. Albeit the Eik doth not bear an Obligement for an additional Backtack Duty, or an Aſſignation to Mails and Duties; yet the making the ſaid Eik to the Reverſion, was a virtual Addition to the Backtack Duty, as being an Addition to the principal Sum in the Wadſet; and the Diſpoſition and Infeſtment upon the principal Wadſet Right became a Title for Payment of the Sums contained in the Eik, as well as thoſe in the Wadſet it ſelf. 2. The Queſtion here not being about the Recovery of Payment by Virtue of the Decreet of Mails and Duties upon the Eik, as well as the Wadſet, but concerning the Application of indefinite Payments already recovered, and Intromiſſions had by *Cramond*: Whereof the Creditor (now that the Debtor is Inſolvent) muſt have his Election, and be allowed to apply the Payments in Satisfaction of a Debt that is leaſt ſecured, and in greateſt Hazard, *February* 13, 1680, *M'rieth* againſt *Campbell*. 3. There is no Conſent of Parties requiſite for regiſtrating Eiks in the Regiſter of Reverſions; Becauſe, that is for Publication only; and Conſent is only needful to the regiſtrating of Writs in Order to Execution and Diligence. 4. There is a great Difference betwixt an Eik to an improper Wadſet, which is a Right of Property; and an Eik to an Infeſtment of Annualrent, which is only a Servitude on the Property, and ſo not a proper Subject to bear the Burden of an additional Eik. Nor doth there appear any ſufficient Ground of Difference in this Caſe betwixt a proper and improper Wadſet; both being Rights of Property while unſatisfied or unredeemed, tho' not extinguiſhable the ſame Way.

Triplyed for the Preſident. The Alledgeance that an additional Back-tack-duty doth naturally reſult from ſuch an Eik, is made *invita Juris Prudentia*, without Authority or Example. And where was it ever pretended that a Party obtaining a Decreet in Abſence upon ſeveral Titles, ſome good, ſome bad, the Intromiſſion ſhould be equally aſcribed to all? Intromiſſion is always imputable to a preferable Right, at leaſt to a valid Right.

The Lords found, That the Declaration produced is not ſuch a valid Eik as to be a Title of *Cramond*'s Intromiſſion, to which his Poſſeſſion might be aſcribed as well as if the Eik had been added to the principal Wadſet.

February 19, 1708. James Millar *Copperſmith in the* Canongate, *againſt the Executors and Repreſentatives of* William Bonar *late Clerk to the Mint.*

IN the Action at the Inſtance of *James Millar*, againſt the Repreſentatives of *William Bonar*, for Payment of 150 Pound *Scots* advanced by the Purſuer to him, as the Fourth Part of Fifty Pound *Sterling*, which *Bonar* ſubſcribed for in the Books of the *African* Company in the Name of *James Millar*, who by Bond ſtood obliged to repay the 50 Pound *Sterling* to him, upon this Ground; That the Defenders had uplifted the ſaid Share from the Commiſſioners of the Equivalent: The Purſuer offered to prove Payment of the 150 Pound *Scots*, by an Accompt of Charge and Diſcharge betwixt him and *William Bonar*, all written with *William*'s Hand; wherein the Article of 150 Pound is ſtated, and Credit given for it to *James Millar*. Which holograph Accompt, and the Bond jumping exactly together in the Sum, were found lying by *William Bonar* at his Death, and recovered by a Diligence from *Alexander Swyntoun* the Defenders Factor.

Alledged for the Defenders. The pretended Accompt of Charge and Diſcharge, is but an unſubſcribed Scroll, conſequently null and not probative, by the *Act* 80. *Parl.* 6. *Ja.* 6. and the *Act* 5. *Parl.* 3. *Ch.* 2. It is not ſufficient to prove that the ſame is Holograph, becauſe, *Comparatio Literarum* (the ordinary Mean of proving Writs Holograph) is ſo fallible and uncertain, that little Streſs can be laid upon it. Nor could Holograph proved by a Parties Oath make the Scroll of an Accompt probative againſt him, 1 *July* 1665, *Naſmyth* contra *Bower*; 2 *January* 1687, *M'lurg* contra Earl of *Dalhouſie*. Yea, *November* 1680, *Lockhart* contra *Lockhart*, a ſubſcribed Accompt wanting Witneſſes was found not probative, being written by one who was no Merchant. Again, my Lord *Stair*, (*Inſtit. Tit. Probation by Writ*) ſays, That unſubſcribed Holographs do not prove, unleſs written on Compt-books or authentick Writs, and in the Caſe betwixt *Purveyance* and *Knight*, *June* 8, 1677, obſerved by the Lord *Dirltoun*: It was thought hard that Compt-books in *Scotland* where they are not ſo exactly kept, as elſewhere, ſhould prove a Debt againſt the Owner of the Book. Nay, this is a Caſe of ſo general Concern, that Perſons of all Ranks might eaſily be ruined, if Scrolls of Accompts which are written very oft *Spe numerandæ Pecuniæ*, or upon other Suppoſitions, or even Compt-books not regularly kept (tho' more authentick than Scrolls) ſhould be ſuſtained to prove againſt them.

Anſwered for the Purſuer. An unſubſcribed Holograph Accompt is probative in Law againſt the Writer's Repreſentatives, *November* 20, 1662, *Wardlaw* contra *Gray*, *December* 17, 1675, *Laurie* contra *Drummond*, and lately betwixt Mr. *Andrew Hay* and the Executors of Sir *Patrick Aikenhead*, and betwixt *Chiſholm* and *Ainſly* of *Blackhill.* The Reaſon is founded both in Law and Equity: Such Accompts being underſtood framed to no other End than for preſerving the Memory of Payment made, which no Man is preſumed to do to his own Prejudice.

The Lords found the Accompt probative of the Purſuer's Claim; he proving that the ſame is Holograph, and was found lying by *William Bonar* at his Death: In Reſpect the Bond and the Accompt jumped together in the Sum.

February 20, 1708. Gideon Elliot *Chirurgeon Apothecary in* Edinburgh, *againſt the Repreſentatives of Captain* William Veach.

IN the Purſuit at the Inſtance of *Gideon Elliot*, againſt the Repreſentatives of Captain *William Veach*, for Payment of an Accompt of Medicaments furniſhed by the Purſuer to the Defunct: The Lords found, That the Three Years Preſcription of the ſaid Accompt *quoad Modum probandi* by Witneſſes, was interrupted by a Letter from him to the Purſuer, acknowledging Debt in general, and that he had ordered his Payment by a Friend.

Eodem Die. *The Lady* Cardroſs, *againſt the Repreſentatives of* Alexander Hamilton *Baillie to Sir* William Stuart *of* Strathbrock.

SIR *William Stuart* of *Strathbrock* having in *Anno* 1671 ſet a Three nineteen Years Tack of ſome Lands in *Broxburn* to *Alexander Hamilton* his Baillie, bearing expreſly with Advice and Conſent of Sir *William*'s Curators under-ſubſcribing, which yet no Curators ſubſcribed: The Lady *Cardroſs*, as Heir to Sir *William Stuart*, purſued a Removing from theſe Lands againſt the Repreſentatives of *Alexander Hamilton*, who defended themſelves upon the Tack, as yet ſtanding unexpired.

Alledged for the Purſuer. That the Tack was *ipſo Jure* null, being granted by Sir *William* when Minor without Conſent of his Curators. For inſtructing the Minority, and his being clothed with Curators at the Time, the Purſuer produced the following Evidences, *viz.* A Suſpenſion and a Summons in *Anno* 1666; a Summons in the 1670; a Charge in 1671; an Act and Commiſſion in 1669; and a Summons in the 1672; all at the Inſtance of Sir *William Stuart* and his Curators, with a regiſtrate Factory in the Year 1672; Tack, and Factory in *Anno* 1667 ſet and ſubſcribed by him and them, to which two laſt *Alexander Hamilton* himſelf is a ſubſcribing Witneſs; A Certificate under the Hand of Mr. *Mercer* Commiſſar Clerk-depute of *Edinburgh*, that Sir *William*'s Act of Curatory ſtands in the Minute Book the 8 of *May* 1667, and that he could not give an Extract by Reaſon of the Warrants that Year being diſordered; Mr. *James Naſmyth*'s Receipt of the Act of Curatory it ſelf in the Year 1671; and an Extract of Sir *William*'s Baptiſm in the 1652: Which Documents the Purſuer contended, could not be controverted by the Repreſentatives of *Alexander Hamilton*, who, by ſubſcribing the Tack quarrelled as a Party, and the other Tack and Factory as a Witneſs, all bearing the Conſent of Curators under-ſubſcribing, and the two laſt ſubſcribed by Curators, hath acknowledged Sir *William*'s Minority and his having Curators. For as a Minor *ſe Majorem dicens* cannot be reſtored: So a Major acknowledging his Parties

Minority, ſhould be bound to the Conſequences of it; eſpecially in this Caſe, where Mr. *Hamilton*, as Sir *William*'s Chamberlain and Baillie, could not be ignorant of his Circumſtances.

Anſwered for the Defenders. None of the Documents adduced are ſufficient Proof of Sir *William*'s having had Curators lawfully choſen. Becauſe, from the Rule *invito non dantur Curatores*, the Preſumption that Minors have no Curators ariſeth, which cannot be elided but by a judicial Act of Curatory. A third Perſon's authorizing a Minor *qua Curator*, doth not infer that he was choſen Curator in a legal Way, but only renders the Authorizer obnoxious as Procurator. Again, as no private Arguments or Deeds are ſufficient to ſupply the Want of the legal Solemnities that Law requires, in the judicial eſtabliſhing of Curators: Far leſs will the Minor's aſſerting himſelf to have Curators, alter his Condition, ſo as to annul the Deed: And a Witneſs to a Paper is only preſumed to know what he ſees, *i. e.* the Parties Subſcription, and not the Age or Quality of the Subſcriber. Yea, tho' it were proved, that there was an Act of Curatory, *non conſtat* but the ſame was null, and informal. Nor are the Documents produced ſufficient to clear when Sir *William* was born, ſo as to infer that he was Minor at the making of the Tack quarrelled: Becauſe, Teſtificates of Baptiſm are by Deciſions found not probative of Minority, however they may prove Majority. Therefore the Inſtructions above-mentioned are in vain adduced for proving jointly the Points in Controverſie; when all of them taken ſeparately ſignifie no more to the Purpoſe, than ſo many Cyphers, without a Figure, to the making up a Number.

The Lords ſuſtained the Nullity of the Tack, as granted by Sir *William Stuart* in Minority without Conſent of his Curators: Tho' no Leſion was qualified.

Eodem Die. Margaret Boſwal *and* William Hamilton *of* Grange Breich *her Husband, againſt Cornet* George Boſwal.

IN the Action at the Inſtance of *Margaret Boſwal* and her Husband, againſt Cornet *Boſwal* her Father, the Lords ſuſtained a marginal Note upon the Purſuer's Contract of Marriage in Favours of the Cornet; albeit no Witneſſes were ſubſcribing thereto, and the Contract did not bear that the Witneſſes to it, were alſo Witneſſes to the marginal Note: In Reſpect the Purſuer's Double of the ſame Contract produced by themſelves bore the very ſame marginal Note, and they did not diſown the Verity of their Subſcription thereof.

February 24, 1708. *The Creditors of* John Corſe, *againſt* James Pedie, John Luke, *and other Partners of the Eaſter Sugary of* Glaſgow.

JOhn *Corſe* having ſubſcribed in the Books of the *African* Company 500 Pound for himſelf, as much for *James Pedie*, and the like Sums for *John Luke*, *Robert Corſe* and *William Corſe*; and for *Robert* and *George Bogle* 250 Pound each, extending in whole to 3000 Pound; and the Payments made to the Company conform to the Subſcription being recorded in their Books either as made by *John Corſe* and Partners, or indefinitely as paid by the Co-partners of the Sugary; and a Certificate being given out, in the Terms of the Act of Parliament, ſtating theſe Co-partners Creditors of the Company in their ſeveral Shares of what was paid up effeiring to their reſpective Proportions of the Stock, extending in the whole to 1343 Pound: There aroſe a Competition betwixt *James Pedie*, *Robert Bogle* and *John Luke*, and the Creditors of *John Corſe*.

Alledged for the Creditors of John Corſe. That the whole 1343 Pound with the Intereſt thereof at 5 *per Cent.* to the firſt of *May* laſt, belongs to them: In Reſpect *John Corſe* their Bankrupt Debtor being the only Subſcribent and Perſon bound to the *African* Company, and there being no Obligation upon thoſe for whom he ſubſcribed; the Moieties are preſumed to have been paid out of *John Corſe*'s own Mony, unleſs the other Parties prove that they made the Payments themſelves.

Anſwered for Pedie, Luke and Bogle. John Corſe's qualified Subſcription in the Books was as valid an Inſtruction of their Shares, as if there had been formal Transfers in their Favours, at leaſt equivalent to a Backbond of the Date which would have ſo affected his Share, as his Creditors thereafter could not reach the ſame by Diligence to the Prejudice of the Co-partners. And tho' he only was bound to the Company, yet he did effectually communicate a Share to the reſt, and might no doubt have purſued them upon their Oaths to pay and relieve him of their Moieties. Again, ſeing the Payments are ſet down in the Books *indefinite*, as from the Partners of the Sugary, or from *John Corſe* for himſelf and in Name of the reſt, Law preſumes the Advance was made by all of them; unleſs the Creditors of *Corſe* will inſtruct *Scripto*, or *Juramento* of the Partners, that he made the whole Payments: For had *Corſe* been the ſole Power, the Payments would have been recorded in other Terms, to clear that all was paid with his Mony.

The Lords conſidering that *John Corſe* ſigned the Companies Books for *James Pedie* and *John Luke* each of them 500 Pound *Sterling*, and for *Robert Bogle* 250 Pound; And that the ſaid Perſons are alſo ſtated as Creditors to the Company in the ſaid Sums, by the Certificate obtained from the Committee of Directors: Therefore the Lords found, That *John Corſe*'s Subſcription was to the Behoof of *James Pedie*, *John Luke*, and *Robert Bogle* effeiring to their reſpective above-mentioned Sums, and that the Mony is preſumed to have been advanced by them; unleſs it be offered to be proved by their Writ or Oath, that the Mony was not advanced by them, but by *John Corſe*.

Eodem Die. William Kennedy *of* Daljarroch, *againſt* John Vans *and* Hugh Crawford *Merchants in* Air.

IN the Competition betwixt *John Vans* and *Hugh Crawford*, as Arreſters of a Share in the *African* Stock belonging to *David Ferguſon* their Debtor, and *William Kennedy* of *Daljarroch* who had alſo arreſted the ſame as Creditor to *David Ferguſon per* Bond, wherein he, *Thomas M'jarrow*, and *John Ferguſon* ſtood bound Co-principals; *Daljarroch* being preferred, and thereby having recovered Payment of all that was due to him: *John Vans* and *Hugh Crawford* craved that he might be decerned to aſſign his Bond to them, for recovering, off the other two Co principals therein, the *Superplus* of what was paid out of *David Ferguſon*'s Effects more than his Third Share; in Reſpect *Vans* and *Crawford* as come in *David Ferguſon* their Debtor's Place, ſhould have the ſame Relief that was competent to him.

Alledged for Daljarroch. He is not bound to aſſign the Relief competent to *David Ferguſon* againſt theſe bound with him: In Reſpect the Competitors neither derive Right thereto from *David Ferguſon*, nor have affected the ſame by legal Diligence: For their being fruſtrated of Payment out of the Equivalent by *Daljarroch*'s Preference, intitles them only to ſeek Aſſignation of his Debt and Diligence for operating their Payment out of other Effects belonging to the common Debtor: But *Daljarroch* is not obliged to aſſign his Right and Diligence in ſo far as concerns Third Parties to whom *Vans* and *Crawford* are not Creditors.

Anſwered for Vans and Crawford. In all Competitions of Creditors, where one having double Security for his Mony, reſtricts his Payment to one Subject, and thereby excludes a Co-creditor who had affected that Subject, the Creditor preferred is obliged to aſsign what further Security he had to the other, tho' that other had not affected that additional Security by Diligence.

The Lords found, That *Daljarroch* is not bound to aſsign: Becauſe, *Vans* and *Crawford* had not affected by Diligence the Clauſe of Relief in the Bond granted, to him.

Eodem Die. John *Earl of* Marr, *contra Feuars of* Bothkenner.

IN the Proceſs at the Inſtance of *John* Earl of *Marr*, againſt the Feuars of *Bothkenner*; Immemorial Uſe of Payment was found to determine the Quality of *Bollas Frumenti* contained in the *Readendo* of the Defenders Feu-charters, to be Wheat.

February 28, 1708. Allan Lockhart *of* Cleghorn, *contra* John Wardrop *of* Dalmarnock.

IN a Competition betwixt *Allan Lockhart*, and *John Wardrop*, Creditors of *Colquhoon* of *Kenmure*, whoſe Seaſines were regiſtrated on the ſame Day: They were brought *in pari Paſſu*, notwithſtanding of a Declaration produced under the Clerk's Hands that *Allan Lockhart*'s Seaſine was preſented and regiſtrated two Hours before *Dalmarnock*'s; Which the Lords found not probative, no principal Minute-book of the Time of preſenting being produced to evidence the Priority.

Eodem Die. Alexander Aliſon *Writer to the Signet, contra Mr.* James Chalmers *Son to* William Chalmers *Notar in* Kinroſſie.

PAtrick Pittillo having diſponed to Mr. *James Chalmers* an heretable Bond upon the Lands of *Glencorſe*, belonging to *George Pittillo*, to whom the Diſponer was apparent Heir, and, after Intimation of that Diſpoſition to the Debtor in the Bond, having re-diſponed the ſame to *Alexander Aliſon*: The Lords preferred Mr. *James Chalmers* who received the firſt Diſpoſition; Albeit *Patrick Pittillo* the common Granter was ſerved Heir upon the Procuratory contained in the ſecond, in Order to perfect and validate that Right. For the Service was found to accreſce to the firſt Right, which contained alſo a Procuratory, and Warrandice from Fact and Deed.

Eodem Die.

The Lords peremptorily diſcharged any Advocate in any Caſe to proteſt for Remeid of Law by the general Warrant of his Gown, in the Name of his Client; without a ſpecial Mandate from the Client.

June 11, 1708. *Mr.* Robert Bundie *Merchant in* London, *contra* John Kennedy *of* Culzean.

IN the Action at the Inſtance of Mr. *Robert Bundie*, againſt *Culzean*, for Payment of 35 Pound 11 ſhil. *Ster.* contained in a Note granted by the e Defender to *David Crawford* of *Drumſoway*, and indorſed by Progreſs to Ir. *Bundie*; The Lords 12 *February* laſt, having found the Sum compenſ- ble by the equivalent Sum contained in another Note granted by *Drum- way* to *Culzean*: The Purſuer reclaimed upon theſe Grounds, 1. *Culzean* d renounced Compenſation by a Letter to *Drumſoway*, deſiring him to put f the Man with the Bill to a Day, by promiſing to pay him Intereſt, and ot to neglect that Concern of his; unleſs we ſuppoſe *Culzean* guilty of a eſign to inſnare People advancing Mony upon the Faith of his Note to *rumſoway* an inſolvent Perſon, which bore Date only a Day after *Drum- way's* Note to him, and could have no other Meaning than to furniſh Cre- it to *Drumſoway*: Conſequently the Defence of Compenſation ought to be epelled. 2. *Compenſatio non perimit Obligationem ipſo Jure, ſed Ope Exceptio- nis*: And at the proponing this Exception, there are no habile Terms of ompenſation exiſting betwixt *Culzean* and the Purſuer, who is not *eadem erſona* with *Drumſoway*; Nor did ever that Ground of Compenſation exiſt ven betwixt *Drumſoway* and *Culzean*; Seing *quod in Diem debetur, non com- penſabitur antequam Dies venerit*, L. 7. ff. *de Compenſationibus*; And the De- nder cannot pretend that *Drumſoway* had the Note unindorſed in his Per- n at the Term of Payment. Therefore the Purſuer cannot be prejudiced his Debt, more than Payment of a Bank-bill could be evited by a Debt ue by *David Spence* to the Bank before the Date of their Bill. And by the vil Law, Compenſation is not to be admitted in dubious Caſes. L. *ult.* 1. C. *de Compenſationibus*. 3. Writs and Tranſactions made abroad, are gulated, as to the Conſtitution and Extinction, by the Law or Cuſtom of e Place where made; Becauſe, otherwiſe Perſons would get no Credit in a range Country: And ſo it is that no Compenſation by the Law of *England*, here the Note purſued was made, is ſuſtained againſt the like, which *Ne- gative* proves it ſelf till a contrary Cuſtom be inſtructed.

Anſwered for the Defender. 1. By his Letter to *Drumſoway*, he doth not aſs from his Compenſation, but on the contrary expreſly deſires *Drumſoway* o pay the Note, becauſe he ſtood indebted to him for the like Sum. Nor an *Culzean's* Deſign to compenſe his own Note with *Drumſoway's*, admit of ny Conſtruction of Fraud: ſeing he was not to ſuppoſe in the leaſt that his Note would ever have been indorſed to any Perſon, by a Man who knew imſelf to be Debtor to *Culzean* in the Equivalent. 2. Albeit neither Com- enſation nor Payment operate without being proponed: yet both extin- uiſh the Obligation *ipſo Jure*, not only from the Time they are proponed, ut from the Time that both Debts concurr'd. And the L. 7. ff. *de Com- enſationibus, loquitur de Die incerto, qui habetur pro Conditione*. For in other Caſes *Dies cedit, quamvis nondum venit*; And Compenſation takes Place, ſo oon as mutual Obligations are granted. The Inſtance of Bank-notes, is no ways parallel; for *David Spence* is only inſert in theſe *Nomine tenus*, the Bearer being underſtood to be Proprietar. 3. This Note being granted to a *Scots* Man at *London*, after the *Scottiſh* Form, by a *Scots* Man accidentally there, and ignorant of the Laws of the Place, what can hinder him from any legal Defence competent by our Law in a Proceſs for Payment here? But *eſto* the Cuſtom of *England* were to regulate the Matter, the Purſuer *qui allegat Conſuetudinem debet eam probare*.

The Lords repelled the Compenſation: Becauſe, the two Notes being granted for the ſame Sum within a Day of one another, it ſeemed a Contrivance in *Culzean* to furniſh *Drumſoway* with Credit.

June 16, 1708. *The Taylors of the* Cannongate, *contra the Taylors of* Edinburgh.

THe Town of *Edinburgh* granted to the Taylors there a Seal of Cauſe in the Year 1531, ratified by King *James* 5, and another in the Year 1584, ratified by King *James* 6, bearing, “ That the Taylors of ‘ *Edinburgh* were heavily hurt and prejudiced by unfree Men dwelling in the ‘ *Cannongate*, *Potterraw* and other Suburbs, their taking Clothes out of ‘ *Edinburgh*, to be wrought within their own Freedoms, for the Uſe of Inhabitants ‘ in *Edinburgh*; And therefore ordaining, That if any Perſon not ‘ Burgeſs free Man of the ſaid Burgh, be apprehended taking out or bringing ‘ in any ſuch Work ſhapen or unſhapen, it ſhall be lawful to the Deacon ‘ or Maſters, or any of them, with the Concurrence of an Officer to ſeize ‘ and keep the ſaid Work, till Payment be made of 40 Shilling by the ‘ Work-men, and as much by the Owners for giving Work to be wrought ‘ without the Freedom of the Burgh. The Taylors of *Edinburgh* having been in Uſe, in Conſequence of theſe Seals of Cauſe, to ſeize Unfreemens Work; The Queſtion of Right and Privilege came to be debated betwixt them, and the *Cannongate*-Taylors, in mutual Declarators before the Lords.

Alledged for the Cannongate-Taylors. No Act of the Town Council of *Edinburgh* could by ſuch extraordinary Clauſes, without calling or hearing the Taylors of the *Cannongate* and others intereſſed, deprive them of their Liberties and Privileges. For this, upon the Matter, is, *Jus dicere extra Territorium*; And Acts of Parliament were found Neceſſary to intitle ſome Manufactures to ſuch Privileges, which yet are *ſalvo Jure cujuſlibet.* Nor can the Sovereign grant a Monopoly, except for the Encourgement of a new Invention: and a *Novo-damus* upon a Partie's Reſignation containing a bounding, doth not prejudice Meithes and Marches. Now what may be the Conſequence of ſuch a mighty Power in the Town of *Edinburgh*? All Ranks of People from every Corner of the Nation who come to reſide and ſpend their Fortunes there, might come to find themſelves abridged and deprived of the free Diſpoſal thereof, for Meat and Drink, as well as Clothing; Craftſmen might impoſe upon them by ſetting extravagant Prices upon their Work; Men would be provoked to buy Clothes from others than Merchants of *Edinburgh*. 2. Burgeſſes dwelling in *Edinburgh* cannot be ſubjected to ſuch Thraldom more than the reſt of the Lieges: For a Burgeſs is only ſubject to ſuch regular Orders of the Town Council, as are ordinary and neceſſary for the Government of the Place, without ſurrendring his common Liberty and Property, which he enjoys as any Subject; And the Lords of Seſſion have often reſcinded Town-council-acts, putting unreaſonable Reſtraints upon their own Burgeſſes. 3. The Taylors of the *Cannongate* have alſo their Seal of Cauſe, with full Liberty to work to all the Lieges; and bear Burden as well as the Taylors of *Edinburgh*.

Anſwered for the Taylors of Edinburgh. All Burghs being in Uſe to grant ſuch Seals of Cauſe to their Reſpective Incorporations, for maintaining of their Liberties, in Recompence of the Burdens they bear of Stent, Watching, Warding, and other Services authorized by Princes and Parliaments: How can theſe be thought to incroach upon the Liberties of the Subject? True, in ſome Reſpect they reſtrain (as all Privileges do) the Liberty of others, but for the Good of the Nation; And ſo all Men ought to comply with them. Seing Strangers coming to *Edinburgh* can be as well ſerved within the Burgh, what Neceſſity is there to Incourage their imploying Unfreemen, againſt the Privilege of Incorporations? Which Privilege is both agreeable to Reaſon, and countenanced by Acts of Parliament, particularly the 154 *Act*, *Par.* 12. *Ja.* 6. diſcharging and ſuppreſſing the Exerciſe of Crafts n the Suburbs of Royal Burrows, as Prejudicial to Craftſmen bearing Burlen within Burgh. 2. The Taylors of *Edinburgh* are far from pretending o break into the Shops of Taylors in the *Cannongate*, or any ways to invade their juſt Privilege of working to all the Lieges: But only to hinder hem to ſteal as it were the Meat out of their Neighbours Mouths in *Edinurgh*, by working within their Freedom, or taking out and bringing in Work here. The Taylors of the *Cannongate* have Privileges for any Burden they ear, in which the *Edinburgh* Taylors do not offer to wrong them: But 'tis ertain, That the Taylors of the *Cannongate* are liable to no ſuch Burden of tent, Watching or Warding as theſe of *Edinburgh* are.

Replyed for the Cannongate-Taylors. They don't deny the Town's Power f granting Seals of Cauſe, with reaſonable and ordinary Clauſes, but only ontrovert ſuch as are extraordinary and exorbitant. The cited Act of Pariament is only againſt vagabond Unfree-men, who fled from their Maſters n *Edinburgh*, and drew the Work of the Town to the Suburbs, where they et up Booths without being made Free there: And to extend it againſt the *annongate*-Taylors, who have their own Seal of Cauſe and particular Freelom, were to beſiege and ſhut them in from all Imployment.

The Lords ſound, That the Seal of Cauſe granted to the Taylors of *Edinurgh*, is an effectual Reſtraint as to Burgeſſes, and ſuch as bear Scot and Lot here; And aſſoilzied them *quoad* theſe from the *Cannongate*-Taylors Declaraor of Immunity. Thereafter 27 *November* 1708, The Lords found, That he ſaid Taylors of *Edinburgh* had no Right to ſeize any Work brought into he Town and made by the *Cannongate*-Taylors belonging to Strangers, or thers reſiding in *Edinburgh* without bearing Scot and Lot.

une 24, 1708. Jean Pringle *Relict of* George Rutherford *Baillie in* Dumbar, *againſt* Iſobel Manderſtoun.

THe ſaid *Jean Pringle*, as Executrix to her Huſband, purſued *Iſobel Manderſtoun* for 98 Pound contained in her Bond granted to the Defunct, who proponed a Reaſon of Compenſation or Payment, by two Horſes to he Value of 90 Pound given to the Defunct, and offered to prove the ſame by the Purſuer's Oath. She having deponed, acknowledging the Receipt of ſuch Horſes, but adding, That they were received in Payment of an Accompt of furniſhing to the Defunct; And in Fortification of the Quality, produced the Defunct's Compt-book containing the ſame inſert: The Lords found the Quality of the Oath intrinſick, and decerned to pay the Bond.

Eodem Die. *Competition betwixt the* Cowies *Heirs-Portioners of* Bothkenner.

IN the Competition betwixt the *Cowies*, Heirs-portioners of *John Cowie* of *Bothkenner*, *Janet Cowie* the eldeſt claimed the Yard, as well as the Houſe, as a *Præcipuum, Jure primogenituræ*, without Diviſion or Compenſation; and contended, That ſuch a Claim was founded in Law and the Practice of the Nation. For, 1. The eldeſt Daughter of *Innes* of *Dunoon* in *Angus*, poſſeſ's'd the Houſe, Yards and Parks of *Dunoon*; The eldeſt Daughter of Sir *Thomas Nicolſon* poſſeſſeth the Houſe, Yards, and a conſiderable Park of *Carnock* without Diviſion, or Compenſation; beſides many other ſuch Inſtances. 2. The Right of *Primogeniture* ſtands eſtabliſhed by the judicial Law of *Moſes*, *Deuter.* 21. 17. and *Gudelin de Jure noviſſimo*, *Lib.* 2. *C.* 14. obſerves, That *in Feudis illud generale, ut Jure Primogenituræ unus unave, vel totum, vel ſemiſſem, vel aliam Partem præ cæteris obtineat.* 'Tis true that ſome of our old Lawyers, tho' they cannot but yield ſome Privilege to the Eldeſt, think ſome Recompence ought to be given to the reſt upon that

Account: But this Opinion is without Foundation in Law or Cuſtom. For where Law declares any Thing to be mine, another can have no Intereſt therein; And it's unreaſonable to oblige a Perſon to give a Recompence for what *de Jure* is his own. 2. *John Cowie* the Heretor did evidence his Will, That the Yard ſhould go with the Houſe; in ſo far as he hath incloſed the Houſe, Office-houſes and Cloſs within the ſame by a continued fenced Hedge, and admitted no Paſſage thereto, ſave one through the Cloſs, and continually poſſeſs'd the ſame, without ſetting it ſeparately for Rent, ſelling only ſo much of the Fruit as he could ſpare. 3. A Houſe diſponed carries with it the Pertinents neceſſary for the Uſe thereof poſſeſs'd by the Diſponer, *July* 18, 1676, and *December* 9, 1679. And tho' ſometimes a greater Houſe may have adjoined to it a leſſer Orchard, *et e contra*, *Majus et Minus* ought not to vary the Law in this Caſe.

Anſwered for the younger Heirs-portioners. Albeit the Eldeſt gets the Houſe as a Thing indiviſible, without an Equivalent; Yet the Orchard, which is of its own Nature diviſible rendring yearly Profit, tho' for Expediency it may be adjudged to one, the reſt muſt have their Share of the Price. Nor doth other Heirs-portioners acquieſcing in that Matter to the Eldeſt, make Law in Prejudice of the younger Heirs-portioners competing here. Beſides, there are contrary Inſtances, in the Caſe of *Hamilton* of *Pumpherſtoun*, where an equal Diviſion of Yards and Parks was made before the Sheriff of *Linlithgow*; And in the Caſe of *White* of *Weedins*, where the whole Subject without Diſtinction was equally divided. And our greateſt Lawyers *Craig*, *Skeen*, *Stair*, *Mckenzie* and *Whitelaw*, in his Notes on him, hold that a Recompence is due, where the Subject is valuable, even for a Superiority that has Feu-duties: Tho it be otherwiſe in a Barony, or *Caſtrum* (as foreign Lawyers ſpeak) where all around the principal Manſion-houſe, at which Seaſin is to be taken, is underſtood to be annex'd thereto, ſo far as the ſame may have Relation to the Houſe, rather than to a Tenandry.

The Lords found, That the Orchard not having been ſet for Rent, did belong to the eldeſt Heir-portioner as well as the Houſe, without any Recompence to the younger Heirs.

Thereafter, *July* 22, 1708. The Lords preferred alſo the eldeſt Heir to the Cuſtody of the Writs, upon her granting an Obligement to make the ſame furthcoming to all concerned, or to give Tranſumpts upon their equal Charges.

June 25, 1708. William Bell *Portioner of* Ridpeth, *contra* James Dunlop *Factor for* Moriſtoun.

James Dunlop having ſubſcribed a Writ, declaring that *William Bell* had agreed with him for the Purchaſe of *Brotherſtanes* belonging to the Laird of *Moriſtoun*, and was to pay 4600 Merks as the Price at the Terms therein-mentioned, and to give *Moriſtoun* good Security therefore, and that he *Moriſtoun* was to give to *Bell* a Diſpoſition with abſolute Warrandice; And Mr. *Dunlop* having afterwards ſignified by a Letter to Mr. *Bell*, that he had reported to *Moriſtoun* and his Friends the Bargain himſelf had made with *Bell*, and they would not reſile from his Agreement, and therefore deſired Mr. *Bell* and his Son to haſten into *Edinburgh*, that the ſame might be perfected; And *Moriſtoun* having ſold the Lands to Sir *William Scot* of *Harden*; Mr. *Bell* required *James Dunlop* to implement the Bargain under Form of Inſtrument, and purſued him for Payment of 1000 Pound of Damages.

Alledged for the Defender. The foreſaid Declaration was only Writ *Memoria Cauſa*, containing no Obligement upon him to cauſe *Moriſtoun* Diſpone, nor upon *Bell* to pay the Price, and ſo is no Contract, not being ſigned by *Bell*: And as ſuch a Writ could not oblige him to take the Bargain, or make him liable for the Price; Neither could it tie *Moriſtoun* or his Factor.

Anſwered for the Purſuer. The Declaration ſufficiently inſtructed the Tenor and Conditions of the Bargain, and ſo excluded *Locum Pœnitentiæ* allowed in verbal Agreements: Conſequently ought to be effectual to make the Granter liable for the Purſuer's Damage, ſuſtained through not Performance of the Minute; Eſpecially conſidering that he was ready to have performed his Part.

The Lords found the Declaration obligatory upon the Defender to make up the Purſuer's Damage through the not Implement of the Terms of the Agreement preſtable by *Moriſtoun*.

Eodem Die. William Coupland *of* Coliſtoun, *contra* William Caruthers *Chirurgion*.

IN a Competition for the Mails and Duties of *Brakenwhat*, betwixt *William Coupland* and *William Caruthers* Adjudgers thereof, The latter rav'd Preference upon this Ground; That the Debt for which *Coupland* had djudged was ſatisfied in whole, or in Part, before the leading of his Adjudication. *Caruthers*, for proving thereof, recovered by a Diligence a Diſcharge of the Debt, which *Coupland* offered to Improve, and *Caruthers* was rdained to abide by *ſub Periculo falſi*: After *Caruthers* had ſuffered the Term to be circumduced againſt him, for not abiding by; The Lords admited *James Carlyle* of *Brakenwhat* compearing for his Intereſt, and proponing Payment upon the Diſcharge, to abide by the Verity thereof, and ordained *Coupland* to conſign his 40 Pound, in reſpect no Colluſion betwixt *Caruthers* and *Coupland* could prejudice or debar *James Carlyle* from extinguiſhing his Creditor's Debt, and abiding by the Verity of the Inſtruction thereof. Albeit it was alledged for *Coupland*, That in all Improbations the Uſer of the Writ muſt abide by it, *June 16, 1675*, Lady *Logie* contra *Meldrum*: ſince otherwiſe the Effect of an Improbation might eaſily be elided by ſhifting ſuſpect Writs from Hand to Hand; Beſides, *James Carlyle* is an inſolvent Perſon.

June 30, 1708. William Selkrig *Writer in* Edinburgh, *contra* John French *Maltman in* Glaſgow.

IN the Action at the Inſtance of *William Selkrig*, againſt *John French*, for Payment of 80 Pound *Scots*, as a Year's Rent of a Houſe in *Glaſgow* pertaining to the Charger, and ſet to *William Drew* Inkeeper there, to whoſe Moveables and Houſhold Pleniſhing *John French* had Right by Diſpoſition intimated by Inſtrument of Poſſeſſion, and debarred *William Selkrig* from poinding the ſame, for his Year's Rent, by Virtue of his Hypotheck.

Alledged for the Defender. He could not be liable for the Year's Rent, Becauſe, albeit he as Creditor to *Drew* took a Diſpoſition to the Houſhold Pleniſhing, and got an Inſtrument of Poſſeſſion: yet he never intrometted with the ſame; But did only by Virtue of his Diſpoſition oppoſe the Purſuer's poinding thereof, after they were removed out of his the Purſuer's Houſe into another, where they were lodged before the Defender acquired Right thereto; who was not bound to know that any Privilege of Hypotheck was competent to the Purſuer. And tho a legal Hypotheck may furniſh a Title to detain, or even recover Goods while extant: No Perſon who hath either *bona Fide* acquired and diſpoſed of them, or who never intrometted, although he had a Title to Intromet, can be overtaken upon that Head. 2. The Defender cannot be liable for the Rent upon the Account of his producing to the Meſſenger the Diſpoſition and Inſtrument of Poſſeſſion: Seing if the ſame could not debar the Purſuer from poinding, he might have proceeded; and if the Diſpoſition was good and valid, there's no Reaſon to make the Defender liable.

Anſwered for the Purſuer. There being a manifeſt colluſive Deſign in *French* to cover *Drew*'s Poſſeſſion by the Diſpoſition: as appears from the Inſtrument of Poſſeſſion containing a Back-tack of the Goods ſet to *Drew*; the Intimation of *French*'s Right to the Meſſenger the very ſame Day that *Selkrig* charged *Drew*; And the ſtopping his Poinding upon Pretext of the Diſpoſition. *French*'s attaining Poſſeſſion by getting the Key of the Houſe wherein the Goods were, back-ſetting them to *Drew*, and allowing him to poſſeſs, was upon the Risk of *French*. Who having got into Poſſeſſion of the Goods, diſpoſed thereof by ſetting them in Back-tack to the common Debtor, and debarr'd Mr. *Selkrig*, is to be held as Intrometter therewith, and conſequently liable for the Rent for which they were hypothecated: Since it is by his own Fault and Fact of ſetting a Back-tack to the Debtor, that he did not intromet. 'Tis of no Moment to pretend, that the Poinding was to have been executed in another Houſe, than *Selkrig*'s: For whereever a Tenant's Goods are carried, they are ſtill affected with the Right of the Hypotheck. 2. 'Tis trivial to alledge, That the Defender could not hinder *Selkrig* to go on in his poinding: Becauſe, the Meſſenger was actually ſcared and hindred from proceeding after Production of the Diſpoſition, leaſt he ſhould incur the Guilt of a Riot; And it was not the Meſſenger's Buſineſs to quarrel the Diſpoſition, there being a legal Remedy.

The Lords repelled the Defences, in Reſpect of the Anſwers.

Eodem Die. John Rule *Merchant in* Drumfries, *againſt Andrew Purdie Merchant in* Edinburgh.

IN a removing from a Tenement within *Drumfries*, purſued at the Inſtance of *John Rule*, infeſt therein as Heir to *John Rule* Chirurgion there his Father, againſt the Tenants; Compearance was made for *Andrew Purdie*, who having adjudged the Tenement from the Purſuer's Father's Author, and ſtanding Infeſt therein, objected againſt the Purſuer's Warning, that it was null for being executed by one *James M'no* a Burrow-officer that was blind, and ſo not capable to execute Diligence; Seing a blind Man could eaſily be impoſed upon, and miſtake one Man, or one Houſe or Door, for another: The Lords found it to be *Jus tertii* to *Andrew Purdie*, to object againſt the Formality of the Warning. In Reſpect he was neither a Poſſeſſor, nor called in the Removing, but only a pretended competing Creditor, who had no further Intereſt than to get himſelf preferred.

Eodem Die. John Lin *Chamberlain to the Earl of* Leven *Supplicant.*

JOhn Lin Factor appointed by the Lords upon the Eſtate of *Rankeillor*, having repreſented by Bill, That the Roof of the Manſion-houſe was ruinous and ready to fall, which, if not repaired, would be a great Prejudice, both to the Creditors and common Debtor, in caſe the Lands were afterwards expoſed to Sale; And that he had procured a Declaration from ſkilful Workmen that had inſpected the Houſe, That it would coſt 333 lb.

Lib. 6 *Shil.* 8 *Penies Scots* to keep up the Roof ; And craved their Lordſhips Warrant to him for imploying Workmen to make ſuch Reparations, or elſe that they would declare him free of any culpable Neglect, for ſuffering the Houſe to decay and go to Ruin : The Lords refuſed to interpoſe their Authority, or to give any Anſwer to the Petition.

July 1, 1708. Katharine Johnſton *Relict of* John Montgomery *of* Crivock, *againſt the Repreſentatives of Provoſt* Napier.

John *Montgomery* having agreed to ſell two Shops in *Glaſgow* to Provoſt *Napier*, wherein *Katharine Johnſton* the Diſponer's Wife ſtood infeft, he brought her to a Tavern upon a *Saturnday* at Five a Clock in the Afternoon, in Order to get her Conſent. She, in Reſpect her Husband was to leave her, and go to *America* upon the *Munday* following, expreſt a Reluctancy and Unwillingneſs to ſign the Diſpoſition : But after ſome Hours ſhe was prevailed with to do it, upon Promiſe of One thouſand Merks laid upon the Table, which was immediately taken back again. *Katharine Johnſton* Twenty four Years thereafter, when her Husband was dead, and her ſelf married to a ſecond, raiſed Reduction of the foreſaid Diſpoſition, againſt the Repreſentatives of Provoſt *Napier*, upon this Ground ; That the Diſpoſition aforeſaid was extorted from her by the Frownings and other undue Importunities of her firſt Huſband, without being read to her at Signing, and ſhe got not the One thouſand Merks promiſed her for her Conſent.

Alledged for the Defenders. The Reaſon of Reduction is not Relevant. For . Provoſt *Napier* was a Perſon who abhorr'd an unfair Purchaſe, Mr. *Montgomery* a mild Gentleman, and *Katharine Johnſton* his Wife of a maſculine Diſpoſition, that could not have been daunted by him in a Tavern, where ſhe might be ſuppoſed leſs ſubject to Impreſſion than *intra Privatos Parietes* ; Eſpecially conſidering, that her Husband was immediately going to another World, and ſo ſhe had no Reaſon to fear his future Reſentment of her ſtanding out. Nor is it of any Moment that ſhe did not ſubſcribe frankly, ſeing not a Wife of an hundred will part with her Heretage without ſome Reluctancy, or Appearance of Grief. 2. By the civil Law, which is liberal in granting Privileges to Wives, *Judicium Uxoris poſtremum in ſe provocare maritali Sermone, non eſt Criminoſum*, *L.* 3. . *Si quis aliquem Teſtari Prohib. vel Coeg.* And marital Reverence is no Ground of Reſtitution, *Niſi Fines excedat Minis gravioribus*, —— *& Uxorem adegiſſe probare poſſit*, *Voet Comment. in Pandect. Tit. quod Metus Cauſa*, *N.* 11. And if it were otherwiſe, Appearance of Reluctancy would annul the Marriages of young Daughters, and all Bargains with Perſons in Power, which are judged by the like Rules obſerved betwixt Man and Wife. Again, marital Reverence is not ſufficient, tho' he were *Vir ferox*, and divorced thereafter, *Stair*, *Inſtit. Lib.* 1. *Tit.* 9. *N.* 8. In ſhort, tho' what is done directly in Favours of the Huſband be retrivable, a third Party or Purchaſer is ſecure, unleſs plain Force be proved, *June* 28, 1671, *Arnot* againſt *Scot*, *July* 12, 1671, *Murray* againſt *Murray*.

Anſwered for the Purſuer. 1. The Huſband's frowning, ſeeming angry and tucking her Clothes, 'cauſe ſhe ſeem'd averſe from ſubſcribing the Diſpoſition, and keeping her ſeveral Hours in a Tavern till he got her perſwaded to conſent to his rendring her miſerable, by allowing him when he was to leave her, to diſpone all ſhe had in the World, are Circumſtances far from arguing that he was mild, or ſhe of a Virago-temper. 2. Tho' *Reverentia maritalis per ſe*, were not ſufficient to reduce this Deed, Law requires not ſuch a Force to reduce a Wife's Deed in Favours of her Huſband, as one for the Behoof of Strangers alleannerly. Therefore honeſt Purchaſers are careful to take the Huſband obliged to cauſe his Wife judicially ratifie the Deed, by ſwearing out of his Preſence before a Judge, That ſhe willingly & freely conſents, without Fear or Compulſion: And tho' this judicial Ratification be not abſolutely neceſſary to the Validity of ſuch a Deed, it is a Preſumption of a Wife's being generally under Reſtraint by her Huſband; And the leaſt Qualification of Force concurring with the *Reverentia maritalis*, is ſufficient to reduce a Wife's Deed for the Behoof of her Huſband, *January* 9, 1623, *Marſhal* againſt *Marſhal*.

The Lords ſuſtained the Diſpoſition, and aſſoilzied the Defenders from the Purſuer's Reduction. For they thought it dangerous to overturn a Diſpoſition upon ſuch a Ground, after Twenty four Years ſilent Acquieſcence by the Purſuer.

July 2, 1708. William Souper *Merchant in* Aberdeen, *againſt* George Piper *and* James Miln *of* Balwyllo.

IN a Competition betwixt *William Souper* and *James Miln*, about the Right of ſome Merchant Goods belonging to *William Pennie* their common Debtor, conſigned in the Hands of *George Piper* by way of Commiſſion, in order to be ſold at *Coningsberg*, and the Product to be returned in other Goods from thence; *William Souper* claimed to be preferred upon this Ground, That the principal Commiſſion accepted by Mr. *Piper*, was indorſed and delivered up to him, and ought to prefer him to any ſeparate Right made of the Goods therein contained, tho' firſt intimated. Becauſe, his Right needed not to be intimated, more than the Indorſation of a Bill of Exchange: And in Tranſactions among Merchants, no Aſſignation to an accepted Commiſſion or Bill, without delivery of the principal Commiſſion or Bill is valid, or can warrand the Accepter to pay.

Anſwered for Balwyllo. He is clearly preferable by having both intimated an Aſſignation to the Goods, and arreſted them in *Piper*'s Hands before Intimation of *Souper*'s Right. For where was it ever heard that Privileges allowed by Law to Bills of Exchange, are communicable to other Merchant Conveyances? And to ſay, That an Aſſignation to Merchant Goods could be completed without a formal Intimation, or that ſuch an Aſſignation could not be made without delivering up the principal Commiſſion, is *ſine Lege Loqui*.

The Lords preferred *James Miln* of *Balwyllo*.

Eodem Die. Arthur Temple *againſt* Alexander Cuninghame *Writer to the Signet*.

A*Rthur Temple* having repreſented by Bill, That ſeveral Papers belonging to him were in the Cuſtody of *Alexander Cuninghame* Writer to the Signet, and craved a Warrant for taking his Oath anent his having thereof; In Reſpect he Mr. *Cuninghame* was a Member of the College of Juſtice, and a dying, by whoſe Death without deponing, the Supplicant would loſe his Mean of Probation: The Lords refuſed the Deſire of the Bill. Becauſe, tho' Members of the College of Juſtice be obliged to anſwer ſummarly as to any Thing that concerns their Imployment, or Truſt from their Clients; in other Caſes they cannot be more ſummarly conveened as Havers of Writs, than the reſt of the Lieges, but muſt be inſiſted againſt *via Ordinaria*, and allowed the common *Induciæ legales*.

July 3, 1708. *Sir* Francis Kinloch *of* Gilmertoun, *againſt* William Forbes *of* Tolquhon.

SIR *Francis Kinloch*, as having Right to a Decreet of Furthcoming obtained againſt Sir *Alexander Forbes* of *Tolquhon*, as Debitor to *Adam Urquhart* of *Meldrum*, purſued *William Forbes* of *Tolquhon*, as repreſenting Sir *Alexander* his Uncle, for Payment.

Alledged for the Defender. The Decreet is null, For that 1. Sir *Alexander* was held as Confeſt upon an edictal Citation at the Market-croſs of *Edinburgh*, Peer and Shore of *Leith*, which was unwarrantable, as appears from a Deciſion bſerved by *Dirletoun*, *February* 5, 1665, *N.* 243. And if a Citation at the Dwelling-houſe of one not perſonally apprehended within the Kingdom, be not ſufficient for holding him *pro Confeſſo*, becauſe of the Party's probable Ignorance f what may be done in his Abſence: *Multo magis* doth Law preſume Ignorance f what is done, in a Way more remote from one's Knowledge and Obſervation, gainſt him at the Market-croſs when out of the Kingdom. Nor is it ſufficient o ſay, That Sir *Alexander* ought to have left a Procurator when he went out f the Kingdom: Seing *utcunque* ſuch a Procurator might have appeared and defended Sir *Alexander*, had the Citation come to his Knowledge, he could not ave deponed for him. 2. The Decreet is null by Act of *Sederunt*, in ſo far as t ſtands ſcored at the Minute Book, for not Payment of the Dues.

Anſwered for the Purſuer. If an edictal Citation at the Market-croſs of *Edinburgh*, Peer and Shore of *Leith*, were not a ſufficient Ground for holding Perſons *pro Confeſſo*, there could be no Furthcoming or Conſtitution purſued gainſt thoſe out of the Kingdom, but what is founded on Writ: And ſo unjuſt Men might defraud their lawful Creditors, by withdrawing and going Abroad. Nor doth the Simile of an Execution at one's Dwelling-houſe not perſonally pprehended, hold in this Caſe: Becauſe, Perſons, while in the Country, may, pon due Inquiry be got cited Perſonally, whereas ſuch as are furth thereof, are ot only hard to be found, but alſo cannot be cited upon the Warrant of any udge of this Nation; and are preſumed to have ſettled Procurators at the chief eats of Juſtice, and where Citations are appointed to be given. As to the cited Deciſion, it doth not meet the Caſe, for there only a Warrant to cite a vagrant Perſon at the Market-croſs, in order to hold him *pro Confeſſo*, was refuſed. . The ſcoring in the Minut Book proves nothing, being no Act of a Judge; nd to reduce Decreets upon ſuch a Head, were of dangerous Conſequence: For 'tis known, That the Keeper of the Minute Book lends the ſame daily to Advocates Servants, Agents, and others, whereby any Decreet might eaſily appen to be ſcored in that Book; And it were even too great a Truſt, to allow the Keeper of the Minut Book himſelf the Power of annulling all Sentences n his Hands, by ſcoring at his Pleaſure. Again, the old obſolete Act of *Sederunt* founded on, bears only, That in caſe the Clerks extract a Decreet that is ſcored for not Payment of the Macer-dues, they ſhould *eo ipſo* be liable to the Macers for the ſame; But doth not in the leaſt annul the Decreet.

The Lords repelled the Defences, and ſuſtained the Decreet of Furthcoming.

July 7, 1708. *The Lord* Saltoun, *againſt Sir* James Elphingſtoun *of* Logy.

IN a Proceſs at the Inſtance of the Lord *Saltoun*, againſt Sir *James Elphingſtoun*, for Exhibition and Delivery of a Bond Blank in the Creditor's Name, granted by Mr. *John Buchan* as Principal, and the Purſuer as Cautioner in the Year 1690, for the principal Sum of 1000 Merks, with Annualrent and a Penalty, which had been delivered to the Defender by Mr. *Buchan* after the Term of Payment, for Security of a conſiderable Sum owing by him to the Defender: Which Bond the Purſuer contended was null, as being *Inſtrumentum penes Debitorem*; And to allow Bonds to be delivered by the principal Debtor after the Term of Payment, would be of dangerous Conſequence; Seing at that Rate, one having retired a Bond, might keep it up uncancelled ſeveral Years, and thereafter becoming Inſolvent, redeliver it to the Creditor whoſe Name is inſert, or if Blank, to any Creditor.

Anſwered for the Defender. He cannot be obliged to exhibite the Bond libelled: In Regard it was his own Evident for an onerous Cauſe, and could not be taken from him but *Scripto* or *Juramento. Perinde eſt* at what Time the Bond was delivered, whether before or after the Term of Payment, ſince the Purſuer acknowledges that he ſigned the ſame, to be a Fund of Credit to Mr. *Buchan*, as his Occaſion ſhould require.

Replyed for the Purſuer. Tho' he for an *Interim* was content to become Cautioner for Mr. *Buchan*; it was never his Meaning or Deſign to afford to him an everlaſting Fund of Credit: And the Bond having remained in Mr. *Buchan*'s Cuſtody ſometime after the Term of Payment, the Purſuer had Reaſon to look upon it as a retired Bond.

The Lords found, That Sir *James Elphingſtoun* is not bound to exhibite the Bond, and aſſoilzied him from the Proceſs.

Eodem Die. *Mr.* Andrew Reid *Miniſter of* Kirkbein, *againſt* George Maxwell *of* Munſhes, *and* John Lanerick *of* Torrorie.

GEorge *Maxwell* of *Munſhes* having raiſed a Valuation of the Teinds of his Lands of *Torrorie*, lying within the Pariſh of *Kirkbein*, during a Vacancy of the Cure, wherein the Patron, Titular and Moderator of the Presbytery were called, as the proper Contradictors; He in *February* 1699, Thirteen Days after Mr. *Andrew Reid*'s Admiſſion to that Church, obtained Decreet, valuing his Teinds to a leſs Duty, than the Proportion of Stipend impoſed on his Lands by a Decreet of Modification and Locality in the Year 1650. Which Decreet of Valuation being reduced by the Commiſſion upon this Ground, That the Miniſter was not called to the pronouncing thereof: Mr. *Andrew Reid* purſued the ſaid *George Maxwell*, and *John Lanerick* preſent Heretor of *Torrorie* for ſeveral Years Stipend due to him out of theſe Lands conform to the Decreet of Modification.

Alledged for the Defenders. They were *bona Fide* Poſſeſſors by Virtue of the Decreet of Valuation, till the ſame was reduced; and could be liable in no greater Quantity of Stipend than their valued Teind-duty: Eſpecially conſidering, that their Teinds are truly worth no more, and the higheſt flown Divines never claim more than the Teind. For even null Decreets and other Deeds have been found *Tituli colorati*, affording the Benefit of *bona Fide* Poſſeſſion till they were reduced, *November* 18, 1664, *Guthrie* contra Laird of *Sornbeg*, *February* 16, 1666, Earl of *Wintoun* contra the Counteſs, *February* 16, 1669, *Hamilton* contra *Harper*, *February* 8, 1679, *Scrimzeour* contra Earl of *Northeſk*, *December* 14, 1677, *Dick* contra *Olipher*. Conſequently, the Decreet of Valuation in Queſtion is a ſufficient *Titulus bonæ Fidei*, not only to *John Lanerick*, who bought the Lands from *Munſhes*, and was not obliged to know but the Decreet of Valuation was the Rule of paying the Teind; but alſo to the Seller, who thought himſelf under no Obligation to call a Miniſter, not in the Cure at the raiſing of the Proceſs: And yet he was cited in a Manner, by calling the Moderator of the Presbytery, whereof he was then a Member.

Anſwered for the Purſuer. There is no Pretence for *bona Fides*, ſo long as the Miniſter's Decreet of Locality ſtands unreduced: For *ignorantia Juris excuſat neminem, November* 16, 1633, *Grant* contra *Grant*. And till Mr. *Reid* was eſtabliſhed Miniſter of *Kirkbein*, it had been officious and unſeemly in him, tho' a Member of the Presbytery, to meddle in Matters of the Stipend of the Pariſh.

The Lords repelled the Defence of *bona Fides*; in Reſpect of the Miniſter's ſtanding Decreet of Modification and Locality.

Eodem Die. Anna Paton, *Relict of* Andrew Logie *of* Loanhead, *againſt* Leith *of* Belchirie.

A*Nna Paton* and *Alexander Leith* having raiſed mutual Proceſſes againſt one another before the Privy Council, and a Committee being appointed to examine Witneſſes; both Parties ſubmitted their Differences to the Committee by obliging themſelves to obtemper and fulfil whatever Sentence ſhould be pronounced in the ſaid Matter. The Committee gave out a Decreet ſigned by the Earl of *Buchan* as *Præſes*, and thereafter pronounced another Decreet in different Terms, which was ſigned by the Majority. *Anna Paton* charged *Belchirie* upon the laſt Decreet, who ſuſpended upon this Ground; That the ſame was null, the Arbiters being exauctorated by the former Decreet of a different Strain.

Alledged for the Charger. The Arbiters were not *Functi* by the firſt Sentence, which could not have the Effect of a Decreet, being ſigned only by the *Præſes* of the Committee.

Anſwered for the Suſpender. Writ is no Eſſential in a Decreet Arbitral, either by the civil Law or by our Cuſtom, more as in other Contracts *bonæ Fidei*; but only an Expedient to evidence what is to be performed by the Parties *hinc inde*. For an Arbiter is bound only *Sententiam dicere; & ſi in Sententia dicenda erraverit, eam corrigere non poteſt, quia Arbiter eſſe deſiit*: And it was found, *February* 7, 1671, *Home* contra *Scot*, that a Decreet Arbitral was valid without Writ.

The Lords found, That the Decreet ſigned by the *Præſes*, and not by the Plurality, was unwarrantable.

Eodem Die. *Lord* Alexander Hay, *againſt the Creditors of* Spot.

BY Minute of Sale in *May* 1701, betwixt *Archibald Murray* of *Spot* and Lord *Alexander Hay*, the former diſponed his Lands of *Spot* to the latter, who was to pay Twenty two Years Purchaſe for the free Rent of the Stock, and for the Teinds conform to the Rate in the Act of Parliament, with Annualrent for both from *Whitſunday* 1701; and the 13 *November* thereafter adjudged *Spot*'s Eſtate in Implement. But *Spot* having been at the Horn long before the Minute of Sale, Lord *Alexander* took a Gift of his Eſcheat, and declared the ſame: And having entred to and continued in Poſſeſſion a Matter of Seven Years, he called the Creditors in a Multiple-poinding, that he might be liable but in once and ſingle Payment for the Rent of the Lands, and not for the Annualrent of the Price, till after *Spot*'s Death. In Regard the Mails and Duties during his Lifetime, fell under the Gift of his Liferent Eſcheat, and belonged partly to Lord *Alexander* himſelf, partly to the Creditors preferred in his Backbond to the Exchequer.

Anſwered for the Creditors of Spot. Lord *Alexander* being bound to pay Annualrent for the Price of his Purchaſe, he cannot ſatisfie that Obligement by compting for the Rents of the Lands: And the Creditors *Jus quæſitum* could not be extinguiſhed or reſtricted without their Conſent. 2. The Property of the Lands being ſtated in Lord *Alexander*'s Perſon by a ſovereign Right, *viz.* The Minute of Sale completed by an Adjudication, his after-purchaſing the Gift of Eſcheat, an acceſſory Right in further Security, could never invert his Title of Poſſeſſion: Nor could he poſſeſs thereby, more than a Purchaſer by Roup can poſſeſs by the Creditors Rights and Diligences he is bound to acquire, while his Title of Sale continues unqueſtioned.

The Lords found, That Lord *Alexander Hay*'s Poſſeſſion ought to be aſcribed to the Minute of Sale, and that he is comptable for the Annualrent of the Price to the Creditors, after Deduction and Allowance to him of the Expences of the Gift, and the whole Preſtations contained in his Backbond, which affect the Rents of the Lands.

July 13, 1708. Gordon *of* Cults, *againſt the Lady* Gight *and* Alexander Daviſon *of* Newtoun *her Husband.*

Newtoun being charged as Husband to the Lady *Gight*, for Payment of 1300 Merks contained in a Bond bearing Annualrent, granted by her before their Marriage to *Gordon* of *Cults*; He ſuſpended upon this Reaſon, That a Husband ought not to be liable for the Stock of the Wife's Debt bearing Annualrent before the Marriage: Becauſe ſuch principal Sums belonging to her fall not under the *Jus Mariti*; as was lately decided in the Caſe of Captain *Gordon* againſt the now Lord *Ceſnock*. 2. *Dirltoun* in his Queſtions under the Head *Jus Mariti*, *Pag.* 106, is of Opinion, That a Husband ſhould only be liable for his Wife's Debt *quatenus locupletior*, according to his Intromiſſion, and as a Tutor, the Wife being *in Tutela Mariti*; and his Right *Jure Mariti* to what belongs to his Wife being underſtood *Debitis deductis*. Which is very Conſonant to the Analogy of Law in other general Adminiſtrators, who are never liable *ultra Valorem* of their Intromiſſions; and *bona Fides non patitur, ut quis cum alterius Jactura locupletetur*. 3. If a Husband's Obligements for his Wife's Debt, were not commenſurate to the Fund of Gear he gets with her, Marriage would be diſcouraged, againſt the Intereſt of the State.

Anſwered for the Charger. *Eſto* there was ſome Hardſhip in a Husband's being liable for his Wife's Debts, publick Utility muſt overrule it, for preventing Imbezilment in Prejudice of lawful Creditors, and ſopiting Pleas betwixt Man and Wife: *Et quamvis durum, ita tamen Lex ſcripta.* But then 'tis no greater Hardſhip to ſubject a Man to the Payment of his Wife's Debts who is *eadem Perſona* with him, than to make an Heir liable for his Predeceſſor's. 2. There is a great Difference betwixt the Caſe of a Tutor or Curator, and a Husband. Seing the former, having but an Office and Truſt of Adminiſtration, cannot be liable further than *in quantum intus habet*: Whereas the latter has the Dominion, and Right of Diſpoſal. Again, Man and Wife are underſtood to have entred in a Society of Well and Wo, Loſs and Gain, which implies an Obligement to relieve one another of their Debts and Burdens: And if the Husband has Right *Jure Mariti* to his Wife's Moveables, he muſt likeways be liable to her Debts, according to the Rule, *cujus Commodum, ejus & Incommodum.* 3. If a Husband ſhould eſcape free of his Wife's Debt, *a pari* her Tocher and Subſtance could not be affected for the Husband's: They would have ſeparate Patrimonies, and ſtill contend they were not *lucrati* by the Marriage, and put their Creditors to new Proceſſes upon that Head, contrary to our eſtabliſhed Cuſtom. 4. The Husband covers the Wife from perſonal Execution, and therefore himſelf ſhould anſwer for her.

Replyed for the Suſpender. Thoſe who Contract with Women, tacitely ſubject themſelves to the legal Conſequences of their Condition: And *qui Jure ſuo utitur, nulli facit injuriam, nec meretur Pœnam.* Marriage being lawful, a Husband ſhould not be puniſhed for it; more than the Prince for creating a Peer, and thereby covering him from perſonal Execution at the Inſtance of Creditors.

The Lords found the Husband liable only for all Annualrents due by the Wife, and not for principal Sums bearing Annualrent.

Eodem Die. William Stuart *Brother-german to* Charles Stuart *of* Polcalk, *Supplicant.*

W*Illiam Stuart* having repreſented to the Lords by a Petition, That his Brother *Charles* was at *Barcelona*, without having named a Factor to manage his Eſtate in *Scotland*, whereby his Rents might periſh in Tenants Hands, his Debtors prove Inſolvent, and his Creditors uſe Diligence againſt his Eſtate for Want of one authorized to take Courſe with them; and therefore craved their Lordſhips would grant Warrant and Commiſſion to the Petitioner for managing his Brother's Affairs in his Abſence, upon finding Caution to compt for his Intromiſſions to the ſaid *Charles Stuart*, and all others concerned: The Lords refuſed the Deſire of the Bill.

Eodem Die. Alexander Bruce, *againſt Sir* James Hall *of* Dunglaſs *and Others.*

AT the calling of a Summons of *Bonorum* at the Inſtance of *Alexander Bruce*, againſt Sir *James Hall* and other Creditors: It was alledged for Sir *James*, That no Proceſs could be ſuſtained againſt him; Becauſe he was not duly cited. In ſo far as the Execution bears that the Meſſenger had left a Copy with Sir *James*'s Servant where he lodg'd in *Edinburgh* in the Morning, when Sir *James* was aſleep in Bed, as the Servant declared; which Execution is contrary to the *Act* 75. *Parl.* 6. *Ja.* 5. ſeing it amounts neither to a perſonal Citation, the Meſſenger not having met with Sir *James*; nor to a Citation at his Dwelling-houſe, Sir *James* having no Dwelling-houſe in *Edinburgh*.

Alledgedged for the Purſuer. The Meſſenger's Civility in not ruſhing into the Room to wake the Gentleman, ought not to be obtruded, as a Fault, but the Execution ſhould be ſuſtained; eſpecially conſidering, that Sir *James* cannot deny his having got a Copy.

Anſwered for the Defender. If Meſſengers obſerve not the Method of Citation preſcribed, they may introduce what arbitrary Forms they pleaſe. Had the Meſſenger been violently debarred from Acceſs, ſomething might be ſaid, but his Civility can never paſs for a legal Execution. Nor is that Formality to be made up by the Declarations or Oaths of Parties. For 'tis not the Party's having the Copy, which might accidentally come to his Hands many Ways, but the Meſſenger's obſerving the legal Form, that renders an Execution valid.

The Lords ſuſtained the Nullity of the Citation, and found no Proceſs againſt Sir *James Hall.*

July 14, 1708. James Graham *Brother to the Laird of* Dougalſtoun, *againſt* James Corbet *Merchant in* Glaſgow.

J*Ames Graham* and *James Corbet*, having each of them Three hundred Pound Shares in the *African* Company, they entred into a Bargain; whereby, Mr.

Corbet being allowed to ſet theſe Shares by putting a Price upon them, Mr. *Graham* gave him Five Guineas to let him have the Choice, either to take Mr. *Corbet*'s Shares, or part with his own to him, at the Rate, he *Corbet* ſhould put upon them. *Corbet* having rated each Share at Fourty two Pound Ten Shilling, (which was the principal Sum advanced) *James Graham* declared his Option to accept of Mr. *Corbet*'s Three Shares at the Price ſet upon them. Mr. *Corbet* did, notwithſtanding, thereafter uplift his own Shares from the Commiſſioners of the Equivalent, which occaſion'd *James Graham* to purſue him for Payment, and Damages.

Alledged for the Defender. Since the Bargain required to be perfected by Aſſignations, there was *Locus Pœnitentiæ* till that Solemnity of Writ was uſed, and the Writs dilivered; which was urged from the common Law, *L.* 17. *C. de Fide Inſtrumentorum*; The Opinion of the Doctors, and our own Law and Prattick, as obſerved by the Lord *Stair*, *Tit. Oblig. Conven.* §. 9. And *Dirltoun* in his *Queſtions* under the Word *Locus Pœnitentiæ.*

Replyed for the Purſuer. This Benefit of *Locus Pœnitentiæ* competent by our Law, holds not in *Re mercatoria*, as the buying a Share in a trading Company, which muſt be regulated by the Laws of Nations and Commerce, which allow not Parties to reſile in ſuch a Caſe: But dictate, That *nihil tam congruum Fidei humanæ, quam ea quæ inter Contrahentes placuerunt ſervare*, *L.* 1. *ff. de Pactis*; And *Grave eſt Fidem fallere*, *L.* 1. *ff. de Pecunia conſtituta.* 2. Here was not ſimply a Contract of Vendition or Sale, but an Agreement by Way of Set, where *eo Momento* a Price was given for the Choice, the Defender tacitely renounced the Privilege of reſiling, and became bound preciſely to Implement: A Perſon who upon the Exchange of *London*, *Holland* or other trading Nations, (where Shares in Bank, and particular trading Companies are daily tranſacted and ſold) ſhould object this *Locus Pœnitentiæ*, upon the Riſing of ſuch Stocks (which in two Hours Time will alter conſiderably) would be hiſſed off the Exchange, as both a Fool and unfair Trader. 3. Our Law allows the Benefit of *Locus Pœnitentiæ* only in Matters of Heretage, and others of great Moment.

Duplyed for the Defender. The Subject in Queſtion was not properly *Res mercatoria*, more than any other Piece of private Property: For the Company was diſſolved, and the Proprietars drew all their Shares. 2. Nor doth it alter the Caſe, that the Bargain was made by Way of Set: A Set of it's own Nature being a Sale, with the Addition only of an Option or Choice, which was an acceſſory to the principal Contract, or a Circumſtance introducing the Sale. The Defender's receiving the Five Guineas as the *Præmium* of the Purſuer's Option, could not hinder him to paſs from the principal incomplete Contract of Sale, upon Reſtitution of the Guineas, more than a Seller in a Caſe where Writ is pactioned to interveen, upon Redelivery of a conſiderable Earneſt-peny given in Part of the Price, would be cut off from reſiling before the Writ is perfected and delivered. 3. It appears from the Deciſions, *March* 5, 1628, *M'gill* contra *Edmonſton*, *January* 12, 1676, *Campbell* contra *Douglaſs*, *June* 28, 1699, *Lauſon* contra *Auchinleck*, that *Locus Pœnitentiæ* is allowed with us even in mercantile Buſineſs.

Triplyed for the Purſuer. The cited Deciſions don't meet the Caſe: And even that betwixt *Lauſon* and *Auchinleck*, which ſeems the moſt pat, there was no *Rei Interventus*, but only an Earneſt-peny given after celebrating the Bargain; whereas here *Res intervenit in ipſo Contractu*, which put Mr. *Corbet* under an Obligement to transfer.

The Lords found, That there having been *Rei Interventus* by the Defender's accepting of Five Guineas, upon a Set for ſtating the Price, and allowing the Purſuer his Choice; and the Purſuer having accordingly made his Choice: The Exception of *Locus Pœnitentiæ* is not competent.

July 15, 1708. George Houſtoun *and his Tutors and Curators, againſt my Lord* Roſs.

G*Eorge Houſtoun* having raiſed Suſpenſion and Reduction of a Decreet in Abſence, obtained by the Lord *Roſs* before the Admiral, againſt the deceaſt *Patrick Houſtoun* the Purſuer's Father, upon this Ground; That the ſame was null for being extracted without the Warrant of a Decerniture ſigned by the Judge, contrary to the *Act* 3. *Par.* 1686, and might have been the Clerk's Manufacture.

Alledged for my Lord Roſs. The Cuſtom of the Admiral Court requires not Decreets in Abſence to be ſigned by the Judge, but only Decernitures upon Debate: And the Cuſtoms of particular Places derogate even from a general Cuſtom, Witneſs *December* 14, 1671, *Duff* and *Brown* contra *Forbes of Colodden*; and the Caſe of *Roſs* of *Tulliſnaught* contra *Turner*.

Anſwered for the Purſuer. The Argument from the Cuſtom of the Admiality is moſt irrelevant, unleſs they pretend a Power of diſpenſing with Acts of Parliament. For tho' it be not neceſſary for a Judge to ſign ordinary Steps of Proceſs, ſuch as Continuation of Diets, Orders about ſeeing and returning, or Production of Writs, whereupon nothing is to be extracted; The Judge's ſigning Interlocutors for an Act or Decreet, is an indiſpenſible Check upon the Clerk, any contrary Cuſtom notwithſtanding. Becauſe indeed, *Conſuetudinis uſuſque longævi non vilis eſt Authoritas, ſed non uſque ſui valitura Momento, ut Rationem vincat aut Legem.* So Cuſtom did not ſuſtain an unwarrantable Adjection to a Tax-roll, *December* 15, 1666. Laws concerning the publick Good and Regulation cannot run in Deſuetude, *January* 27, 1681, *Jack* contra Town of *Stirling*. Yea, the Town of *Edinburgh*'s Decreet as Patrons, againſt Mr. *Andrew Maſſie* a Profeſſor of Philoſophy in their College, was reduced, for that ſome of the Interlocutors were not ſigned; And the Commiſſar of St. *Andrews*'s ſubſcribing only the Docquet after all the Depoſitions of Witneſſes, was found to annul the Decreet extracted thereon. The Deciſion, *December* 14, 1671, concerns only the ſpecial Set of a particular Burgh, which differs in different Burghs. Nor is that betwixt *Roſs* of *Tulliſnaught* and *Turner* any more to the Purpoſe: For there the Interlocutor not having been ſign'd when pronounced in Expectation of Agreement of the Parties, the Lords, by voting it over again, ordained it to be ſigned *in Præſentia*.

The Lords ſuſtained this Nullity of the Decreet, that the Decerniture or Warrant thereof was not ſigned by the Judge; and therefore reduced the ſame.

July 16, 1708. *Sir* Robert Home, *contra Sir* Patrick Home *Advocate*.

S*Ir Alexander Home* of *Rentoun*, in his Contract of Marriage with Dam *Margaret Scot*, being oblig'd to provide the Lands of *Rentoun*, and others therein-mentioned in Favours of himſelf, and the Heirs-male to be procreated of the Marriage; And to grant all Rights, Titles and Securities thereanent, whereupon Inhibition was uſed by the Friends *in Anno* 1690: Sir *Robert Home* Heir-male and of Proviſion of the Marriage, purſues a Reduction and Declarator againſt Sir *Patrick Home*, for reducing a Contract of Alienation of the Eſtate made betwixt Sir *Alexander* and him in *October* 1694, upon this Ground; That the Purſuer had good Intereſt to reduce all voluntary Deeds made by his Father, after executing of the Inhibition, in

Defraud of the Obligement and Proviſion conceived in his Favours, as a Creditor by the Contract of Marriage.

Alledged for the Defender. The Diſpoſition to him could never be quarrelled upon the foreſaid Clauſe and Inhibition; Becauſe, 1. That Obligement is but a ſimple Tailzie and Deſtination of Succeſſion, alterable at Pleaſure, even by gratuitous Deeds; Seing Sir *Alexander* was ſtill Fiar, and not tied up from the free Diſpoſal of the Eſtate, by prohibitory and irritant Clauſes. He being obliged to reſign, failing Heirs-male of the Marriage, in Favours of his Heirs-male of any other Marriage, and failing of theſe, in Favours of his Heirs whatſoever: The Clauſe doth equally relate to them all, as Heirs ſubſtituted to him; So as he might alter the Deſtination in Favours of the firſt Member of the Tailzie, as well as the Deſtination in Favours of the ſubſequent Members. Yea, a mutual Tailzie, which is much more binding, doth not hinder either Party to diſpoſe of their Eſtates as they pleaſe: As *Hope* in his *leſſer Pratticks* obſerves to have been decided betwixt *Spence* and *Spence*; and betwixt the Earl of *Home* and *Coldingknows*, which laſt Caſe is obſerved by *Dury* in *March* 1634. 2. There is a Difference betwixt a Clauſe obliging a Father to reſign his Eſtate in Favours of himſelf in the firſt Place, and to the Heirs of the Marriage as ſubſtituted to him; and a Clauſe providing the Eſtate to the Heirs of the Marriage ſimply: For in the firſt Caſe, the Father is abſolutely Fiar, may diſpoſe as he thinks fit, even by gratuitous Deeds; Whereas ſuch Deeds ſhould not be effectual in Prejudice of an Obligation conceived immediately in Favours of Heirs of a Marriage. 3. The Inhibition could not diſable Sir *Alexander* to diſpone gratuitouſly; Yea, could not have been raiſed, if adverted to at the paſſing, Becauſe, 1. The Inhibition was principally in Favours of the Lady for her Liferent proviſion, and the Heirs-male of the Marriage are only mentioned by the by. 2. Inhibition can only be raiſed upon a preſently effectual Obligement, and not upon Obligements *in Spe*, ſuch as one that is conditional or an Obligement to a long Day, as my Lord *Stair* obſerves *Page* 598. Now the Purſuer having no Intereſt in the Eſtate while the Father lived; Nay it being uncertain if ever he would ſucceed thereto, ſince Sir *Alexander* might have outlived him: Such a *Spes Succeſſionis* could never be the Ground of an Inhibition, *January* 18, 1622, L. of *Silvertounhill* contra his *Father*. 3. Suppoſe there had been Ground for an Inhibition, it could have no further Effect than the Obligement it was raiſed on imported: And as that Obligement could not hinder the Father's free Diſpoſal, neither could the Inhibition, *Hope ibid.* 4. The Purſuer cannot come to the Eſtate by Virtue of the Clauſe in his Father's Contract of Marriage, without ſerving Heir to him, and ſo is obliged to warrant his Deed, *July* 9, 1630, *Veach* contra *Robertſon*, *November* 23, 1677, *Sibbald* contra *Sibbald*, *January* 7, 1675, *Innes* contra *Innes* obſerved by *Dirletoun*, *January* 9, 1684, *Bouſſie* contra *Menzies* obſerved by the Lord *Newtoun*. Albeit the Purſuer be only ſerved Heir of Proviſion, he is alſo the Perſon who may be general Heir of Line; and ſo ſucceeding *in univerſum Jus*, is liable to perform all his Father's Deeds. For his Service is *Actus legittimus, qui nec recipit Diem, nec Conditionem*: And tho' an Heir of Tailzie or Proviſion ſecured by prohibitory and irritant Clauſes, may ſucceed to the Lands, without noticing their Predeceſſor's Deeds contrary to the Proviſion; that holds not in other ſimple Tailzies and Proviſions, whereof the Heirs are *ſuo Ordine*, no leſs liable to perform their Predeceſſor's Deeds, than Heirs-male and of Line are.

Replyed for the Purſuer. Sir *Patrick*'s Aſſertion, That a Proviſion in a Contract of Marriage (which is a moſt ſolemn and favourable Settlement) may be evacuated by a gratuitous Deed, hath no Precedent in former Times, and will ſtand ſingle in all Time coming. Tho' Sir *Alexander* was Fiar, a iar may be many ways reſtrained in the Diſpoſal of his Property. *Acci- it aliquando, ut qui Dominus ſit, alienare non poſſit, Inſtit. Tit. Quib. alien. c. pr.* a Father, tho' Fiar, has not the Liberty of alienating at Random ithout an onerous Cauſe, in Prejudice of his own ſolemn Obligement *Fe- uary* 12, 1677, *Fraſer* contra *Fraſer*, *July* 10, 1677, *Carnegy* and her Huſ- and contra *Smith*, *July* 26, 1677, *Stevenſon* contra *Stevenſon*, *June* 16, 676, *Mitchel* contra *Littlejohn*. The Opinion of our Lawyers go upon this ide, *Stair Lib.* 3. *Tit.* 5. Dirletoun's *Queſtions Page* 85, *and* 86. *Fontan- ella Gloſs* 9. *Part* 1. And ſeing the onerous Cauſe belongs only to the eir of Proviſion of the firſt Marriage, who is *in Obligatione*, the Heirs ſub- itute of any other Marriage, who are but *in Deſtinatione Mariti*, are not ſo ffectual Creditors by Virtue of the Clauſe. Again, there is no Parallel be- wixt a Tailzie that contains a naked Deſtination, and an Obligement in a ontract of Marriage for an onerous Cauſe: And to ſay that mutual Tail- ies may be reſiled from by either Party without an onerous Cauſe, is pre- arious and contrary to the Deciſions cited by the Defender, and to that be- wixt *Sharp* and *Sharp*, *January* 14, 1631. 2. There is no Difference between Clauſe obliging a Father to reſign in Favours of himſelf, and the Heirs of the arriage as ſubſtitute, and a direct Proviſion to the Heirs of the Marriage the firſt Place: For in both Caſes the Father is Fiar, and the Heirs of e Marriage can only come in as Heirs of Proviſion to him. 3. The Inhi- tion is even as expreſly in Favours of the Heirs of the Marriage, as in Fa- ours of the Relict: And *de Praxi* Inhibitions are raiſed upon Contracts of arriage in Favours of Heirs, which are effectual againſt poſterior gratuitous eeds. The Inhibition was not ſuſtained in the Caſe betwixt *Innes* and *nes*, becauſe the Father was alive: And beſides, the contrary hath been und by poſterior Deciſions, *January* 24, 1677, *Graham* contra *Rome*, *Fe- uary* 12, 1677, *Fraſer* contra *Fraſer*. Albeit an Inhibition doth not alter e Ground of the Obligement it is raiſed on, it adds to the Security there- ; and putting the Lieges *in mala Fide* to receive voluntary gratuitous Diſ- oſitions, in Prejudice of the ſame, is a Ground to reduce ſuch. The Reaſon denying Inhibition in the Caſe of *Silvertounhill*, was, becauſe the Parties ontracters, who might ſute Execution, were all dead. 4. The Deciſions *each* contra *Robertſon*, and *Sibbald* contra *Sibbald*, are in the Caſe of oner- us Creditors; And in the laſt Caſe the Creditors had inhibited before the eed in Favours of the Heir: And in the Caſe betwixt *Bouſſie* and *Menzies*, here is only a Declaration in a Proceſs againſt the Heir of the Marriage, ho was not called therein. So that it remains uncontroverted, that an eir of Proviſion by Contract of Marriage, is partly Heir, partly Creditor; eir as to his Predeceſſor's Debts and Deeds for onerous Cauſes, and Cre- itor as to gratuitous fraudulent Deeds. Tho' a Contract of Marriage is ot to be ſo ſtrictly interpreted, as to bind up a Father from diſponing the eaſt Parcel of the Eſtate: It certainly hinders all total gratuitous Alienations, which would directly fruſtrate the very End of the Contract. A Father might indeed, notwithſtanding ſuch a Contract, arbitrate among his Children of the Marriage, by paſſing by the eldeſt, if an Idiot, or undeſerving, and giving his Eſtate to a ſecond Son of the ſame Marriage: But he could not diſpone it gratuitouſly to a Brother, or to a Stranger.

Duplyed for the Defender. There is no Difference whether a Father diſpone his whole Eſtate or a Part in Prejudice of his Heir of the Marriage: For ſeveral partial Rights may exhauſt the whole, and *majus et minus non variant Speciem*; So that if he cannot diſpone the Whole, he cannot diſpone Part. The Conſequence of tying up a Father in theſe Terms, would be, That the next *Day* after the Marriage Inhibition might be ſerved againſt him, which would ruin his Credit, and deprive him of the free *Diſpoſal* of his Eſtate. Yea, it would in Effect hinder the buying of Lands; Becauſe, few would purchaſe from one that cannot diſpone gratuitouſly, for Fear of being put to the Trouble of inſtructing an onerous Cauſe.

The Lords found the Obligement in the Contract of Marriage, whereby Sir *Alexander* is bound to reſign the Eſtate in Favours of himſelf, and the Heir-male of the Marriage, with the Inhibition raiſed thereon by the Friends, did diſable him to diſpone that Eſtate gratuitouſly in Prejudice of the Purſuer, who is Heir-male of the Marriage.

Eodem Die.

The Lords refuſed a Gratis Warrant, in Reſpect the Report of the Advocates for the Poor bore not, That the Petitioner had *probabilem litigandi Cauſam*, but only that he deſerved the Benefit of the Poors Roll.

Eodem Die. Jean Thomſon *and* John Hay *Executors of* John Hay *Taylor in* London, *contra the Earl of* Linlithgow *and his Curators.*

IN a Purſuit on the paſſive Titles at the Inſtance of the Executors of *John Hay*, againſt the Earl of *Linlithgow* and his Curators, for an Accompt contracted by the late Earl at *London*, whereof the laſt Article is in the 1695; It was alledged for the Defender, That the Accompt was preſcribed, not being purſued within three Years.

Alledged for the Purſuers. 1. Preſcription was interrupted by the Execution of a general Charge to enter Heir in *January* 1697, within two Years of the laſt Article of the Accompt, with a Summons for Payment execute in *May* 1698. Which Summons muſt be an effectual Interruption; Becauſe, deducing a Year's Time after the late Earl's Deceaſe, during which the Purſuers could not inſiſt *cum Effectu*, in reſpect of the Defender's Privilege of *Annus deliberandi*, there are not three Years betwixt the Citation and the laſt Article of the Accompt. 2. The Triennial Preſcription cannot be obtruded, becauſe the Debt purſued was contracted in *England*, where no ſuch Preſcription takes Place: For in perſonal Contracts, the Law of the *Locus Contractus* muſt be the Rule; Merchants or Tradeſmen who truſt Foreigners, not being obliged to know the Municipal Law and Cuſtoms of the Place, where the Debtors reſide.

Anſwered for the Defenders. The Execution of the general Charge could have no Effect of Interruption, becauſe it mentions no particular Debt, nor contains any Concluſion of Payment: Nor yet could the Summons interrupt, not being Execute within three Years. The *Annus deliberandi* is not to be regarded; in Reſpect the Defender was ſerved and retoured Heir to the late Earl within a few Months after his Deceaſe. 2. A Purſuit in *Scotland* againſt a *Scots* Man, can only be determined according to the *Scots* Law.

The Lords ſuſtained the Defence of Preſcription.

Eodem Die. *Mr.* Walter Williamſon *of* Cardrona, *againſt* Thomas Thomſon *Writer in* Edinburgh,

Thomas Williamſon, as apparent Heir to *Thomas Williamſon* Merchant in *Peebles*, having diſponed ſome Tenements of Land there, to *Thomas Thomſon*, without a Procuratory to ſerve him Heir to his Predeceſſor; and thereafter diſponed the ſame to the deceaſt *William Williamſon*

Sheriff Clerk in that Town, with a Procuratory to ſerve him Heir: *Thomas Thomſon* applyed to, and required *John Frier* Baillie in *Peebles*, to cognoſce *Thomas Williamſon* his Author Heir to his Predeceſſor, and thereaſter to inſeft himſelf upon *Thomas Williamſon*'s Diſpoſition, which the Baillie refuſing to do, *Thomas Thomſon* proteſted againſt him for Coſt, Skaith and Damage, and took Inſtruments *September* 26, 1707. Thereaſter Mr. *Walter Williamſon* of *Cardrona*, Son to the deceaſt *William Williamſon*, was inſeft in the Lands aforeſaid, as Heir to him, after cognoſcing *Thomas Williamſon* Heir to his Predeceſſor, and raiſed a Declarator of his own Right, with a Reduction of the Diſpoſition to *Thomas Thomſon*.

Anſwered for Thomas Thomſon. Albeit *Cardrona* was firſt inſeft in the Subject under Debate, yet his Inſtrument againſt the Baillie, being prior to *Cardrona*'s Seaſin, and all that a prudent Man could do to expede the firſt Inſeftment, was, in the Conſtruction of Law, equivalent to Inſeftment, and therefore a Ground of Preference to *Cardrona*, who got the Start of him only by the Baillie's Partiality.

Replyed for Cardrona. The Baillie was in the Right not to comply raſhly with *Thomas Thomſon*'s Deſire, becauſe of the dangerous Conſequence of inſefting any Perſon as Heir to his Predeceſſor, which ſubjects him to a paſſive Title; And becauſe of the Want of a Procuratory for that Effect.

The Lords preferred *Cardrona*, in Reſpect that the Diſpoſition in his Favours bears a Procuratory for ſerving the Diſponer Heir to his Predeceſſor in the Subject diſponed, and *Thomſon*'s Diſpoſition bears no ſuch Procuratory or Warrant. Albeit it was alledged for *Thomſon*, That the Diſpoſition in his Favours imply'd a Warrant for ſerving the Diſponer Heir to his Predeceſſor in the Subject diſponed.

July 20, 1708. Thomas Nicol *Writer in* Edinburgh, *againſt* John Park *of* Fulfoordlies.

IN a Compt and Reckoning at the Inſtance of *Thomas Nicol*, againſt *Park* of *Fulfoordlies*, for his Intromiſſions with the Rents of the Lands of *Nethermoninet*; The Lords found an old Tack not relevant to prove the Rental, unleſs Poſſeſſion and Payment conform were alſo proved.

Eodem Die. John Forbes *of* Knaperny, *againſt Captain* John Grant, *and* Grant *of* Dalahaple.

IN a Competition for Major *Alexander Anderſon*'s Share in the *African* Company, betwixt *Knaperny* who had intimated an Aſſignation in his Favours to the Directors, and Captain *Grant* and *Dalahaple*, who had arreſted the ſame in the Hands of the Company and Commiſſioners of the Equivalent, before the other's Intimation: *Knaperny* alledged, That he ought to be preferred, becauſe the Executions of the Arreſtment bore not, *That a Copy was left at the African Company's Office*. And tho' the Meſſenger hath helped the Executions, they cannot be ſuſtained to his Prejudice, having been once null by Act of Parliament: For the Deed of a Meſſenger can't take away a Creditor's *Jus quaſitum*, by ſupplying the Nullity of an Execution, after it is once *in Judicium deductum*, and quarrelled.

Anſwered for the Arreſters. The Executions are unqueſtionably valid. For they bear, *This I did after the Form and Tenor of the ſaid Letters in all Points, whereof I left a juſt* *for the ſaid Directors and Managers, with their Servants in their Office*, &c. And thereaſter theſe Words, *The ſaid Copy bearing the date hereof*,

hereof, Witneſſes Names and Deſignations: And the Copies are duly recorded in the *African* Books. Now, *I left a juſt*, could, in Nature, imply nothing but a *Copy*: And the word *Copy* is added and ſign'd on the Margin, before any Interlocutor in the Cauſe, by the Meſſenger who abides by the Verity on't. And was it ever heard, that a Writ was declared null, for Want of one Word in one Place of the *Body* on't, where ſuch a Word is expreſt in the ſame Clauſe, and neceſſarly underſtood where wanting.

The Lords Repelled the Objection againſt the Arreſtments, and preferred the Arreſters.

July 22, 1708. *The Creditors of Mr.* Robert Craig *of* Riccartoun, *againſt* Margaret Dalgleiſh *the Lady* Riccartoun.

IN a Competition of the Creditors of *Riccartoun*, the Lady claimed Preference for her Liferent Annuity of Two thouſand five hundred Merks upon her Contract of Marriage in *December* 1661 with *Lewis Craig* then younger of *Riccartoun*, containing a Procuratory of Reſignation and Precept of Seaſin, wherein *Thomas Craig* his Father provided him to the Fie of the Eſtate, and her (who brought Thirty two thouſand Merks of Tocher) to the ſaid Annuity, and obliged himſelf to infeſt them in the Fie and Liferent *reſpective*, by two Manner of Holdings *a me* and *de me*; A Charter *a me* granted to them by the ſaid *Thomas Craig* in *January* 1662; a Seaſin of the ſame Date, long prior to the Creditors Rights; And a Charter of Confirmation *in Anno* 1703, which, tho' poſterior, ought to be drawn back *ad ſuam Cauſam*.

Alledged for the Creditors. The Lady's Infeſtment proceeding upon a Charter *a me* is null, for not being confirmed before the Creditors Right interveened, which Mid-impediment hinders the drawing back *ad ſuam Cauſam*.

Anſwered for the Lady. Her Father in Law being obliged to infeſt her both *a me* and *de me*, and the Seaſin relating to a Charter in general, he is preſumed to have done it *omni meliore Modo*, and conſequently to have granted Charters both Ways, conform to his Obligement: It being uſual at that Time ſo to do, and to give Seaſin upon both; *Et quæ fieri debent & ſolent, facile præſumuntur*. Eſpecially conſidering, That the Contract of Marriage is of the Nature of a Charter, containing a Precept or ſufficient Warrant of a Seaſin, tho' no Charter were produced; And *in Favorem Matrimonii*, many Things ſingular have been ſuſtained. Nor is there any Neceſſity now after Fourty Years to produce the Charter *de me*, which has been granted *ex ſuperabundanti* for Form's ſake only, the Contract, which is the remoter Warrant, and the Seaſin, being produced; Seing *probatis Extremis, præſumuntur Media*; Eſpecially *in Re tam antiqua, & Materia favorabili*. So a Contract of Marriage was ſuſtained to adminiculate a Seaſin in Favours of a Wife, whereof a ſeparate Bond granted in Implement of the Contract was the Warrant, and not produced, *June* 29, 1665, *Norvel* againſt *Hunter*. 2. *Et ſeparatim*, tho' commonly a Charter *a me* is null till Confirmation; yet Infeſtments upon Liferent Rights to Wives by Virtue of their Contracts of Marriage, to be holden of the Superiors, *not* confirmed, hath been ſuſtained againſt ſingular Succeſſors, *January* 15, 1663, *Campbell* againſt the Lady *Kilchattan*; and preferred to interveening Rights compleated before Confirmation, 4 *February* 1629, Lady *Aitoun* againſt *Hume*. Nay, even before the Act of Parliament 1695, a baſe Infeſtment in Favours of a Wife, not clothed with Poſſeſſion, was preferr'd to poſterior publick Infeſtments, *February* 21, 1672, *Reid* againſt the Counteſs of *Dundee*.

Replyed for the Creditors. If the Charter *a me* be not the Warrant of the Seaſin, but a Charter *de me* not produced, the Seaſin is null, as wanting a Warrant: For the Contract of Marriage, which is not mentioned or referred to therein,

erein, cannot ſupport it. And if the Charter *a me* be underſtood to be the Varrant of the Seaſin, the Confirmation thereof could not be drawn back to e Date of the Charter and Seaſin, in Prejudice of the Creditors interveening ights: According to the Maxim, *Confirmatio & Confirmatum non poſſunt njungi, propter medium Impedimentum.* Nor doth it alter the Caſe, that the iſponer in the Contract of Marriage, was bound to give Infeſtment either to e holden of himſelf, or of the Superior, *December* 4 and 5, 1623; *Paton* ainſt *Steuart.* And albeit in favourable Caſes, Law will preſume a Thing at ought to be, to have interveened; Preſumptions cannot be received againſt lain Evidences, nor two or more Fictions concur in one Point; as that the harter *a me* produced, was not the Warrant of the Seaſin; That there was Charter *de me* granted; and that it was the Warrant of the Seaſin.

The Lords preferred the Lady's Annuity to the real Rights of the compet- g Creditors completed before her Confirmation: In Reſpect her Seaſin was pported by her Contract of Marriage, providing her to that Annuity, and earing Precept of Seaſin in the Lands affected therewith, and by Fourty ears Poſſeſſion, albeit a Charter *de me* be not produced. For the Lords con- dered that the Seaſin referred only to a Charter in general, and that it was en the Cuſtom to grant Charters *a me* and *de me*, and to take Infeſtment pon both at the ſame Time; and that it is a Preſumption, and not a Fiction Law, that a Charter *de me* interveened.

Eodem Die. William Rollmainers *againſt the Lady* Blantyre, *and others.*

W*illiam Rollmainers* having raiſed a Furthcoming againſt the Lady *Blantyre*, of ſome Moveables belonging to *William Scot* Merchant Travel- r his Debtor, arreſted by him in her Hands; And, after an Act was extract- d, the Defender having for her own Security called the other Creditors of *Wil- am Scot* in a multiple Poinding: The Raiſer of the Proceſs of Furthcoming raved, That *ante omnia* before deciding the Preference, he ſhould be prefer- ed for Expences he had been at in raiſing Summons, extracting Acts and other Diligence, in Order to make the Subject effectual; as being *in Rem verſum* f the Party who comes to be preferred, and diſburſed upon the common In- ereſt. Seing it were hard another preferred ſhould reap the Benefit of *Roll- ainers's* Charges, and draw the whole Stake without any Burden thereof: nd in Sales, or other common Concerns of Creditors, the Money expended o make the Subject effectual, uſeth to be paid off the whole Head.

The Lords refuſed to allow Expences.

July 23, 1708. *Captain* Alexander Straitoun, *againſt the Earl of* Lauderdale.

IN a Purſuit at the Inſtance of Captain *Straitoun*, as having Right by Progreſs to a Debt due by the Duke of *Lauderdale* to Sir *Andrew Forreſter*, againſt the Earl of *Lauderdale*, as Heir-male of Tailzie to the Duke his Uncle, for Payment.

Anſwered for the Defender. He cannot be inſiſted againſt as Heir-male, till the Lord *Teſter* the preſent Heir of Line be diſcuſt, and his Lands adjudged, if he renounce conform to the Sixty ninth Deciſion obſerved by the Lord *Dirletoun*, *December* 18, 1666.

Replyed for the Purſuer. In a former Proceſs the deceaſt Marchioneſs of *Tweeddale* the firſt Heir of Line renounced, and the Purſuer, upon her Re- nunciation, adjudged.

Duplyed for the Defender. He not being called in the former Proceſs, it i ſtill competent to him now to object, That the Lord *Teſter* the preſent Hei of Line is not diſcuſſed; For his Mother's Renunciation doth not hinder him to repreſent, when he thinks fit. Beſides, ſome Eſtate belonging to the Duke was left out of the Adjudication that followed upon the Renunciation.

The Lords found no Neceſſity to diſcuſs the Lord *Teſter* the preſent Heir o Line, if the former Heir renounced, and an Adjudication was led upon he Renunciation. But ſuſtained the Defence upon an Eſtate not adjudged from the former Heir of Line.

Eodem Die. James Nicolſon *of* Trabroun, *and the other Creditors of* Ni-colſon, *againſt the Earl of* Balcarras.

IN a Proceſs at the Inſtance of the Creditors of *Nicolſon*, againſt the Ear of *Balcarras*, for Payment of 4000 Merks contained in an heretable Bond of Corroboration, granted in *Anno* 1652 by *Alexander* Lord *Balcarras* the Defender's Father, to Sir *Thomas Nicolſon* King's Advocate, to which Bond the Purſuers have Right by Progreſs.

Alledged for the Defender. Abſolviture: Becauſe, the Bond purſued on re-lates to a principal Bond granted for the ſame Sum in *May* 1648, by the deceaſt *John* Duke of *Lauderdale*, and the ſaid Lord *Alexander*, conjunctly and ſeverally, which is not produced, and crav'd to be reduced by the Defender, that he may be aſſoilzied from the Bond of Corroboration, as a relative Writ depending upon the original Bond corroborated, and falling with it; ſeing *non creditu Referenti, niſi conſtet de Relato.*

Alledged for the Purſuer. The Bond of Corroboration is a new Bond obliga-tory *per ſe*, and no ways depending upon the Narrative of the former. And it hath been often found, That a Bond of Corroboration is a ſufficient Title to purſue, tho' the principal Bond be loſt or amiſſing, *Beg* contra *Brown*, *July* 1663, obſerved by *Gilmore*, *February* 24, 1676, *Johnſton* contra *Orchardtoun*, obſerved by *Dirletoun*: For the Maxim *non creditur Referenti, &c.* holds only, where there is a ſimple Reference to a Writ, and not where the relative Writ is alſo diſpoſitive.

Anſwered for the Defender. Whatever might be pretended, had the princi-pal and corroborative Bonds been granted by the ſame Perſon (which is the Caſe of the cited Deciſions;) in this Caſe where the original Bond granted by two *correi debendi*, is ſimply corroborated by one of them, Law preſumes; 1. That the principal Bond wanting, contained a Clauſe of Relief by the Duke of *Lauderdale*, in Favours of the Lord *Balcarras*, of which he is deprived through the Want of the ſaid Bond. 2. Its preſumed, That the Creditor got Payment from the Duke, and retired his Bond, ſeing it cannot be produced: For the Creditor was bound to keep up the original Bond for the Earl's Security and Relief. And ſince the Purſuers by their own or their Author's Fault are in no Condition to relieve the Earl, or to afford him Recourſe againſt the Duke's Repreſentatives; he ought to be aſſoilzied from the Bond purſued on, and both Bonds ſhould be reduced and declared extinct, with all that has followed or may follow thereon.

Duplyed for the Purſuer. It may rather be preſumed, That the Duke of *Lauderdale* was only Cautioner in the original Bond; from the Conception of the Bond of Corroboration, and the real Security granted by the Lord *Balcarras*, without the leaſt Inſinuation or Reſervation of Relief againſt *Lauderdale*. 2. A Creditor lies under no Tie to keep the Bond corroborated, ſo as to be liable to the Debtor, in Caſe it be loſt, *ſine lata Culpa*: For as the Creditor thought himſelf ſecure by the new Bond of Corroboration; the Debtor ould have conſulted his own Security by a ſeparate Bond of Relief, or a meous Purſuit for that Effect.

The Lords ſuſtained the Defence, That the Lord *Balcarras* had Relief ainſt the Duke of *Lauderdale* for the one Half of the Sum in the Bond of orroboration; in Reſpect it bears that they were bound *in ſolidum* as Co-rincipals by the Bond corroborated, and the Purſuers do not produce the ſaid ond, that the Defender might thereupon operate his Relief of the other Half ainſt *Lauderdale*: but refuſed to aſſoilzie the Defender totally, unleſs he rove, That his Father was bound only as Cautioner.

Eodem Die. *The Relict and Children of the deceaſt Mr.* Robert Rule *Miniſter at* Stirling, *againſt the Magiſtrates thereof.*

IN the Action at the Inſtance of the Repreſentatives of Mr. *Robert Rule*, againſt the Magiſtrates of *Stirling*, as Adminiſtrators of *Cowan*'s Hoſpital; r Payment of Ten Pound *Sterling* of yearly Stipend for Ten Years, in Uſe to ave been paid for the Space of Thirteen Years to former Miniſters of *Stirling* ut of the Teinds of *Raploch*, belonging to the Hoſpital, over and above the uantity modified in their Decreet of Locality, and withheld from Mr. *Rule* l the Ten Years of his Incumbency.

Alledged for the Defenders. The Miniſter of *Stirling*'s Stipend was concluded y a Decreet of Locality, which doth not affect the Teinds of *Raploch*; and e preſumptive Title of *Decennalis & Triennalis Poſſeſſio*, being effectual only o Miniſters who have no other Title in their Perſon, cannot avail the Purſuers, as repreſenting Mr. *Rule*, who had a Decreet of Locality, to which reſumption muſt cede, *February* 24, 1681, Doctor *Leſly* contra the Miniſter f *Glenmuck*.

Anſwered for the Purſuers. Thirteen Years Poſſeſſion is a preſumptive Title o any Miniſter tho' he be a Stipendiary. Seing, 1. The Reaſon of that oſſeſſory Privilege, *viz.* Becauſe Churchmen are ſuppoſed ignorant and negligent of their Rights, whereof they are but Liferenters, and theſe Rights are ubject to be loſt in the Change of Incumbents, doth equally hold in the Caſe of Stipendiaries, and beneficed Perſons. 2. Any ſtipendiary Miniſter may (notwithſtanding his Decreet of Locality) get an Augmentation of Stipend from the Commiſſion out of the free Teinds of his Pariſh, or enjoy a Mortification: And Thirteen Years Poſſeſſion of the Teind-duty claim'd, is upon the Matter a tacite Augmentation, or perhaps was mortified to ſuch a pious Uſe. The Deciſion 1681, betwixt *Leſly* and the Miniſter of *Glenmuck*, concerns the Caſe of a Miniſter who had been Thirteen Years in Poſſeſſion of the Teinds of his Pariſh, *Jure Parochi*, whoſe Poſſeſſion was aſcribed to a Decreet of Locality afterward produced; becauſe a promiſcuous Poſſeſſion could not be diſtinguiſhed, and applyed to different Titles. But here a Miniſter having uplifted his Stipend, contained in a Decreet of Locality, by Virtue thereof, and a Superplus Duty beſide for Thirteen Years, that Thirteen Years Poſſeſſion muſt be imputed to a diſtinct Title by Mortification, or a Decreet of Augmentation, or the like, which Law preſumes to be loſt. And how many Miniſters in *Scotland* have both Localities and ſeparate Titles for additional Stipend?

The Lords ſuſtained the Purſuers Title of *Decennalis & Triennalis Poſſeſſio*, as ſufficient, notwithſtanding of the ſpecial Decreet of Locality. But thereafter, *November* 1708. Upon a reclaiming Bill given in by the Defenders, and Anſwers made thereto by the Purſuers: The Lords altered their former Interlocutor, and repelled the Purſuers Alledgeance, founded upon *Decennalis & Triennalis Poſſeſſio*; in Reſpect of the Decreet of Locality, to which the preſumptive Title muſt cede.

Eodem Die. *The Lord* Elibank *and his Siſters, againſt Lord* Preſtounhall *and* Alexander Mackenzie *of* Frazerdale *his Son.*

ALexander late Archbiſhop of St. *Andrews* having, by his principal Teſtament, *named the Lady* Preſtounhall *his ſecond Daughter his Executrix and univerſal Legatrix, reſerving to himſelf to burden her with what Debts and Legacies he thought fit, and Power to the Perſons in whoſe Favours theſe ſhould be granted, to purſue her for Implement, and ſhe refuſing or delaying to do the ſame, to purſue for and affect the whole Goods conveyed in her Favours, as freely and fully as if they were diſponed directly to themſelves by the Teſtator.* Thereafter by a Codicil, he burdened his Executrix with the Payment of ſome particular Debts and Legacies, and ordained her to divide the Remainder of his Effects betwixt her ſelf, and her eldeſt Siſter the Lady *Elibank*, and her Children. Both the Siſters being now dead; the preſent Lord *Elibank* and his Siſters, as repreſenting their Mother, purſued the Lord *Preſtounhall* to compt and reckon for his and his Lady's Intromiſſions with the Biſhop's Executory, and *Alexander Mackenzie* of *Frazerdale* their Son as Executor to his Mother.

Alledged for the Defenders. The Lady *Preſtounhall* was not bound to do Diligence as an ordinary Executor, but only liable for the equal Half of her actual Intromiſſions: And being equally concerned in the Subject, Law preſumes ſhe acted providently. So they are willing to aſſign the equal Half of all outſtanding Debts, which is all that the Teſtament and Codicil obligeth them to: It being provided in the Teſtament, *That in Caſe the Executrix ſhould refuſe or delay to make Payment, the Legatars might purſue and affect the Defunct's Goods and Gear, as effectually, as if they were immediately conveyed to themſelves*; which argues, That the Biſhop did nor intend to oblige the Executrix and her Husband to more Diligence for he Siſter's Half of the Executory, than for their own.

Anſwered for the Purſuers. Executors are liable for Diligence, when they have little or no Benefit by the Teſtament: And the Lady *Preſtounhall*, who had the Half of the Executory, was under a more particular Obligation to execute the Defunct's Will nicely. 2. Had ſhe abſtained from or repudiated the Office, it had fallen to another that would have been liable to have done Diligence: And an Intromettar who, by a Title debarred another, is liable for Diligence. Again, the Executrix, at giving up of the Inventory, did not proteſt not to be liable for Diligence, but only for actual Intromiſſions: Nor would the Commiſſars have admitted ſuch a Proteſtation, as being directly contrary to the Nature of the Office. Nay, 'tis queſtionable in Law, if the Defunct at the Time could have diſpenſed with the giving up of Inventory, or the being liable for Omiſſions.

The Lords found the Executrix liable for Diligence, reſerving all Defences.

July 27, 1708. *The Duke of* Douglaſs, *againſt the Creditors of* Spot.

THE Duke of *Douglaſs* having a Gift of 400 Pound *Sterling* yearly, containing an Allocation upon the heretable Chamberlain of the Lordſhip of *Dunbar*; and having got the Backbond granted to the Exchequer by Lord *Alexander Hay* Donatar of the Eſcheat of   *Douglaſs* of *Spot*, who is heretable Chamberlain, burdened therewith, his Grace applyed to the Lords for an Order to the Donatar to pay him the Sum of 7546 Pound 7 Shill. 1 d. due by *Spot* as Chamberlain. Which the Creditors of *Spot* contended ſhould not be granted: In Reſpect, they offered to prove that a great Part of the Mony is yet reſting by the Feuars and others liable in Payment; and ſuch Reſts were always ſuſtained as a valid Article of Diſcharge in a Chamberlain's Accompts, when he inſtructs Diligence done therefore.

Alledged for the Duke. The Treaſury and Exchequer were never in Uſe to take Reſts off the Hands of the Queen's Chamberlains, Sheriffs, Stewarts, or Baillies who were bound to fit their *Æques* yearly in Exchequer, and to get Letters of Relief againſt Debtors. And albeit Sheriffs, who have no Fee, are in a more favourable Caſe than Chamberlains who have one: Yet the former are not only bound to fit an *Æque* for the Time they officiate, but alſo for all preceeding their Entry from the laſt fitted *Æque*.

Anſwered for the Creditors of Spot. The Queen's Chamberlains are not in the Caſe of Sheriffs, who, upon giving Infeſtment, get Payment, and are ſecure in all Events by the Clauſe *capiendo Securitatem*.

The Lords found, That Diligence did not exoner the Chamberlains of the Crown Rents, from anſwering and being liable for Reſts due by the Vaſſals or Tenants.

Eodem Die. John Drummond *of* Megginſh, *againſt* John Stuart *of* Innernytie.

IN a Wakening of a ſpecial Declarator of *Blairhall*'s Eſcheat, at the Inſtance of *Megginſh*, againſt *Innernytie* and his Tenants: The Defender alledged no Proceſs, becauſe the Summons, not having been called in Judgment within a Year after elapſing of the laſt Day of Compearance, expired, and could not be ſummarly wakened; as was decided *November* 1684, *Belſhes* of *Tofts*, contra Earl of *Loudoun*. For a Wakening is only of Summons ſuperannuated after it was once called, *Stair*, *Inſtit. Pag.* 638. This holds for the ſame Reaſon, That a Summons not executed within Year and Day after the raiſing, becomes null, *March* 1686, *Jolly* contra Laird of *Lamingtoun*. So in the *Roman* Law, the *Prætor*'s *Edicts* laſted only for a Year, unleſs turned into a Proceſs, by Judicial Signatures within that Time: And even after *Res* was *litigioſa*, there was a certain Time prefix'd for a final Determination of the Cauſe, *L.* 13. § 1. *C. de Judiciis*. Which is alſo done in moſt Places abroad.

The Lords found, That the Summons, not being called within Year and Day after the laſt Diet of Compearance, fell and could not be wakened.

Eodem Die. Anna Byers, *againſt* Alexander Reid *her Husband*.

IN a Reduction at the Inſtance of *Anna Byers*, againſt *Alexander Reid* her Husband; for reducing their Contract of Marriage upon Minority and Leſion: The Lords ſuſtained this Reaſon of Reduction, that the Purſuer had in the 17 Year of her Age diſponed the Property of her heretage to the Defender, who was *obæratus*, and not in a Condition to ſecure any ſuitable Proviſion to her effectually.

Eodem Die. Anna *and* Elizabeth Boigs *and their Curators*, *againſt* George Watſon *Merchant in* Edinburgh.

IN the Reduction at the Inſtance of *Anna* and *Elizabeth Boigs*, as Creditors to *John Tait* Merchant in *Edinburgh*, againſt *George Watſon*; for reducing a Diſpoſition granted to him by *Tait* in Security of Debt, upon theſe Grounds, 1. It was a Diſpoſition *omnium Bonorum*, acquired, and to be acquired, whereby the Diſponer became Bankrupt, and the Purſuer with his other Creditors diſappointed of their Payment. 2. The Diſpoſition was latent *retenta Poſſeſſione*: In ſo far as the Defender allowed the Diſponer to continue in his Shop, to buy and ſell as formerly, and alſo allowed him to poſſeſs the Houſhold-pleniſhing, and to uplift the Rent of a Tenement diſponed, till ſuch Time as he broke.

Anſwered for the Defender. By no Law is the taking a Hypotheck or Security of ſuch Goods forbidden, on the contrary the civil Law allows a Flock of Sheep to be Hypothecated for Debt, L. 13. ff. *de Pignor. et Hypoth. in Rebus in Taberna.* L. 34. ff. *eod.* If then it was lawful for the Defender to take a corroborative Security (which is virtually but a Hypotheck) in the Pleniſhing and Shop-goods, by the very Nature of the Right, he might forbear to make Uſe on't, if he thought fit; Conſequently, his not entring to poſſeſs by Virtue thereof can never prejudice him. Again, forbearing to take Poſſeſſion of Goods diſponed in Security doth not ſo eaſily infer Simulation, as forbearing to poſſeſs upon a Diſpoſition of Property, would do: in reſpect the one wholly denudes the Granter, and the other do's not, but is conſiſtent with retaining Poſſeſſion for a Time. This acceſſory Security needs not be made Uſe of immediately when given, but the Receiver is at Freedom to make Uſe thereof when his other Security fails, unleſs he be prevented by another Creditor's more timely Diligence. It would be of dangerous Conſequence to ſuſtain Latency *per ſe*, as a ſufficient Ground to reduce a Diſpoſition; For at that Rate even Bonds might be reduced for the like Reaſon; And Latency was found to be no ſufficient Ground of Reduction, *February* 7, 1673, *Burnet* contra *Fraſer*. Nor can the Defender's Right be thought latent, ſeing he took immediately ſymbolical Poſſeſſion: And the Reaſon of his abſtaining from real and actual Poſſeſſion, was, becauſe his Annualrents were punctually paid, which is ſufficient to clothe a baſe Infeftment with Poſſeſſion, and take off the Preſumption of Simulation.

Replyed for the Purſuer. Perinde eſt whether the Diſpoſition be an abſolute Right, or only a Right in Security, Creditors being defrauded by the one, as well as by the other. The Inſtrument of Poſſeſſion can't be regarded: Since a Bunch of Ribbons, as the Symbol for the Ware in the Shop, was not delivered there, but clandeſtinely in *Tait*'s Houſe at the Foot of a Cloſs, where the Inſtrument was taken; And in the Caſe of *Robert Hamilton* Merchant, *January* 11, 1682, ſuch a Diſpoſition, as that made to the Defender, was found ſimulate, *ad hunc Effectum* to bring in all the Creditors *pari Paſſu*, or according to their Diligence. Were Contrivances of this Sort allowed among Merchants, no Body could know whom he hath to deal with: For notwithſtanding of one's open trading, and a fair Sight of Goods in his Shop, all may belong in the mean Time to another Perſon. Such Practices have been redreſs'd by ſeveral Deciſions, as *Street* contra *Maſſon*, and *February* 12, 1669, *Pot* contra *Pollock*, *November* 28, 1679, *Cathcart* contra *Glaſs*. As to the Prattick betwixt *Burnet* and *Fraſer*, The Lands contained in the Tack, againſt which the Latency was objected, were poſſeſs'd by the Husband, and his Poſſeſſion was hers; Beſides, the Aſſignation to the Tack was *Proviſio remuneratoria*, the ſame as if it had been contained in the Lady's Contract of Marriage, and ſo could not be thought latent.

The Lords ſuſtained the Diſpoſition in ſo far as concerned the Heretage. But found *Tait*'s retaining Poſſeſſion of the Shop, and Houſhold-pleniſhing, and ſelling the Goods in the Shop until he broke; relevant to reduce the Diſpoſition *quoad* theſe.

Eodem Die. *Alexander Ragg, againſt* Iſobel Brown *Lady* Hartſide.

AT expeding before the Macers, the Service of *Alexander Ragg* who was out of the Kingdom, as Heir to *Margaret Williamſon* of *Barnhill*, by

Virtue of a Procuratory granted by him for that Effect, to *David Smith* Uncle to the Laird of *Methvin*; It was objected by *Iſobel Brown*, That the Procuratory produced is null, being granted by *Ragg* long before *Margaret Williamſon* died, or the Succeſſion devolved to him as apparent Heir; and could not revive by her Death, according to the Rule *quod ab Initio vitioſum eſt*, &c.

Anſwered for David Smith. 1. 'Tis *Jus tertii* to *Iſobel Brown*, who has no Intereſt, to make ſuch an Objection. 2. He produced a Diſpoſition to him by *Alexander Ragg*, conveying all Right he had to *Margaret Williamſon*'s Eſtate, in caſe ſhe died without Heirs of her Body, and the Succeſſion fell to him; and containing a Procuratory to *David*, in that Event to ſerve and retour the Diſponer as Heir to *Williamſon*, which Procuratory is now good, when the Condition is purified. For what more ordinary, than Reſignations by apparent Heirs, whoſe ſuperveening Service renders the ſame effectual? And *Mandatum poſt Mortem exequendum* ſubſiſts after the Mandant's Death, both by the civil Law, and by ours, *January* 18, 1678, *Gray* contra Lady *Ballegerno*. But whatever might be pretended, if the Procuratory were ſolely *in Rem Mandantis*, this *in Rem Mandatarii*, is valid unqueſtionably.

Replyed for Iſobel Brown. She had good Intereſt to make the Objection, being the next Heir of Line to the Defunct, and preſumed to be ſo, till a nearer appear, or a valid Procuratory from him. 2. It is againſt Law and Good-manners, for a preſumptive Heir to grant Warrant to ſerve him, when the Event of his Succeſſion ſhould happen, by the Death of a Perſon, at the Time not out of Hopes of Children: Which Pactions *de Hæreditate Viventis*, as *Vota captandæ Mortis alienæ*, are reprobated in Law.

Duplyed for David Smith. The *Roman* ſubtlety againſt *Pactum de Hæreditate Viventis*, was peculiar to that jealous People; contrary to the Rule of Nature, by which every Intereſt preſent or future, is the Subject of Agreement; And rejected by the univerſal Cuſtom of *Europe*, particularly of *Scotland*, *July* 6, 1630, *Aikenhead* contra *Bothwel*. 2. It is plainly *Jus tertii* for *Iſobel Brown*, who proves not her Claim, to object againſt the Service, which proceeds upon what is inſtantly verified: And by the Act 114. *Par.* [illegible]. *J.* 1. No Exceptions are to be proponed againſt the Brieve of Inqueſt, as if it were a Brieve of Plea, if it have the Ordinary Forms of Execution therein-mentioned.

The Lords ſuſtained the Procuratory.

July 31, 1708. Elizabeth Butler *and Lieutenant* John Gordon *her Husband for his Intereſt*, *contra* Alexander Ragg.

IN a poinding of the Ground at the Inſtance of *Elizabeth Butler* and her Husband, againſt *Alexander Ragg* as Heir to *Margaret Williamſon*, an Advocate having compeared, and craved to ſee the Proceſs for the Defender who was out of the Kingdom; It was alledged for the Purſuers, That no Advocate's Compearance for a Perſon out of the Kingdom could be ſuſtained without a ſpecial Mandate, as was decided, *February* 3, 1681, contra *Stuart* of *Archattan*.

Anſwered for the Defender. Tho' an Advocate would not be allowed, without a ſpecial Mandate, to plead for one out of the Kingdom; he may, by the Privilege of his Gown, crave to ſee any Proceſs againſt ſuch an one, that in the mean Time before it come in by the Courſe of the Roll, he may acquaint his Friend abroad, and get a Mandate with Inſtructions about what Defences ſhould be made. The cited Deciſion is alien to the Point: For an Advocate's craving there to have one out of the Kingdom reponed againſt a Decreet in Abſence, could not be ſuſtained, becauſe it reſolved in a Defence.

The Lords found, That an Advocate might, by the Warrant of his Gown, be allowed to ſee the Proceſs for the Defender; tho' he could not be allowed to plead for him and make Defences, without a ſpecial Mandate.

Eodem Die. Alexander Montgomery *of* Aſloſs *Tackſman of the Town of* Edinburgh's *Mills, contra* Jean Alexander *Relict of* Adam Cleghorn *Brewer in* Edinburgh.

IN the Action for abſtracted Multures at the Inſtance of *Aſloſs*, againſt *Jean Alexander*. The Purſuer inſiſted againſt the Defender, alledging, That ſhe being a Burgeſs poſſeſſing a Tenement of Land within *Edinburgh*, was obliged to go to the Town's Mills upon the Water of *Leith*, which by their Charter are annexed to the Royalty. Becauſe, as the Inhabitants of a Barony are bound to go to the Mill of the Barony; So the Inhabitants of the Royalty, are thirled to the Mills of the Royalty, which are in Effect the Queen's Mills, and have greater Privilege than the Mills of a Barony. 2. Burgeſſes within Burgh are obliged to obey the Acts of the Town-council made for the Good of the Burgh, and by a Tract of ſuch Acts, Burgeſſes are ordained to go to the Town-mills with their Grain, under the Pain of Eſcheat of what is abſtracted, and Payment of double Multure. Now the Acts of a Town-council are more binding, than Acts of a Baron-court, being in Effect like Decreets-arbitral as to what relates to the Town's common Good, whereof the Mills are a Part. Which Acts have been homologated and obeyed always till the Abuſe of Hand-mills or Querns, contrary to Law crept in.

Anſwered for the Defender. The Mills of the Water of *Leith* being no Part of the original Conſtitution of the Royalty, but only purchaſed lately by the Town, and annexed thereto, as a Part of their common Good: No Inhabitants within the Burgh are thirled to theſe Mills, except ſuch as have voluntarily aſtricted themſelves, *July* 13, 1632, Earl of *Murray* contra Feuars of *Muckart*; Or againſt whom a Right of Thirlage is acquired by Preſcription; Neither of which can be pretended in this Caſe. Nor, 2. Can Burgeſſes be reſtricted in their Trade, without their Conſent, by the Town-council, but only by the Laws of the Nation. Magiſtrates, who are but Adminiſtrators for the Good of the Inhabitants, may better their Caſe, but cannot make it worſe; more than they could exact Two Penies for the Pint of Ale, without a publick Law. And Burgeſſes owe Obedience to Magiſtrates only, when they are executing the Queen's Laws, as Sheriffs in that Part, and acting for the Well or Good Government of the Place; and not when they would limite and burden private Perſons Property by unwarrantable Acts: For otherwiſe any Sheriff might at the ſame Rate impoſe upon all within the Shire.

The Lords repelled the Defences: And found that the Tenement poſſeſſed by the Defender is thirled.

November 11, 1708. *ACT of SEDERUNT, Regulating the Side-bar, and concerning extracting and giving Stops by the Ordinary.*

THE Lords of Council and Seſſion Conſidering the great Inconveniencies ariſing to the Liedges, and the extraordinary Trouble they are put to, through

hrough the Importunity of Agents and Parties, in their Addreſſes for getting auſes called at the Side-Bar, without any previous Advertiſement to the Advo- ates concerned, by Rolls put upon the Wall the Night before, as was appointed y a former Act of *Sederunt*; For preventing whereof, They Appoint and Enact, hat only two Lords in one Day ſhall come out to the Side-Bar *ſucceſſive* by urns, according to their Seniority, from Ten to Twelve in the Forenoon, and ach Lord ſhall continue at the Side-Bar for the Space of an Hour only, except e Lord Ordinary upon the Bills, who may come out at any time for calling Bills f Suſpenſion or Advocation to be paſt or refuſed by him, or Bills of Complaint emit to him by the Lords to be ſummarly diſcuſt; And that Parties and Procura- rs may know the particular Hours of each Lord's outcoming, ordains the Keep- of the Rolls for the Outer-houſe to affix upon the Wall each *Monday* Week- , the particular Days, Hours and Names of the Lords, that are to be Ordinaries the Side Bar for that Week; In which Roll, the Ordinary in the Outer-houſe eekly is to be paſt over, as to theſe Hours falling to him by Courſe betwixt en and Twelve: And Diſcharges the Calling of any Cauſes at the Side-Bar, but ch whereof the Lord Ordinary, who is to call the ſame, ſhall cauſe affix on e Outer-houſe Wall, the Night preceeding, a Roll ſubſcribed by the ſaid Or- inary's principal Servant; And Ordains the ſaid Cauſes to be ſet down in the d Roll by Number, thus, 1, 2, 3, 4, *&c.* and the total Number of Cauſes in e ſaid Roll to be perfixt thereto in Words, and not in Figures; As alſo, Diſ- arges the Interlining or Adding any Cauſes to the ſaid Roll, with Certificati- ; the Contraveener ſhall be debarred the Parliament Houſe, and declared In- pable of any Imployment or Service about the ſame for ever, attour refounding the Party leſed his Damage and Expences; And likeways Diſcharges the Ex- anging of Days and Hours by the Lords. And further, in caſe any Lord ſhall t at any Time go through all the Cauſes in his Side-Bar Roll, he ſhall, at his next de-Bar Calling, begin with the Cauſe he formerly left at, and ſo proceed orderly; nd diſcharge the Calling of any Cauſes in the ſubſequent Rolls by that Ordinary, l firſt all the Cauſes in his preceeding Roll be Called; And likeways diſcharge e Clerks to write Minutes or Interlocutors in any Proceſſes Called at the de-bar, contrary to the Orders and Regulation above-written, with Certifica- on, That all Decreets, Acts, Sentences, and Interlocutors pronounced at e Side-Bar, and written contrary to the above Regulations, ſhall be void and ull; And Ordain the Clerks, upon Application of Parties, to give out the xtracts of any Decreet, Act or Proteſtation, after elapſing of Twenty four ours after reading thereof in the Minute-book, notwithſtanding of any verbal top, which verbal Stops are hereby diſcharged; And ordain all written Stops o be ſubjoined to a Repreſentation craving the ſame, and that the ſaid Stop hall not endure or continue above a Fourthnight in Time of Seſſion, and if granted in Time of Vacance, ſhall not endure after the Eighth Day of the down itting of the next Seſſion, except the ſaid Stops be renewed. And ordain heſe Preſents to be Recorded in the Books of *Sederunt*, publiſhed at the Market-croſs of *Edinburgh*, and Printed, and a Copy thereof affixed in the Parliament Houſe.

November 12, 1708. Alexander Scot *Writer in* Edinburgh, *contra* Mr. George Seton *of* Gardinroſe.

IN the Purſuit at the Inſtance of *Alexander Scot* againſt *Gardinroſe*, for Payment of 1000 Pound, contained in a Bond granted by him for Love and avour to *Janet*, *Margaret*, and *Mary Setons* his Siſters, with this Quality, *That it ſhould be null, if he were decerned to pay to* Jean Kennedy, *and Captain* Monro *her Husband, any Part of the Sum of* 3000 *Pound that they were purſuing him for*; Which Bond was Aſſigned to *Alexander Scot*: The Lords found that Payment made to the ſaid *Jean Kennedy* and her Huſband by virtue of a Decreet arbitral, was equivalent to Payment upon a judicial Decreet, and did irritate the Bond; unleſs the Purſuer could alledge a Defence whereupon *Gardinroſe* might have been aſſoilzied from *Jean Kennedy*'s Proceſs.

November 16, 1708. *Dam* Anna Houſtoun *and the Lord Juſtice Clerk her Huſband for his Intereſt, againſt* John Hamilton *of* Bangour.

THe deceaſt Sir *William Hamilton* of *Whitelaw* having, in his Contract of Marriage with Dam *Anna Houſtoun*, *Obliged himſelf to imploy* 60000 *Merks Scots upon Land, Annualrent, or other ſufficient Security to himſelf and her in Conjunct-fie and Liferent*; And thereafter by a Bond *obliged his Heirs not of his own Body, for important Cauſes and Conſiderations, to pay to her* 7000 Pound Sterling: The ſaid Dam *Anna Houſtoun* and the Lord Juſtice Clerk her preſent Huſband for his Intereſt, purſued *John Hamilton* of *Bangour*, as Repreſenting the ſaid Sir *William Hamilton*, to implement the Proviſion in the foreſaid Contract of Marriage.

Alledged for the Defender. No Proceſs could be ſuſtained on the Contract, becauſe the 7000 Pound Bond was granted in Satisfaction. Seing *Debitor non præſumitur donare*; *& Nemo præſumitur Rei ſuæ Jacturam facere*; Which is a Principle confirmed by a continued Tract of Deciſions, *February* 4. 1623. Guild contra *Guild*, *November* 11. and 13. 1624. *Wallace* contra *Wallace* of *Ellerſlie*, *February* 17. and 24, 1632, *Kinnaird* contra *Yeaman*, *November* 1688, the Children of *Walter Law* contra *Liddel*. *February* 2. 1688. *Selkirk* contra *Inglis*, *November* 27. 1685. *Robertſon* contra her Father's Heirs.

Replyed for the Purſuer. The 7000 Pound Bond could not be underſtood in Satisfaction of the Obligement in the Contract; Becauſe, the Granter doth not as in the Contract, bind all his Heirs, but only his extraneous Heirs not of his own Body; And the Bond muſt be reckon'd gratuitous, ſeing it bears not to be granted for onerous Cauſes; but only *for important Conſiderations*, which in a Deed granted by a Man to his Wife, imply no more than a Motive of extraordinary Affection. So that the Bond was only a conditional Gratuity to the Lady, failing Heirs of the Granter's Body, without any Relation to the Contract: And had he deſigned it in Satisfaction of his Obligement in the Contract, it was eaſie to have expreſs'd ſo much. As to the cited Deciſions, they are not to the Purpoſe: For it is own'd, that a poſterior may comprehend a prior Obligement; But the preſent Queſtion is, If a Perſon having the free Diſpoſal of his own, may not ſtand under different compatible Obligations, when the *Quæſtio Voluntatis* is cleared by ſo pregnant Circumſtances, as do ſufficiently take off the Brocard, *Debitor non præſumitur donare*?

Duplyed for the Defender. The Defunct's not expreſſing the 7000 Pound Bond to be in Satisfaction of his former Obligement, doth not elide the *Preſumption*, which, had that been expreſt, could not take *Place*, but plainly makes Way for it; ſeing *Whitelaw* was a Lawyer who knew the Import of the Brocard. It is trifling, to pretend, That becauſe extraneous Heirs are bound in the Bond, it cannot be in Implement of the Contract, which the Heirs of the Defunct's own Body were obliged to make effectual: ſeing theſe extraneous Heirs are no otherways bound, than as they are *Una et eadem Perſona cum Defuncto*. And 'tis ridiculous to diſtinguiſh betwixt onerous and important Cauſes.

The Lords found, That the 7000 Pound is to be imputed in Satisfaction o the Obligement in the Contract of Marriage: ſeing *Debitor non præſumitu donare*.

Novemb

November 17, 1708. *Mr.* William Veach *Miniſter at* Drumfreis, *againſt Lady* Mary Maxwell, *now Counteſs of* Traquair, *and the Earl for his Intereſt.*

IN a Competition betwixt Mr. *William Veach* and the Counteſs of *Traquair*, who had both adjudged the Lands of *Dalskairth*, for Debts due to them by *John Grierſon* the Heretor : It was alledged for Mr. *Veach*, That the Counteſs's Adjudication is null, for that it libels only the Ground of her Debt, and that ſhe could not get Payment, and therefore requires the Debtor's whole Lands to be adjudged in the Terms of the Act of Parliment 1672 ; without requiring the Debtor to produce a free Progreſs to Land correſponding to the Debt, and a fifth Part more, which is an Alternative in that Statute. And by Act of *Sederunt February* 26, 1684, altho' Purſuers ought to libel both the Alternatives of the Act 1672 : Yet they ſhould not take a Decreet for a fifth Part more, unleſs the Defender compeared and diſponed particular Lands.

Anſwered for the Counteſs. The Act 1672, requires not all the Clauſes therein to be repeted in a Summons of Adjudication : But it is ſufficient to mention the Act, and conclude that the Debtor's Lands ought to be adjudged in the Terms thereof, for Payment of the Sums due to the Adjudger. Narrating the Act in long Terms, is but an Art of Writers, to make their Clients pay the more : For there is no Neceſſity to inſert at Length a publick Law, which all are obliged to know. Yea, even in the Caſe of alternative Obligations, the Creditor may purſue Performance of one Member of the Alternative, and will get Decreet for the ſame, unleſs the Debtor claim his Privilege of Election. . The not libelling the Act *ad Longum*, did not hinder the Debtor againſt whom the Adjudication was purſued, to compear and offer a Progreſs in the Terms of the Act : And his neglecting to do ſo, was a paſſing from that Benefit. And 'tis all one to the common Debtor, whether both the Members of the Alternative were ſpecially libelled or not ; ſeing he might in either Caſe have had the Benefit of reſtricting the Adjudication, by ſatiſfying the Conditions required by the Act, and without that could have had it in neither Caſe.

The Lords repelled the Nullity proponed againſt the Counteſs of *Traquair*'s Adjudication, but reſtricted the ſame as a Security for principal Sum and Annualrents.

November 23, 1708. William Sym *and* Robert Scot, *againſt* John Donaldſon *Notary in* Bamff.

WIlliam Cruickſhanks Merchant in *Bamff*, having diſponed his whole Eſtate to *Jean Cruickſhanks* his Daughter, *Robert Scot* Writer in *Edinburgh*, Aſſigny under Truſt to *William Sym* Heir to the ſaid *Jean Cruickſhanks* his Mother, raiſed Reduction & Improbation of a Diſpoſition granted by the ſaid *William* and *Jean Cruickſhanks*, with Conſent of *Patrick Sym* her Husband, to *John Donaldſon* upon this Ground : That the Diſpoſition quarrelled bore only, That *William Cruickſhanks* ſubſcribed by two Notaries and four Witneſſes, and the Purſuer offered to improve the Subſcriptions of the Witneſſes (whereof the ſaid *William Sym* was one) by their Oaths. *William Sym* (who being an inſtrumentary Witneſs, was allowed *cum Nota* to depone, notwithſtanding his Intereſt in the Cauſe) diſowned his Subſcription ; Another of the Witneſſes acknowledged his, but did not remember that he heard or ſaw *William Cruickſhanks* give Warrant to the Notaries, or that he ſaw *Patrick Sym* or *Jean Cruickſhanks* ſubſcribe, or own that they had ſubſcribed it, being Ten or Twelve

Years ago, but ſaid he knew their Subſcriptions, and was ſure he would not have ſubſcribed Witneſs, except in Preſence of the Parties; A third Witneſs was dead; and the fourth deponed, That it was like his Subſcription, tho' he could not be poſitive. The Purſuer contended, That the Diſpoſition was not only null as to the Subſcription of *William Cruickſhanks*, for Want of four Witneſſes; But alſo was null *in Totum*, in Reſpect, 1. The Subſcriptions of *William Sym* and *Jean Cruickſhanks*, who ſubſcribe as Conſenters, muſt fall as Acceſſories with the Subſcriptions of *William Cruickſhanks* the principal Diſponer. Becauſe, the whole four Witneſſes being indefinitely adhibited to the Subſcriptions of the Parties and Notaries, the controlling two of them weakens the Faith of the other two: Eſpecially ſeing the dead Witneſs's Depoſiion is only preſumptively Probative, and the other who owned his Subſcription is not Poſitive, that he ſaw the Parties ſubſcribe, or heard them own their Subſcriptions, in the Terms of the Act of Parliament 1681, which annuls his Teſtimony. 2. The Diſpoſition is null; Becauſe, not Sideſcribed by the Parties at the Juncture of the Sheets: For albeit there was no poſitive Law before the Year 1696, requiring Sideſcription, *Ita invaluit Uſus & Conſuetudo*, for preventing the cutting of a Writ, and affixing new Sheets of a different Tenor to the laſt. Again, the Act 1696, appointing every Page to be ſigned as Margines were before, implys, That Sideſcribing was neceſſary by our Law. And by an Act of *Sederunt July* 18, 1691, all Signet Letters were ordained to be ſideſcribed, as was done by Clerks of Seſſion in their Extracts: Conſequently Sideſcribing is far more neceſſary to principal extrajudicial Writs, that have no Warrants upon record to check the Tricks of unjuſt Men.

Anſwered for the Defender. 1. The Writ being unqueſtionably ſubſcribed by *Patrick Sym* and *Jean Cruickſhanks*, to whom *William* had formerly diſponed the Subject, it ſufficiently denudes them, and excludes the Purſuer who is Heir to his Mother. Nor is it of any Moment, that they add the word *Conſent* to their Name: Seing their ſigning their Names ſimply would have ſufficiently conveyed the Subject; And the ſuperfluous Addition of the word *Conſent*, cannot prejudice the Right, *Quia utile per inutile non vitiatur*. The Act of Parliament 1681, requires only, That a Witneſs ſhould ſee the Party ſubſcribe, or hear him own his Subſcription, but not that a Witneſs ſhould after a long Time diſtinctly remember that he ſaw the Party ſubſcribe, or heard him own his Subſcription: And one's owning himſelf to have been a Witneſs, implys all that is required by the Act of Parliament. 2. There was never any Law for Sideſcribing before the Act 1696, and the Diſpoſition quarrelled was anterior to the Act 1696, the firſt Law for Sideſcribing: And the Lords have frequently ſuſtained Writs not ſideſcribed as Probative, where the laſt Sheet duly ſubſcribed, contained the ſubſtantial Clauſes relative to the preceeding Sheets; and the Diſpoſition quarrelled contains in the Beginning of the laſt Sheet, a coherent Part of the Clauſe concerning delivery of the Writs, with the Clauſe of Regiſtration, Precept of Seaſin, and Clauſe of Reverſion. The Act 1696 points at what was ordinary, without declaring Writs not ſideſcribed before to be null. It concerns alſo Decreets, as well as Contracts: And if the Want of Sideſcribing were a Nullity in all Decreets, eſpecially Decreets of Appriſing; many hundred Securities would blow up, it not having been cuſtomary to ſideſcribe ſuch Decreets, till a Matter of Thirty ſix Years ago.

The Lords found the Diſpoſition in Favours of *Donaldſon* not Probative as to the Subſcription of *William Cruickſhanks*, but Probative as to *Jean Cruickſhanks* and her Husband's Subſcriptions; and in Reſpect the laſt Sheet of the ſaid Diſpoſition ſubſcribed by them, contains the material Things in the Diſpoſition, repelled the Objection of its not being ſideſcribed by them.

November 24, 1708. *Mr.* William Halkerſton *of* Rathillet, *againſt* John Melvil *of* Mordecarnie.

THE Lordſhip of *Fife* having fallen to the Crown by the Forſeiture of *Murdoch* Earl of *Fife*, King *James* the Fifth *in Anno* 1535, granted a Feu-charter to the Defender's Predeceſſor, of the Lands of *Mordecarnie* and *Star*, a Part of the Lordſhip, *cum Molendinis & Multuris* in the *Tenendas*; thereafter *in Anno* 1541, feued out to the Earl of *Crawford* another Part called the Lands of *Rathillet*, with the Mill thereof, and Multures of *Mordecarnie* and *Star*, which Right came by Progreſs in the Perſon of Mr. *William Halkerſton*: Who purſued a Declarator of Aſtriction againſt *John Melvil* preſent Heretor of *Mordecarnie* and *Star*, alledging that the Defender's Lands were thirled to his Mill of *Rathillet*. Becauſe, it was one of the Mills of the united Barony or Lordſhip of *Fife*, and the King's Mill: All the Land of which Lordſhip are preſumed to be aſtricted to the Mills thereof, unleſs Immunity be clearly documented. For as in general, it was never controverted, that the King's Mill carries the Aſtriction of his own Lands; and all the Lands of a Barony have been found thirled to the Mill thereof, *July* 17, 1629, *Newliſtoun* againſt *Inglis*: So the Defender's Lands are expreſly thirled to the Purſuer's Mill, by the Charter 1541, which bears in the Narrative, *That the Lands and Mill of* Rathillet *had been poſſeſſed by the Earl and his Predeceſſors, as Rentallers and kindly Tenants, ſince the Days of King* James *the Fourth*; Which is as plain an Evidence as can be, in ſo ancient a Matter, that the Defender's Lands were thirled to the Purſuer's Mill, and that there was ſuch a Mill before the Defender's Charter, at leaſt is ſufficient to transfer upon him the Burden to prove that there was none. Eſpecially conſidering, that the Tenants of the Defender's Lands are proved to have gone ſome Years, a Matter of Fourty Years, ago to Mill, tho they performed no Services, and paid only for Multure, as ſtrangers, a Peck of ſix Firlots.

Anſwered for the Defender. It appears not that, at the Date of his Charter 1535, there was any Mill upon *Rathillet*, to which his Lands could have been aſtricted, or that they were in Uſe to go to any other Mill of the Lordſhip of Fife as ſuch: So that then *Mordecarnie* was *Terra libera*, and could not be aſtricted *in Anno* 1541, after the King was denuded. And tho it were to be preſumed, That when both the Defender's Lands, and the Purſuer's Mill belonged to the King, theſe Lands were thirled to the Mill; and that from the Purſuer's Poſſeſſion of the Defender's Multures a great many Years ago, it were preſumed *retro*, that the King had the ſame Poſſeſſion before his granting either of the foreſaid Charters: The Clauſe *cum Molendinis & Multuris* in the *Tenendas* of the Defender's Charter, may concur to elide ſuch a preſumptive Aſtriction; and be a Title of preſcribing abſolute Immunity, or being joined to long Poſſeſſion of Freedom, by going to other Mills (which is the Defender's Caſe) may overballance the Preſumption of an imaginary Thirlage, not inſtructed to have been clothed with any Poſſeſſion for 100 Years, and with very little thereafter; albeit ſuch a Clauſe could not infer Exemption from a clear antecedent Aſtriction. So a Clauſe *cum Molendinis & Multuris*, even in the *Tenendas* of a Charter granted by the Sovereign, is found to import Freedom from Thirlage, *January* 1692, Lord *Newbyth* contra Lady *Whitekirk*, and *December* 7, 1665, *Veach* contra *Duncan*, obſerved by *Dirltoun*. 2. No Mill can have the Privilege of a King's Mill as to the Multure of any Lands, except where Poſſeſſion is inſtructed while the Property ſtood in the King's Perſon; *February* 5, 1635, *Dog* contra *Muſhet*, *January* 8, 1662, *Stewart* contra Feuars of *Aberledno*: For otherways all Mills would be the King's Mills, ſeing all feudal Rights in *Scotland* flow from the Crown, and ſometime or other were the Sovereign's Property. 'Tis a meer Imagination to advance that all Parts of a Barony are by a natural Servitude thirled to the Mill thereof: For at this Rate, no Writ would be neceſſary to conſtitute any Thirlage, and the whole Nation would find themſelves thirled; becauſe, all Lands ly either in ſome Lordſhip, Barony or Stewartry, *&c.* and ſo behov'd to be thirled to the Mill of the reſpective Juriſdiction. To give ſuch a Privilege to the Mill of a Barony, were to put it in a better Caſe than the King's Mill, which hath no Claim to Thirlage, without an expreſs Conſtitution, or Proof of Uſe of coming to it. There are a many of Deciſions declaring Lands not aſtricted to the Mill of the Barony, where it is not formally conſtituted or conveyed as the Mill of the Barony: And Preſumptions *retro* are not to be admitted for Servitude againſt Liberty, as was decided betwixt *Fullertoun* of *Corsbie*, contra *Baillie* of *Monktoun.*

Replyed for the Purſuer. Whatever might be pretended for the Neceſſity of Poſſeſſion to aſtrict the King's Lands to his own Mill, where there is no Evidence of the Aſtriction in Writ: Poſſeſſion is not neceſſary here, where the Thirlage was expreſly conſtituted by the Charter 1541; yea it's impoſſible to prove Poſſeſſion immediately ſubſequent to ſo old an Evident, except by Decreets or Acts of Court, which are not required to the preſerving a Right of Thirlage. Therefore ſeing the Purſuer has proved Acts of Poſſeſſion, as far as the Memory of Man can reach, the Thirlage once conſtituted by the Charter aforeſaid, cannot be loſt for not proving Poſſeſſion within Fourty Years thereof, which is preſumed *retro*: For otherwiſe hardly could any ancient Right be ſecure. The Deciſion betwixt *Corsbie* and *Monktoun*, doth not meet, for there the Lords would not preſume one Year *retro*, to perfect the poſitive Preſcription, where Law requires a poſitive Proof of Fourty Years: But here a Servitude once conſtituted, is preſerved by Acts of Poſſeſſion as ancient as the Memory of Man, from falling by the negative Preſcription; and the Preſumption *retro* neceſſarly takes Place, it being impoſſible to prove by Witneſſes Things without the Compaſs of Man's Memory. The Defender's Uſe of paying out Town Multure only, without being liable to Mill Services, doth not deſtroy the Thirlage, but only diminiſh the Effect of it.

The Lords found the Defender's Lands of *Mordecarnie* and *Star* to be thirled to the Purſuers Mill of *Rathillet*: But found the Defender and his Tenants liable to pay for Multure a Peck of ſix Firlots, as Strangers paid.

November 27, 1708. John Forbes *in* Tombeg, *againſt* George Forbes of Shiels.

John *Forbes* in *Tombeg* having charged *George Forbes* of *Shiels* with Horning for Payment of the Sums in a Bond, Principal, Penalty and Annualrents reſting unpaid due by *George* to him: The Lords aſſoilzied the Debtor from the Penalty. In Reſpect, ſome Annualrents had been paid, and the Charge ſhould have been reſtricted to ſo much Annualrent as was truly reſting: Albeit the Debtor could not ſay, That when charged he offered to pay the Annualrents truly reſting, and that the Charger refuſed to accept thereof.

December 1, 1708. Patrick Barclay *of* Towie *and his Curators, againſt the Creditors of* Rothemay.

THE Tutor of *Patrick Barclay* of *Towie* having taken to the Pupil a Right to his Father *Rothemay*'s Eſtate with the Burden of Debts, and ſerved him Heir to his Father; *Patrick Barclay*, with Conſent of his Curators, raiſed Re-

Reduction of the ſaid Diſpoſition and Service *ex Capite Minorennitatis & Leſionis*, pretending that his Father's Debts exceeded the Value of the Eſtate.

Alledged for the Creditors of Rothemay. The Purſuer cannot ſeek to be reſtored *in Integram*, until he firſt compt for, and reſtore the Rents of *Rothemay* intrometted, or that ought to have been intrometted with by his Tutors and Curators, during the Years of his Poſſeſſion.

Anſwered for Towie. He could only be liable to hold compt for his Tutor's Intromiſſions, in ſo far as he was *Locupletior Factus*, or profited thereby. For as Law allows not Minors to reap Profit with another's Loſs, ſo they are not o ſuffer Prejudice by the Deeds of their Tutors, which can only bind them *in uantum* profitable *& in Rem verſum*: As is clear, 1. From the civil Law, *L. 7. §. 5. in Fin. L. 22. L. 27. §. 1. in Fin. ff. de Minor. L. un. Cod. de Reput. Quæ fiunt in Jud. in Integ.* And the Opinion of Lawyers, *Struvius ad Tit.* 7. §.65. *Sande Deciſ. Pag.* 31. and *Additio Hæreditatis* is reckoned among theſe Deeds againſt which Reſtitution is moſt eaſily granted, *L. 6. ff. de Minor.* s being a Matter of whole Sale, and *Res periculoſiſſima.* 2. This is agreeable o our Law and Practice, whereby a Tutor's Intromiſſion cannot ſubject the Pupil to a paſſive Title, but only make him liable *quatenus in Rem verſum*, *November* 30, 1665, *Boyd* contra *Telfer.* A Minor hath his Election to purſue Reſtitution againſt the Party without diſcuſſing his Curators, tho' they were ufficiently Solvent, *July* 2, 1667, Lord *Blantyre* contra *Walkingſhaw*: Much more if they were Inſolvent. 3. It were indeed a great Hardſhip for Pupils to nſwer for the Miſmanagement of their Tutors, as if they were Cautioners or them; whereby they might be ruined by the Deeds of others they were ot capable to prevent, being conſidered in Law as having neither Will nor udgment, or Capacity to diſcern what may be acted in their Affairs: And if he Rents of *Rothemay* have periſhed, the Creditors have themſelves to blame, or not affecting them by legal Diligence in due Time.

Replyed for the Creditors of Rothemay. Law hath indeed provided for the ecurity and Indemnity of Minors, that they be not prejudiced by the Weakeſs of their Judgment or Unripeneſs of Years, in their Contracts with third Parties who voluntarily chuſed to deal with Minors: And even in that Caſe Reſtitution ought to be made with as little Prejudice to the other Party Contracter as can be, *L. 23. §. 4. ff. de Minor.* But where a Perſon neceſſarily without his own Choice falls to have Buſineſs with a Minor, as where a Minor ucceeds to the Party's Debtor, if he, the Minor ſeek to be reſtored againſt he Succeſſion, he muſt reſtore what his Doers have withdrawn from the Heretage, which the Creditors were hindred by his Service to poſſeſs: For they ſeing an Heir fairly entred, could not in Juſtice heap up Expences upon the Eſtate by affecting the Rents. And here the Purſuer cannot pretend Loſs by his own Miſmanagement, he having always been under the Conduct of Tutors and Curators, againſt whom he may recover what they have miſmanaged, *Actione Tutelæ & Curatelæ.* 2. As to the Deciſion 1665, betwixt *Boyd* and *Telfer*, there is a viſible Difference betwixt ſubjecting a Pupil to an univerſal paſſive Title by his Tutor's Intromiſſion which is penal, and the obliging him to reſtore his Predeceſſor's Eſtate as it was the Time of his Entry, if he claim Reſtitution *in Integrum*, which is *Rei perſecutoria*, and agreeable to the Rule, *Reſtitutio ita facienda ut unuſquiſque Jus ſuum recipiat.* And in the Caſe of the Deciſion betwixt the Lord *Blantyre* and *Walkingſhaw*, a Perſon had voluntarily bargained with, and lent Mony to a Minor; whereas here the Defenders fell innocently againſt their Will into Buſineſs with a Minor: Beſides that, even in that Deciſion ſeveral of the Lords were inclined not to ſuſtain Proceſs, till the Curators were firſt diſcuſs'd. 3. There is leſs Hardſhip to leave the Purſuer to ſeek Relief off his Tutors and Curators, than to expoſe

Creditors to the endleſs Hardſhips of a tedious Compt and Reckoning with them.

The Lords ſound, That the Purſuer cannot be reſtored upon the Head of Minority and Leſion, unleſs he reſtore the whole Rents of the Eſtate intrometted, or that might have been intrometted with by his Tutors and Curators.

December 8, 1708. Patrick Hepburn, *againſt* Francis Hepburn *his younger Brother.*

PAtrick Hepburn *of Nunraw*, having voluntarily interdicted himſelf to Five Perſons, or any Three of them during all the Days of his Lifetime, and thereafter diſponed his Eſtate of *Nunraw* to *Patrick Hepburn* his Father, whereof the Father, after the Death of Three of the Interdicters, obtained a Ratification and a new Diſpoſition from young *Patrick*, and rediſponed the Eſtate to *Francis Hepburn* his Grand-child, young *Patrick*'s ſecond Son, paſſing by *Patrick* his elder Brother: This elder Brother (who ſeveral Years after, procured another Diſpoſition from his Father young *Patrick*) raiſed Reduction againſt the ſaid *Francis Hepburn* of the Right made to old *Patrick* upon this Ground; That it was granted by a Perſon under Interdiction, without Conſent of his Interdictors.

Anſwered for the Defender. The Defect of the firſt Diſpoſition was ſupply'd by the Ratification and new Diſpoſition made after the Interdiction fell by the Death of the *Quorum* of Interdictors. So in a Caſe betwixt Mr. *Roger Hepburn* and *Nunraw*, *February* 22, 1704, The Lords repelled a Reaſon of Reduction of a Bond *ex Capite Interdictionis*; in Regard there was not a *Quorum* of the Interdictors alive when the Bond was granted.

Anſwered for the Purſuer. Tho' a Perſon after Majority might ratify Deeds done in his Minority, becauſe the Impediment of Nonage is then removed: A Man interdicted for notour Levity and Weakneſs could not, ſo long as Notoriety of his Weakneſs remained, even after the Death of the *Quorum* of Interdictors, do any Deed to carry away his Eſtate out of the natural Channel of Succeſſion. 2. Whatever might be pleaded for the falling of an ordinary Interdiction by Death of a *Quorum* of Interdictors: The Interdiction in Queſtion muſt be underſtood to ſubſiſt, without Reſpect to the failing of the *Quorum*; becauſe, by the ſpecial Tenor thereof young *Patrick Hepburn* was interdicted to the Perſons therein named during all the Days of his Lifetime.

The Lords repelled the Reaſon of Reduction, in Reſpect of the Ratification and new Diſpoſition granted by young *Patrick Hepburn* after the Interdiction was fallen by the Death of the *Quorum* of the Interdictors. Nor would the Lords, *January* 5, 1709, ſuſtain Prodigality and Weakneſs *per ſe* as a Reaſon to reduce the ſaid Ratification and new Diſpoſition: Seing Prodigals and weak Perſons were not interdicted *ipſo Jure* by the civil Law, but only *Officio Judicis* upon a Cognition; and our Law acknowledgeth only two Sorts of Interdiction, *viz.* Voluntary and Judicial.

December 10, 1708. *Sir* Alexander Cuming, *againſt* John *Vere* Kennedy.

SIR *Andrew Kennedy* having in *Anno* 1689 got a Commiſſion from King *William* to be, during his Lifetime, Conſervator of the *Scottiſh* Privileges in the *Netherlands*, and his Majeſty's Reſident: He in *Anno* 1697 procured a new Commiſſion to himſelf and his Son, narrating and ratifying the former, with

th a *Novodamus* to them, during the Lifetime of Sir *Andrew*, to be conjunct
nſervators and Reſidents, and to *John Vere Kennedy* to be Conſervator and
ſident after his Father's Deceaſe during the King's Pleaſure. Sir *Andrew*
nnedy having for Malverſation been deprived of his Office of Conſervator
nuary 16, 1708, and of the Office of Reſident *January* 29, 1708, and
Decreet extracted: *John Vere Kennedy* ſtep'd in for his Intereſt, and con-
nded, That notwithſtanding the Reduction of his Father's Right, the Com-
ſſion *quoad* him ſtood good during his Father's Lifetime, and thereafter
rante Beneplacito Reginæ; and therefore Sir *Alexander Cuming*'s Right to the
ffice could not be declared.

Alledged for Sir Alexander Cuming. The Son's Right depended on the Fa-
r's as to any fixt Period of Time, and when the Father's came to ceaſe,
Son's Right to the Office reſolved in a *Beneplacitum*, which is declared
a new Gift from Her Majeſty to Sir *Alexander Cuming*. For can the
auſe appointing him Conjunct with his Father during his Father's Life,
ke him Conjunct with his Father, when his Father cannot be Conjunct
th him? Or can the Words *Conjunct Conſervator during his Father's Life*,
port Conjunct Conſervator without his Father, during his Father's Life?
is is the very Reverſe ſenſe of the Words. And can any Man of common
ſe imagine, That Sir *Andrew* who had Right to the Office *in ſolidum* by the
ſt Commiſſion, which was ratified in the ſecond, did forfeit his Office to his
n, and not to the Sovereign? This were indeed to encourage Vice and
ward Iniquity with a Witneſs. So that by the Conception of the Gift,
th the Life and Conjunction of the Father are neceſſary to exiſt together,
ſuſtaining the Son's Title beyond the Sovereign's good Pleaſure.

Anſwered for Mr. Kennedy. His being Conjunct in the Commiſſion with
Father, was only a Conjunction in the Right and Title, and not as
the Exerciſe: For he and his Father might have acted ſeparately in the
miniſtration. And tho a Gift of this Kind to any ſingle Perſon during his
ife, implys the Condition of *quamdiu ſe bene geſſerit*, and is underſtood to
ntinue *ad Vitam, aut Culpam*: Such a Gift in Favours of Two jointly dur-
g the Life of one of them, that *Terminus* muſt ſtrictly be underſtood of
e other's natural Life allennerly, without the foreſaid Implication or Ex-
nſion to *Culpa*. For ſeing Sir *Andrew* could not either by voluntary Di-
iſſion or Incapacity to Officiate prejudice his Conjunct, far leſs could he by
is Tranſgreſſions.

Replyed for Sir Alexander. 1. If the Right to the Office fall upon Diſſolu-
on of the Conjunction, the Exerciſe muſt fall in Conſequence: For it is no
ſs abſurd for Mr. *Kennedy* to divide the Exerciſe from the Right it ſelf, than
is for him to pretend any other Right than *ad Beneplacitum*, after his Fa-
her is laid aſide. 2. The Diſtinction betwixt a Grant to one Perſon during
is Life, and a Grant to Two during the Life of one of them, has no Foun-
lation in Law, unleſs the two Perſons Rights were in diſtinct Commiſſions:
Whereas here the Father and Son are individually conjoined in the ſame
Gift. 3. Upon the ceaſing of the Father's Right, whether by Death or o-
therways, the Son's Right falls to the Ground, and reſolves in a *Beneplaci-*
tum: As the Office of Tutors named jointly falls by the Death or Incapa-
city of One of them, *June* 17, 1671, *Drummond* contra the Feuars of *Both-*
kenner; Mandates, Commiſſions, Factories and Letters of Actornie granted
to two jointly, are void and return to the Granter by the Death of One
of them. So an Office granted to Two not *conjunctis et diviſis et Alteri*
eorum diutius viventi, vacates upon failing of One of them: As the Lord
Coke obſerves in the 11 *Book of his Reports in Auditor Curl's Caſe*, and in
the Caſe of the *Sheriffs* of *London*, and *Plowden* Fol. 382, and Fol. 180.
Becauſe, thereby the Truſt and Confidence required in the Office is broke;

Nam ſecarius expediuntur Negotia commiſſa pluribus. So that Mr. *Kennedy* loſes his Right upon his Father's Deprivation; not by Way of Puniſhment, but by an implied Limitation in the Conception of the Gift it ſelf, bearing only to them jointly, which cannot ſubſiſt in one.

The Lords found, That the Reduction of Sir *Andrew*'s Right upon Malverſations, had the ſame Effect againſt his Son's Right, as if he Sir *Andrew* were naturally dead.

December 14, 1708. William Jamiſon *in* Glenſide *and* Margaret Jamiſon *his Daughter, contra* Robert Sheriff *in* Culbeg.

R*Obert Sheriff* in *Culbeg* having ſubſcribed a Writ of the Tenor following; "At *Leckie* the Tenth Day of *March* 1708, It is concluded and agreed betwixt *Robert Sheriff* in *Culbeg*, and *William Jamiſon* in *Glenſide* of *Leckie*, and *Margaret Jamiſon* his Daughter. The ſaid *Robert Sheriff* obliges him to marry the ſaid *Margaret Jamiſon* under the Pain of 500 Merks *Scots.* Wherefore we Conſent to the Regiſtration of thir Preſents, in the Books of Seſſion, or any other Judge competent, before theſe Witneſſes, the ſaid *Thomas Jamiſon* Writer hereof, and *Alexander Jamiſon* at *Leckie*, Day, Month and Year of GOD foreſaid. Upon this Obligement *William Jamiſon* and his Daughter purſued *Robert Sheriff* for the 500 Merks, in Reſpect he had reſiled from the Purpoſe of Marriage.

Alledged for the Defender. The Obligement is null by the Act of Parliament 1681, for Want of the Deſignation of Writer and Witneſſes.

Anſwered for the Purſuer. Theſe Words *At Leckie* ſufficiently Deſign both.

Replyed for the Defender. The Word *Said* being prefix'd to *Thomas Jamiſon*'s Name, who is not mentioned in any former Part, is an Evidence that he was previouſly deſigned, and not to be deſigned by the Words *At Leckie.* 2. In Stile Perſons are not deſigned *At*, but *In* ſuch a Place. 3. The Words *At Leckie* deſign the Place, and not the Writer and Witneſſes, as appears from the following Words, Day, Month and Year of GOD foreſaid, without further Mention of the Place.

Duplyed for the Purſuer. If the Writ, by Miſtake mentioned the Word *Said* before *Thomas*'s Name, while he had not been formerly ſpoke of, the Words *At Leckie* were the more neceſſary to deſign him, for helping the Miſtake: And the Word being *inutiliter adjectum,* the Deſignation *Per illud inutile non Vitiatur.* 2. To live *At* or to live *In* ſuch a Place, are promiſcuouſly uſed for One and the Same. 3. The Words *At Leckie* cannot be allowed to deſign the Place, becauſe that was expreſs'd at the Head of the Writ; And the Words *Day, Month* and *Year* have been added *per Incuriam,* they being expreſs'd at the Top. So that in good Senſe and *Grammar* the Words *At Leckie* may be as well applyed to the Deſignation of Writer and Witneſſes, as to the Place; *hoc maxime attento,* that they and no other of that Name reſide at *Leckie.*

The Lords found, That the Words *At Leckie* related not to the Date or Place but to the Writer and Witneſſes, and found them ſufficiently deſigned thereby, the Purſuers proving that they lived in *Leckie* at the Time.

December 16, 1708. James Davidſon *of* Tullimorgan, *againſt the Town of* Aberdeen.

A*Ndrew Skeen*, who purchaſed the Lands of *Rutherſtane*, having taken the Right to himſelf in Liferent, and to his Son *Robert* in Fie, with a

Faculty to *Andrew* to burden, contract Debt, and to ſell or otherways diſ- ſe at his Pleaſure: *Andrew Skeen* in the Year 1670, granted a Bond of orroboration to *Tullimorgan* of ſome Debts he formerly owed him, narrat- g the Faculty to burden, and that the Granter had burdened the Fie with eſe Debts; in the which Bond *Robert* accepted the Debt upon him, and a Burden upon the Fie, but no Infeſtment appeared to have followed ereon. In *Anno* 1673, The Town of *Aberdeen* got the ſaid Lands diſ- oned to them by *Andrew Skeen*, and were infeſt. There aroſe a Competi- on for the Mails and Duties betwixt the Town and *Tullimorgan*, who had judged the Lands for his Debt, and claimed to be preferred upon this round; That the Bond of Corroboration was a real Burden upon the Lands, d an Exerciſe of the reſerved Faculty, which the Town was bound to ow might have been exerc'd, as it truly was; And a Diſpoſition with e Burden of the Father's Debts, was ſuſtained to make theſe Debts real, as they could not be prejudic'd by the Son's ſubſequent Deeds, *Newtoun eciſ.* 101. Again, had the Son truly paid *Tullimorgan*'s Debt, and taken enunciation from him, it would have been hard to allow the Father to ejudice his Son by a poſterior voluntary Diſpoſition. And in the Caſe of e Creditors of *Kinfauns*, a Father's Exerciſe of a Faculty in Favours of s Son of a Second Marriage, not extant the Time of making the Diſ- ſition, was found real in Favours of the Son, and preferable to poſterior reditors contracting.

Anſwered for the Town. The Father's reſerving to himſelf a Power to ontract Debts and burden the Eſtate, was not deſigned to make every xerciſe of the Faculty, a real Burden upon the Eſtate; but only to be ef- ctual againſt the Fiar, ſo as he could not hinder the Father to burden ally when he thought fit to do it. For that can be no real Burden, hich afterwards may be, or may not be, and every one is at Freedom to ntract with him who has only a Faculty to burden, till interpelled by me Record or Diligence known in Law: Seing none could be ſure of what tent perſonal Debts might have been contracted. Law has determined real urdens to be only ſuch, as are to be found in the Regiſters of Seaſins, tornings, and Inhibitions; or are contained in the Boſom of the Author's ight; or which are real of their own Nature, as Servitudes: under none f which *Tullimorgan*'s Bond falls. 2. Tho' where a Father diſpones a Right o his Son with the Burden of Debts contracted, or to be contracted by im, none can contract with the Son, but with the Burden of theſe Debts: et the Father's Creditors with whom he contracted before or after, emain with Reſpect to one another as perſonal Creditors, till they rank nd ſecure themſelves by habile real Rights or Diligences, tho' they be real Creditors as to the Son's Deeds, who hath no Right but with the Burden of he Father's Debts.

The Lords found, That the Bond granted to *Tullimorgan* was no real Burden upon the Eſtate of *Rutherſtane*, which could affect or prejudge the Diſpoſition in Favours of the Town of *Aberdeen*.

December 18, 1708. *Colonel* John Erskin *of* Carnock, *contra Sir* George Hamilton.

COlonel *Erskin* having Right to an Appriſing led by *Duncan Lindſay*, againſt Sir *John Blackadder* of *Tulliallan*, with a Charter and Seaſin following thereon in *Auguſt* 1633, diſponed by *Lindſay*'s Grand-ſon and Heir to the Earl of *Kincardin* the Colonel's Author in the Year 1676, who was infeſt that ſame Year upon a Charter under the great Seal: The Colonel raiſed a Reduction, Improbation and Declarator againſt Sir *Robert*

Miln, and Sir *George Hamilton* his Aſſigny, for reducing and extinguiſhing *James Loch* of *Drylaw*'s Adjudication againſt the Heirs of *Patrick Wood*, to whom *Duncan Lindſay* diſponed his Appryſing in *May* 1634, adjudging from them the ſaid Diſpoſition, containing a Procuratory of Reſignation, regiſtred in the Regiſter of Reverſions, to which Adjudication Sir *George* had Right, upon this Ground; That the Bond which was the Ground of the ſaid Adjudication, was paid before the leading thereof.

Alledged for the Defender. 1. It is *Jus Tertii* to the Purſuer to quarrel *James Loch*'s Adjudication, upon the Account of Payments made by *Patrick Wood*; ſince the Purſuer derives no Right from *Patrick Wood*. 2. He could not reduce *Loch*'s Adjudication, without firſt Calling his Repreſentatives to be heard for their Intereſt: Seing in all Reductions the Defender's Authors muſt be called.

Anſwered for the Purſuer. It can never be reckoned *Jus Tertii* to him to defend his real Right to the Lands of *Tulliallan*, againſt a null Adjudication, more than againſt a Right falſe and feigned. For tho' it might ſeem *Jus Tertii* for any to make an Objection againſt a competing Right, that doth not quite annul the ſame, when the Objector derives no Right from the Granter of that he quarrels: Yet he who hath a real Right to any Subject, has ſufficient Intereſt to impugn and except againſt a competing Right manifeſtly null in Law; Which is not properly alledging upon any Perſon's Right, but alledging that there is no ſuch Right, or Debt in the Field; which it is even *Pars Judicis* to deny Action upon *ex proprio Motu*. The Lords by a Tract of Deciſions have been in Uſe to allow a Perſon to object what ſeems not his immediate Concern for annulling his Antagoniſt's Right, *July* 22, 1668, *Johnſton* of *Sheens* contra *Arnold*, *July* 16, 1675, *Campbell* and *Riddoch* contra *Stuart*. 2. *Drylaw*'s Heirs need not to be called by the Purſuer: Seing they are not only denuded totally in Favours of the Defender, whereby they have no direct Intereſt; But are not liable ſo much as to warrand from their Father's Fact and Deed, and ſo have no ſubſidiary Intereſt.

Replyed for the Defender. *James Loch*'s Adjudication is not like a Right falſe and feigned, or vitiated and lacerated, but is valid of it ſelf, quarrelled only upon the Deed of a third Party, *viz.* Payment made by *Patrick Wood* of the Sums therein contained: Which, not being objected by his Repreſentatives in the Decreet of Conſtitution or Adjudication, is not competent to be proponed by a third Party deriving no Right from *Patrick Wood*, nor yet a Creditor to him. For as his Repreſentatives might renounce any Objection of Payment, and acquieſce in the Adjudication: The Purſuer who is an unconcerned third Party, could not complain of being prejudiced in his Intereſt by the ſaid Renunciation. As to the Deciſion betwixt *Johnſton* and *Arnold*, the Objection was upon a Mid-couple wanting in the Progreſs of Right, which was always ſuſtained; And the Prattick 1675, is a circumſtantiate Caſe anent the improving of Rights upon Falſhood: And even in Improbations, a general Clauſe *calling* for all Writs granted to the Defenders and their Predeceſſors, is *reſtricted* to Writs granted by the Purſuer and his Predeceſſors, or Authors, *whoſe* Right he produces.

The Lords repelled the Alledgeance of *Jus Tertii*: And found no Neceſſity upon the Purſuer to call *Drylaw*'s Heirs.

December 19, 1708. *Mr.* William Boyl *Brother to the Earl of* Glaſgow, *and other Tackſmen of the Town of* Edinburgh'*s Impoſt upon Ale, Againſt* Charles Straiton *Brewer in* Grange.

THe Town of *Edinburgh*'s Tackſmen purſued *Charles Straiton* for the Impoſt of two Penies upon the Pint of all Ale and Beer imported by him

within

ithin the Town and its Privileges, from the firſt of *July* 1706, to the firſt f *July* 1708, during the Courſe of the Purſuer's Tack.

Alledged for the Defender. 1. The Act of Parliament 1693, conferring e Gift of that Impoſt upon the Town, allows them the like Execution and iligence for In-gathering thereof, as they have for their other Common-ood and Revenue. Which is only to ſtop the Ale or Beer at the Port till ayment be made, as the Town's Collectors do for other Impoſts of Brandy, auſey-money, *&c.* 2. By the Act 12. of the Parliament 1669, all Proeſs for Goods Imported, without paying Cuſtom and Exciſe, muſt be raiſed ithin three Months after the Importing; and the Defender is in a parallel aſe. And further, by the Statute of *England*, 1. *W.* and *M. Cap.* 24. §. 6. Information (*i. e.* Proceſs) againſt Brewers or Ale-houſe-keepers, for ny falſe or Miſ-entry, or Offence, can only be brought and entred within ree Months after Commiſſion of the Offence: Now the Matters of Exciſe e ſince the Union regulated by the Law of *England*; And the Town of *dinburgh*'s Impoſt is not more privileged than the Queen's Exciſe.

Anſwered for Purſuers. 1. It's unaccountable how the Defender would rerict Diligence for the Town's Impoſt to a Collection at the Port, which is npracticable: An hundred Men not being ſufficient to attend all the Entries the Town and its Privileges, where Ale may be Imported. 2. The Acts unded on concern only Fines and Penalties incurred by concealing and mbezilling the Queen's Exciſe: Whereas the Impoſt purſued for is a civil Debt, *Rei perſecutoria*, and the Purſuers do not inſiſt in a penal Action, to ave the Value of the Drink imported in Place of the Cask and Liquor that ight have been ſeized by them, if found.

The Lords found the Town's Impoſt is not liable to the three Months Preſcription.

December 24, 1708. *Laird of* Pourie *againſt* Hunter *of* Burnſide.

IN the Action at the Inſtance of the Laird of *Pourie* againſt Hunter of *Burnſide* his Vaſſal; The Lords found a Promiſe to give the Purſuer a Piece of Silver-plate worth 20 Pound *Sterling*, upon his having paſſed from the Benefit of an Irritancy in the Defender's Right, incurred by his Father, not probable by Witneſſes.

Eodem Die. *Doctor* Robert Trotter *contra Captain* John Telfer.

DOctor *Trotter* having charged Captain *Telfer* for Payment of a Bond of Ten Pound *Sterling*, he ſuſpended upon this Reaſon, That the Bond was granted for the Cure of a Malady the Suſpender laboured under, which was ineffectual by the Doctor's Negligence, in not over-ſeeing the Diſpenſer of the Medicaments, and by Miſapplication in the Quantity of theſe Medicaments.

Anſwered for the Charger. 1. If Phyſicians ſhould be called in Queſtion for their pretended Miſapplications, every unfortunate Accident upon a Patient's Health, would be a Pretence for Repetition of Phyſicians Fees; which is as abſurd as to repete a Lawyer's Fees when the Cauſe is determined againſt his Client. 2. The Bond charged on bearing for borrowed Money, and renouncing all Exceptions in the contrary, and being delivered after performing of the Cure; The Suſpender could not recur to alledge upon any pretended Miſapplications, *&c.* whatever he might have done before.

Replyed for the Suſpender. 1. 'Tis true, Phyſicians are ſeldom quarrelled for their Miſapplications and Faults, the Grave buries many of theſe, and many Phyſicians have that Regard to their own, and their Patients Credit, as not to bring Queſtions of this Kind before any Judicature: But 'tis as true, Phyſicians are tied to the Laws, and the great Truſt theſe have of Mens Lives, requires more Diligence than in other Offices, *L.* 18. *Pr. L.* 44. *ff. ad. L. Aquiliam.* The Caſe of an Advocate is not the ſame, who may not be to blame, when the Judge determines againſt his Client: And yet if he were groſly negligent, there is no Reaſon for his getting a Honorary. 2. It doth not alter the Caſe, that the Bond was granted after the Cure was thought to be performed, when it was not: ſince *Ignorantia Facti nocet Nemini.*

The Lords repelled the Reaſon of Suſpenſion.

December 25, 1708. ACT *of* SEDERUNT *anent the Lords due Attendance.*

THe Lords of Council and Seſſion conſidering how Expedient and Neceſſary it is, That they duly and punctually attend every *Sederunt* in Time of Seſſion, and alſo in their Turns in the Time of Vacance, and for the better Diſpatch of Buſineſs, being reſolved that a fixed and conſtant Rule be eſtabliſhed; Do therefore Ordain the Lords preſent at their ſitting down in the Morning, after the Ringing of the Seſſion Bell, to be marked in the *Sederunt*: And that if any of their Number be then abſent, and come in after their entring upon Buſineſs, they ſhall be ſo marked by themſelves. And that if any of the ordinary Lords remove out of the Parliament Houſe before the ordinary Time at Twelve a Clock, that his removing ſhall be alſo marked, and he thereupon held as wholly abſent. And the ſaid Lords do Enact and Declare, That ſuch as come in after the Lords are ſet and entred upon Buſineſs, ſhall loſe the Sum of Ten Shillings *Sterling*, and ſuch as are altogether abſent, or ſo reckoned as aforeſaid, ſhall loſe the Sum of Fourty Shillings *Sterling* for each *Sederunt*; And likeways for the better Diſpatch of Buſineſs, as ſaid is, and becauſe in Time of Vacance many Bills of Suſpenſion, and all Liberations do require the Attendance of three Lords, Therefore the ſaid Lords do Ordain, That the Ordinary on the Bills for the Time, do attend at leaſt *Tueſday* and *Thurſday* Weekly, and that the Ordinary for the preceeding Week, and the Ordinary for the Time, and for the ſubſequent Week, do attend at leaſt each *Thurſday*, for diſpatching ſuch Bills as require three Lords; and the ſaid Lords do alſo Ordain the Clerks to the Bills to keep an exact Journal to be delivered in to the Clerks of the Seſſion, and to be Recorded in the Books of *Sederunt*, the firſt Meeting of the enſuing Seſſion: And the ſaid Lords do Enact and Declare, That the Ordinary upon the Bills for the Time who ſhall be abſent, ſhall loſe Twenty Shillings *Sterling* for each Day's Abſence; And that each of the other Lords ſhall loſe Fourty Shillings *Sterling* for their Abſence every *Thurſdays* Meeting, and Ordain the Clerks to extract Abbreviates of the Diets in which any of the ſaid Lords are late or abſent in Seſſion or Vacance *reſpective*, and deliver the ſame to the Lords Collector at the End and Beginning of every Seſſion, that the Deductions may be made accordingly, and the ſaid Sums deduced to accreſce to, or be divided amongſt the remanent ordinary Lords, and the Collector to be comptable therefore: And declare, That they will admit of no Excuſe in the Premiſſes, for whatſomever Cauſe or Occaſion, except only when they are called away by the Government, or neceſſarly abſent upon the Account of the Death or Sickneſs of ſome near Relation, made known to, and allowed of by the Lords; or when they are neceſſarly detained by their own Indiſpoſition or Sickneſs, with this further Exception in Time of Vacance, unleſs the abſent Lord prevail with another to attend and ſerve in his Room : And Ordain, That the Lords of Juſticiary during the Months they are in Circuit be paſt over, and the next in Courſe officiate in their Week ; And Ordain thir Preſents to be inſert in the Books of *Sederunt.*

Eodem Die. ACT *of* SEDERUNT *anent Factors upon, and Tackſmen of Sequeſtrate Eſtates.*

THe Lords of Council and Seſſion taking to their Conſideration, a late Practice uſed by ſome Factors Nominate by them, and Tackſmen for incumbred Eſtates of Buying in, and Componing the Debts affecting the ſame, which being very Prejudicial both to the Debitor and his Creditors ; The Lords do hereby ſtrictly Diſcharge any ſuch Tranſactions to be made in Time coming, either by the Factors and Tackſmen themſelves, or by Inter-poſed Perſons for their Behoof ; *And declare,* If any ſuch Purchaſes or Tranſactions be made, and diſcovered hereafter, they ſhall be held equiva-ent to a Diſcharge and Renunciation of the Debts, ſo Bought and Acquired y them, and a formal Extinction thereof, ſo as the Lands and Debtor ſhall e Freed and Diſburdened of the ſame : And that theſe Factors or Tackſmen hall not be allowed to impute or aſcribe any of their Tack-duties or Intro-miſſions with the Rents of theſe Eſtates, towards the Payment of any Part of heſe Debts ſo bought in, either Principal or Annualrents, nor retain the Rents in their own Hands upon that Pretence, but ſhall hold Compt to the Creditors as they ſhall be Ranked for the ſame : *And further,* the ſaid Lords *Enact and Declare,* That in Caſe a Factor or Tackſman of a Sequeſtrate Eſtate, ſhall obtain any Abatement or Gratuity from the Creditors to whom they make Payment of any of the Rents, that the Benefit of the ſaid Abate-nent or Gratuity, ſhall accreſce to the common Debtor and his Creditors : *nd the Lords Declare,* when ever ſuch Caſes occur, they will inviolably bſerve this Act, and *Decide* accordingly. *And Ordain* thir Preſents to be nſert in the Books of *Sederunt,* and to be Publiſhed and Printed, that it may ome to the Knowledge of all the Liedges, and none may pretend Ignoance.

December 31, 1708. *Mr.* Charles James *late Regiſter of the North Britiſh Ships, againſt* Richard Watkins *Stationer in* Edinburgh.

MR. *Charles James* being turned out of his Imployment by the Commiſ-ſioners of the Cuſtoms, upon Information given to them, That he had runk heartily to the Pretender's Health, under the Name of K. *James* 8. bout the Time of the late deſigned Invaſion : He raiſed a Proceſs of Scan-dal before the Commiſſars of *Edinburgh,* againſt *Richard Watkins,* as having been the Informer againſt him, and cited the Commiſſioners of the Cuſtoms as Witneſſes. Which Action was advocated by *Watkins* from the Commiſſars, upon this Ground of Iniquity, That they admitted the Libel to Probation, eſerving the Conſideration of the Import till adviſing : albeit the Libel was ltogether general, without condeſcending upon Perſons, Time, or Place ; And the delating a Perſon for a Crime to his Maſter, or ſuch as had Power over him, could never be the Ground of a Proceſs of Scandal ; Eſpecially if it was a Crime againſt the Common Wealth, where there is no *Animus injuri-andi.*

Anſwered for James, 1. The Libel is not altogether general, the Injury being ſpecially and circumſtantially libelled, and as to Perſons and Place it bears, That the Defender had defamed the Purſuer to ſeveral Perſons of Quality, whoſe Names and Characters ſhould, if required, be condeſcended on, and the ſuppreſſing thereof was not to take Advantage of the Defender, but to ſhun Offence to the Commiſſioners. 2. The Commiſſioners are noways challenged for their Management in the Diſpoſal of their Servants, but are only required to bear Teſtimony of the falſe Aſperſion caſt upon *James* by *Watkins*, who is not their Servant, and ought to be puniſhed as a falſe Informer.

Replyed for Watkins, 1. By the Libel's being general, and not circumſtantiate as to Perſons, Time, or Place, the Defender is excluded from the Mean of Exculpation, by alledging *alibi*, *&c.* 2. If the Commiſſioners of the Cuſtoms cannot receive private Complaints of their own Officers, without ſubjecting the Informer to a Proceſs of Scandal, wherein they muſt be cited as Witneſſes, as the Purſuer has done, their Servants may ſafely malverſe; ſeing no Man will dare to table an Accuſation from the Fears of a Proceſs of Scandal.

The Lords found the Libel of Scandal ought to be ſpecial with Reſpect to Perſons, Time, Place, and found that giving the Commiſſioners of the Cuſtoms private Information againſt any Perſon imployed under them, is no relevant Ground of a Proceſs of Scandal, and that theſe Commiſſioners cannot be conveened as Witneſſes, to depone upon ſuch private Information, and remitted to the Commiſſars to proceed accordingly.

Eodem Die. James Smith *Factor to the Eſtate of* Wintoun, *contra* John Matthie *Skipper in* Preſtounpans.

IN a Proceſs at the Inſtance of *James Smith* contra *John Matthie*, for the Price of a Bargain of Salt, bought by the Defender from the Purſuer: The Lords found the Terms of the Bargain probable by the Depoſitions of the Earl of *Wintoun*'s own menial Servants, for whoſe Behoof the Salt was ſold; who were found as neceſſary Witneſſes in this Caſe, as Merchants Servants and Apprentices are for proving the Sale and Delivery of their Maſters Goods. Albeit it was alledged for the Defender, That domeſtick Servants were not to be ſo truſted to depone in their Maſters Concerns, as Prentices: Becauſe the latter being for the moſt part Gentlemens Sons under Indentures, who cannot be put away at the Maſter's Pleaſure, are more like Tenants having Tacks, than Servants, and ſo not ſo much under the Impreſſion of their Maſters.

Eodem Die. *Miſtreſs* Griſſel Bruce *Lady* Riddoch, *againſt* Hugh Forſyth *of* Garval.

J*Ames Alexander* in his Daughter's Contract of Marriage with *William Bruce*,
Brother to the Laird of *Auchinbowie*, " diſponed his Lands of *Riddoch* in
' Favours of the ſaid *William Bruce* and *Janet Alexander* in Conjunct-fie and
' Liferent, and to the Heirs of the Marriage in Fie, reſerving to the ſaid
' *James Alexander* the Diſponer, and *Griſſel Inglis* his Spouſe, during all the
' Days of their Lifetime, two Chalders of Victual allocated upon a particular
' Part of the ſaid Lands. *William Bruce* died before *James Alexander* and
Griſſel Inglis, leaving *James Forſyth* of *Garval* Tutor Teſtamentary to *Griſſel*

Bruce his Daughter, who poſſeſſed and uplifted as Tutor, the Rent of the whole Lands, including the reſerved two Chalders of Victual, for ſeveral Years. After expiring of the Tutory, Miſtreſs *Griſſel* and her Curatrix purſued *Hugh Forſyth* of *Garval*, as repreſenting the ſaid *James Forſyth* the Purſuer's ſole Tutor, to compt and reckon. In which Proceſs ſhe charged him with the two Chalders of Victual reſerved to the Grand-father and Grandmother, for ſo many Years as they were uplifted by *James Forſyth Tutorio Nomine.*

Anſwered for the Defender. He cannot be charged to compt to the Purſuer for the Rent of the Liferented Lands, which were no Part of the *Patrimonium Pupillare*, but he is liable in Repetition for the ſame to the Repreſentatives of the Purſuer's Grand-father, who can only exoner him effectually. Nor doth it alter the Caſe, that the Purſuer repreſents her Grand-father: Being the Defender can only be liable to compt to her as Executor to the Grand-father for the ſimple Rents without Intereſt; Whereas in a Compt and Reckoning with her as a Pupil, he would be liable alſo for Annualrent of theſe Rents.

Replyed for the Purſuer. The Tutor having uplifted the reſerved Rents *Tutorio Nomine*, it is not the Defender's Buſineſs to diſpute the Pupil's Right to the ſame. For if Tutors were allowed to free themſelves from this Way of Compting for the Pupil's Rents, becauſe the Pupil had no Right thereto, it were of dangerous Conſequence, and might induce Tutors to propale the Secrets and latent Defects of their Pupils Rights, in Order to free themſelves from Compt and Reckoning.

The Lords found, That the Defender muſt compt as Tutor to the Minor, for the reſerved two Chalders of Victual, uplifted and diſcharged by James *Forſyth Tutorio Nomine*: But for the Defender's further Security, ordained the Purſuer to eſtabliſh a Title in her Perſon as Executrix to the Grand-father, that thereby ſhe may diſcharge the Defender upon Payment.

January 1, 1709. ACT *of* SEDERUNT, *Anent Proteſtations, Suſpenſions, and Advocations*, &c.

THE Lords of Council and Seſſion, for the better Diſpatch of Buſineſs, and preventing of undue Delays, Do Enact, Statute, and Ordain, That in all Time coming, where-ever a judicial Proteſtation, or Proteſtation and Remit, ſhall be admitted by the Lord Ordinary, through the keeping up of Suſpenſions or Advocations, unleſs the Cauſe be again called by the Ordinary, and the Suſpenſion or Advocation alſo produced the ſame Week; That in the Caſe foreſaid, before the Suſpenſion or Advocation be taken in by the Clerk, or the Party reponed againſt the ſaid Proteſtations, every ſuch Party ſhall pay to the contrary Party, or to the Clerk for his Behoof, the Sum of Ten Shillings *Sterling*: As alſo, where-ever a Decreet finding the Letters orderly Proceeded, or an Act and Remit, ſhall be pronounced for not debating the Reaſons of Suſpenſion or Advocation, the like Sum of Ten Shillings *Sterling*, ſhall be paid by each Suſpender or Raiſer of the Advocation, to the contrair Party, or to the Clerk for his Behoof, before they be reponed againſt the ſame, or allowed to propone their Reaſons of Suſpenſion or Advocation, unleſs Application be made to the Ordinary, and a Stop obtained in Writing, within ſix free Days after the Date of the Ordinary's Decreet or Remit; And diſcharge any Clerk to write upon any Proceſs, until theſe Sums be paid, with Certification he ſhall be liable for the Double of theſe Sums. And alſo, The Lords Enact and Ordain, That where a Purſuer before any inferior Court advocates his Cauſe, and does not inſiſt within fifteen Days after admitting of the Advocation (not reckoning the Vacancy) and cauſes call the ſamen, and give it out with the Proceſs to the Defender's Procurators to ſee; That then and immediately thereafter, the Defender may call for the Advocation, and put up a Proteſtation at the Minute-book, whereupon the Purſuer ſhall be obliged to produce his Advocation with the principal Proceſs, and an Out-giving thereon; Otherwiſe the Proteſtation and Remit ſhall not be ſcored, but given out to be extracted: And the Defender, when the Advocation is ſo produced, with the Proceſs and Out-giving, ſhall be allowed before he return the Proceſs, to enrol the ſame in the Roll of Suſpenſions and Advocations upon his own Advocates Return. And for that Effect allows the Defender's Procurators to keep up the Proceſs ſix Days allowed for ſeeing, and until the firſt *Saturday* in Seſſion-time thereafter, ſo as he may get the Proceſs enrolled. *And ſicklike*, The ſaid Lords Enact and Ordain the Clerks of the Bills, or their Deputes (under the Penalty of five Pounds *Sterling* Mony *Toties Quoties* attour Performance) to give up all Proteſtation Mony, to be conſigned in their Hand, without any Fees to the Party concerned, upon Sight of the extracted Proteſtation or Decreet, finding the Letters orderly Proceeded, and Receipt of the Party in a Diſcharge, expreſſing the Subſtance and Date of the Warrant, without Neceſſity to leave the Lords Warrant: And that this Act be effectual not only for uplifting ſuch Proteſtation Mony as ſhall be Conſigned in time coming, but alſo, for uplifting all ſuch as already lyes conſigned in the Bill Chamber. And further, That Defenders in Improbations may have Opportunity to make Productions after Extracing the Act for the ſecond Term, and before granting Certification thereon, The Lords Ordain all Acts for the ſecond Term to be once called Judicially among other Acts, only to the Effect the Purſuers Procurators may intimate to the Defenders Procurators to Satisfy the Deſire thereof, betwixt and a certain Day to be appointed by the Ordinary, not exceeding Ten Days; And Ordain the Clerks to write the ſaid Intimation upon the Margin of the Act, which is to be ſubſcribed by the Lord Ordinary. And likeways Enact and Appoint, That in all Improbations, where a ſecond Production is once made, and the Dues for a ſecond Calling paid in with the ſecond Production, and great *Aviſandum* therewith, and Certification *contra non producta*, all Productions that be thereafter made before extracting the Decreet of Certification ſhall be received by the Clerks, and inſert in the ſaid Decreet of Certification, without the Neceſſity of any new Calling, to make *Aviſandum* therewith, or to obtain a new Decreet of Certification *contra non producta*; And ordain thir Preſents to be inſert in the Books of *Sederunt*, and to be Publiſhed and Printed, that it may come to the Knowledge of the Liedges, and none may pretend Ignorance.

January 4, 1709. James Hardy *Merchant in* Kelſo, *againſt* Helen Allan *and* Walter Chiſholm *her preſent Husband for his Intereſt.*

JAmes *Hardy* having charged *Helen Allan* and her Husband, for Payment of Thirty Pound *Scots*, contained in a Decreet obtained at his Inſtance againſt her before the Sheriff of *Berwick*; they ſuſpended upon this Reaſon, That tho' the ſaid Decreet bears that *Helen Allan* was perſonally apprehended, and a Procurator marked compearing for her, and producing the Copy of the Summons given her as a Mandate: Yet the ſaid Procurator did ſo far overact his Part, as that the Purſuer having offered to prove a Promiſe of Payment by the Defender's Oath, he officiouſly deferred the ſame to the Purſuer's Oath, who thereupon deponed and got Decreet for what he pleaſed; Which is a palpable Nullity in the Decreet charged on. For 'tis the conſtant Cuſtom in inferior

Courts,

urts, for a Defender's Procurator to get firſt a general Mandate to defend,
d where any Thing is to be deferred to the Purſuer's Oath, he muſt have a
ecial Procuratory for that Effect: It being of dangerous Conſequence to
tain the Copy of a Summons as a ſufficient Mandate to authorize any who
pleaſed to call themſelves Procurators before an inferior Court, to con-
ude a Perſon arbitrarily. Seing Copies of Summonſes may be loſt, or may
l in the Hands of the Purſuers or their Doers, being left at the Dwelling-
uſe with Servants, *&c.* And perhaps might be procured from the Officer
o executed the ſame, if they were to have ſuch an Effect.

The Lords turned the Decreet into a Libel; Becauſe the Suſpender's Pro-
rator had deferred the Promiſe of Payment to the Charger's Oath, without
pecial Mandate for that Effect.

Eodem Die. Andrew Ker *Merchant in* Edinburgh, *againſt* Katharine Primroſe *Relict of Mr.* David Heriot *Advocate.*

N a Competition betwixt *Andrew Ker* and Mrs. *Heriot*, for the Mails and
Duties of ſome Acres of Land in *Corſtorphine*: The Lords ſuſtained an
judication at her Inſtance, upon her Son's Renunciation and a Decreet *Cog-*
ionis Cauſa, obtained before an inferior Judge, within whoſe Juriſdiction
ſe Acres lay. Albeit it was alledged for Mr. *Ker*, That as no inferior Judge
diſcuſs the Competition of heretable Rights, far leſs are they competent to
judge them from the Debtor to the Creditor. And Adjudications upon Re-
nciations to enter Heir, were, long after Appriſings were warranted by
tute, introduced by the Lords of Seſſion *ex nobili Officio*, for ſupplying
Defect of our Law, which argues that they cannot be pronounced by in-
ior Judges.

Eodem Die. John Irving *of* Drumcoltran, *againſt* John *and* Robert Corbets, *and Partners.*

N the Proceſs at the Inſtance of *John Irving* againſt *John* and *Robert Cor-*
bets and Partners, for Repayment of certain Debts he had borrowed by
eir Warrant, for the Uſe of the Company, while he was concerned in the
anagement of their Affairs.

Alledged for the Defenders. The Purſuer being both their Factor and Caſh-
eeper, he is obliged to Compt and Reckon before he could ſeek any Relief:
eing *ante redditas Rationes* he was preſumed to have ſufficient Effects of theirs
his Hands, to anſwer all his Diſburſements.

Anſwered for the Purſuer. It were unaccountable Hardſhip to leave the Pur-
uer to immediate Diſtreſs for Money borrowed by him *ex Mandato* of the De-
enders, for their Uſe, without Relief till the Iſſue of a Compt and Reckoning,
which may depend ſome Years: And if Mandates of this Kind did not import
a renouncing of any Compenſation or Retention, upon the account of a Society-
debt till Accompts be ſtated and cleared, and a liquid Ballance in the Manda-
tar's Hand; No Manager would ever ingage his private Credit for the Company.

The Lords repelled the Defence, and decerned againſt the Defenders for the Sums commiſſioned by them to be borrowed by the Purſuer; He always finding Caution to pay what ſhould be found due to them in the Event of the Compt and Reckoning.

January 5, 1709. *Lady* Greenock, *againſt Sir* John Schaw *of* Greenock.

THE Lords ordered a Proceſs at the Lady's Inſtance againſt her Son Sir *John Schaw* to be inrolled, albeit he was abſent at *London* as a Member of Parliament, and claim'd his Privilege. Becauſe, the Privilege that Members of Parliament cannot during the ſitting thereof be ſued at Law, hinders not to expede the Preliminaries or Preparatories of Proceſs which paſs of Courſe.

January 13, 1709. *The Laird and Lady* Airth, *and Sir* George Hamilton *their Aſſigny, againſt* Hamilton *of* Grange *and his Tutors.*

AN heretable Bond in *Anno* 1672 for 22000 Merks being granted to *Douglaſs* and *Hunter*, by *Jean Bruce* Lady *Airth*, and *John Hamilton* of *Grange* her Husband for his Intereſt conjunctly and ſeverally, with a Precept of Seaſin in the Lands of *Airth* allennerly; and in *Anno* 1674, the Creditors having advanced to *Grange* 7000 Merks more: He, with Conſent of the Lady *Airth* his Spouſe, granted them a Security upon the Coal of *Grange* for the whole 29000 Merks, by Contract narrating the ſame to have been advanced to *Grange* and the Lady for Payment of their Debts, upholding and advancing their Coal and Salt-works; and *Hunter* and *Douglaſs*, by their Backbond of the ſame Date with the Contract, were obliged to diſcompt and apply their Intromiſſions with the Coal and Salt in Payment of the 29000 Merks, and to grant Diſcharges thereof accordingly to *Grange* and his Lady. After *Grange*'s Deceaſe, the Lady *Airth* diſponed her Eſtate to *Richard Elphinſton* of *Calderhall* her ſecond Husband, who upon Payment procured an Aſſignation to the heretable Bond of 22000 Merks. The preſent Laird and Lady *Airth*, as deriving Right from the ſaid *Richard Elphinſton*, purſued *Hamilton* of *Grange*, as repreſenting the ſaid *John Hamilton* the firſt Husband, for Payment of the 22000 Merks and Annualrents thereof from 1674.

Anſwered for the Defender. The 22000 Merks being ſpecially borrowed upon the Lady *Airth*'s Accompt, and the heretable Bond granted upon her Lands allennerly: He cannot be obliged to pay except upon his being aſſigned to the Infeſtment of Annualrent wherein old *Grange* was Cautioner; *that he* might operate his Relief out of the Eſtate principally bound. 2. The Heretor of the Eſtate principally affected with the ſaid Debt, having paid the ſame, it became extinct by Confuſion, and the Cautioner, or he who was acceſſorly bound in the perſonal Obligement for the Creditors Security, was free.

Replyed for the Purſuer. This Debt muſt be underſtood contracted by *Grange* for his own Behoof, and the Lady's Obligement, but the Effect of his Influence: Seing they are both jointly bound in the Bond, and grant Receipt of the Mony; and the Clauſe granting Receipt of the Mony, with the Clauſe of Requiſition, and Obligement to repay, are null *quoad* the Wife, as our Law annuls all perſonal Obligements for Sums of Mony granted by Wives, who can only burden their Heretage, *December* 15, 1665, *Ellies* contra *Keith*. 2. *Eſto* the Mony had been borrowed for the Wife's Behoof, ſhe being *ſub Cura Mariti*, it ought to be inſtructed that the ſame was ſo applied. 3. The Contract 1674 bears, That the 29000 Merks was applied for their joint Uſe, and not for her's allennerly. 4. The Creditors Intromiſſions with the Coal and Salt, is by the Backbond to be applied in Payment of the whole Sum promiſcuouſly, and the Creditors were bound upon Payment to Diſcharge him and her of the whole.

Duplyed for the Defender. The Wife was *prima* both *in Obligatione & Diſpoſitione*: The Husband conſenting only for his Intereſt. His being obliged

jointly

intly with her was but cautionary, and acceſſory for the Creditors farther ecurity. It's in vain to preſume that the *ipſa Corpora* of the Mony came to the usband's Behoof: Becauſe, tho' it were ſo, it was a Gift, which cannot be vacuated by any coming in the Wife's Place. Nor is a Husband liable *qua urator* to his Wife, to anſwer for any heretable Right acquired from her, to ny but her ſelf in Caſe ſhe revoke. The Husband's granting a cumulative ecurity upon his own Coal and Salt for the Mony, was the Effect of his being rmerly bound as Cautioner: And a Cautioner taking a Diſcharge to the rincipal, has notwithſtanding Relief *ipſo Facto*, *ex Negotio geſto* for the Principal; yea, may uſe the Creditors Name, or force an Aſſignation for the better fectuating thereof, *July* 13, 1675, *Scrimzeour* contra Earl of *Northesk*. *air*, *Lib.* 1. *Tit.* 8. §. 8. The Contract of Coals bearing the 29000 Merks have been borrowed for both their Behoofs, is to be underſtood, *applicando gula ſingulis*; *viz.* That the 22000 Merks was for her Behoof, and the 7000 erks for his: And both may in ſome Senſe be underſtood for the common ehoof, in Reſpect of the ſeveral Intereſts of Terce, Courteſie, *&c.*

The Lords found, That the 22000 Merks Bond is principally and originally e Lady *Airth*'s Debt, and that the ſame do's affect the Eſtate of *Airth*, and e Heirs and Repreſentatives of the Lady, Granter of the ſaid Bond; and at the Defender is not liable to pay the ſame to the Purſuer as deriving Right om the Repreſentative of the Lady principally bound, by whoſe Payment it came extinct *Confuſione*.

anuary 18, 1709. *Mr.* David Balvaird, *againſt* Watſon *of* Wallacecraigie.

Ames Watſon, Heir to *William Watſon* Mariner in *Dundee* as Principal, and *Thomas Watſon* Merchant there as Cautioner; having in *February* 1697, anted a Bond of Corroboration of a Liferent Annuity of 200 Pound provided *Griſſil Ramſay*, in her Contract of Marriage with the ſaid *William Watſon*: r. *David Balvaird*, the ſaid *Griſſil Ramſay*'s ſecond Husband purſued *Alex*- *der Watſon* of *Wallacecraigie*, as Heir to the Cautioner, for a Year and a alf's Annuity preceeding *Whitſunday* 1707. Who pretended to be free of his ather's Cautionry by the 5 Act of the Parliament 1695, whereby Cautioners r Sums of Mony in Bonds or Contracts are free after 7 Years from the Date of e Bond.

Alledged for the Purſuer. The ſaid Act concerns only Cautioners for liquid ums: Whereas the Defender's Father was Cautioner for a Fact or annual reſtation provided in *Griſſil Ramſay*'s Contract of Marriage, which was not ue, nor could be exacted the Time of the Ingagement: Seing a new Obligation for the annual Preſtation ariſeth yearly. And the laſt Clauſe in the Statute ecuring legal Diligence done within ſeven Years for what fell due in that Time, lear that theſe Debts only fall within the Verge of that Act, which were due, nd for which Diligence could have been done within the ſeven Years.

Anſwered for the Defender. 1. The Words of the Law are general concerning Principals and Cautioners: *Et noſtrum non eſt diſtinguere.* 2. The Reaſon of the Law, *viz.* To prevent the Ruin of Perſons and Families by the growing Burden of Cautionry, pleads more in Favours of a Cautioner in an Annuity, than any other: Becauſe a Cautionry for a definite Sum is liquid and the Hazard known; whereas an Annuity grows yearly, and may run out to an indefinite ruinous Length. A Cautioner in a Bond being ſtreſs'd or getting Aſſignation may adjudge once for all; and the Fear of expiring of the Legal will force Relief; yea the principal Debtor in a Bond may be charged upon the Obligement to free and ſkaithleſs keep, which imports that he ſhould pay for the Cautioner's Liberation: Whereas a Cautioner for an Annuity cannot adjudge once for all; nor is the Creditor obliged to accept of a Stock in Mony in Lieu thereof. 3. It is not to the Purpoſe, that ſubſequent Annuities could not have been exacted the Time of the Ingagement; for the ſeven Years run from the Date of the Writ, without Reſpect to the Term of Payment.

Replyed for the Purſuer. The Act 1695 was only intended to prevent the Hurt and Prejudice ariſing to Perſons and Families by Cautionry for borrowed Mony, which was a Burden of it ſelf, and became a growing Burden, as the Law terms it, by the running on of Annualrents unpaid. No Body was prejudic'd by the expiring of the Cautionary Obligements for Sums of Mony; ſeing the Creditor might call for his whole Mony within the *Septennium*: But a Cautioner *ad Factum præſtandum*, as to pay a Sum annually, or a Cautioner in a Suſpenſion, *&c.* cannot be brought under that correctory Law without many Abſurdities. Again, the Cautioner in this Caſe was only obliged conditionally for ſo many Years as the Liferentrix ſhould happen to live. Which conditional Obligement, not being like a conditional Obligement for individual Sums, falls not within the Compaſs of the Act 1695, but is determined by *L. 108. ff. de Verb. Signif. Debitor intelligitur is, a quo invito exigi Pecunia poteſt.* And ſeing he became Debtor only from the Time the Annuity fell due, when he could be diſtreſs'd, Preſcription cannot run in this Caſe: Seing otherwiſe ſome Creditors would have ſeven Years to do Diligence againſt their Debtor's Cautioners, others but one Year; yea, a Cautioner for a Liferent Proviſion could not ſtand bound longer than ſeven Years, which cannot be deſigned by the Law. 2. Albeit the ſeven Years in the Act are declared to run from the Date of the Writ, it muſt be underſtood with this Quality, ſo be, the Cautioner was ſeven Years bound.

The Lords found, That the Act of Parliament 1695 doth not extend to this Caſe: And therefore repelled the Defence. For if the ſaid Act were not reſtricted to Bonds of borrowed Mony: No Perſon could be effectually Cautioner in a Contract of Marriage, or in Clauſes of Warrandice or Requiſition.

Eodem Die. *Mr.* Robert Darling *Miniſter at* Eues *Kirk, againſt Mr.* John Hay *Son to Mr.* John Hay *Parſon of* Peebles.

IN a Competition for the Rents of a Tenement in *Linlithgow* belonging to the deceaſt *Humphrey Welſh*, betwixt Mr. *Robert Darling* who had adjudged the ſame from the Heretor's apparent Heir, and Mr. *John Hay* who ſtood infeſt upon an heretable Bond granted to him by Mr. *Welſh* on Death-bed, corroborating a former perſonal Bond granted in *Liege pouſtie*; Mr. *Darling* having repeted a Reduction of the ſaid heretable Bond *ex Capite Lecti*: The Lords repelled the Reaſon of Reduction, in Reſpect of the antecedent onerous Cauſe. Albeit it was alledged for Mr. *Darling*, That the anterior perſonal Bond was no Obligation upon the Debtor to grant an heretable Bond of Corroboration, whereby the Heir was cut off from getting Relief of that Debt out of the Executry: And Perſons on Death-bed could not prejudice their Heirs.

Eodem Die. James Donaldſon *Merchant in* Edinburgh, *againſt* Archibald Cockburn *Merchant and late Baillie there.*

IN a Competition betwixt Baillie *Cockburn* and Mr. *Donaldſon*, Creditors of *Patrick Haliburton* Merchant in *Edinburgh*: The Lords refuſed to ſuſtain an Arreſtment uſed by *Donaldſon* in the Hands of Miſtreſs *Helen Swyntoun* Spouſe to Captain *Francis Charters*, when her Husband was out of the Kingdom,

dom, to affect a Debt owing by the Captain to *Haliburton.* Albeit the Lady had an ample Factory and Commiſſion at the Time to uplift, receive, aſſign, diſcharge and diſpoſe of all Sums, Goods, Gear, and others whatſoever belonging to her Husband, and if needful, to purſue therefore. Becauſe, if a Decreet of Forthcoming againſt a Factor, without calling his Conſtituent, were ſuſtained; the Conſtituent's whole Eſtate might without his Knowledge be evicted out his Factor's Hands, and perhaps for Debts not truly due.

January 19, and February 1, 1709. *Mr.* William Halkerſtoun *of* Rathillet, *againſt* John Melvil *of* Mordecarnie.

IN the Declarator of Thirlage at the Inſtance of *Rathillet* againſt *Mordecarnie*, the Lords, *November* 24, 1708, having found the Defender's Lands thirled to the Purſuer's Mill: The Defender alledged, That the Thirlage cannot extend to Farm Duty, Horſe Corn or Seed; nor to Grain that the Tenants can ſpare to ſell over and above their Rent and Family Exigence. Becauſe, 1. This s only a preſumptive Thirlage founded on the Sovereign's Privilege, and Poſſeſſion preſumed *retro*: And *quod contra Juris communis Regulas introductum ſt, non eſt extendendum*, but, as all Privileges, is to be ſtrictly interpreted. Again, Thirlage conſtituted by Uſe or Cuſtom, muſt be regulated by Uſe or Cuſtom; for then *tantum præſcriptum, quantum poſſeſſum*, ſeing the Effect cannot exceed it's Cauſe: And the Purſuer cannot prove that his Authors or Predeceſſors were ever in Poſſeſſion of Multures for the Defender's Farms, or or ſpare Bolls ſold by the Tenants. Nor can it be preſumed *in Dubio*, that ither the Maſter would conſent to impoſe a dry Multure upon himſelf for his Farms, or upon his Tenants, or that Tenants would ſubject themſelves to ſuch a dry Multure, without expreſs Paction: And dry Multure cannot be voided, if either the Maſter's Farm, or the Tenants ſpare Bolls be thirled; ſeing both theſe muſt be ſold in the Market to Merchants, who often live at a great Diſtance, and neither will nor can bring them to the Thirl-mill. Beſides, the Defender can be liable to no other Thirlage than as it was conſtituted when his Lands belonged to the King in Property, at which Time no Part of the Farms could be thirled: Seing *Res ſua Nemini ſervit.* Again, The Defender and his Tenants can be in no worſe Caſe by this preſumed Thirlage, than if they had been expreſly aſtricted to grind their Corns at the Mill of *Rathillet*, which would only have extended to ſuch Corns as they had Occaſion to grind for the Uſe of their Families: Becauſe *in Dubio, reſponendum pro Reo & pro Libertate.* So *January* 21, 1681, *Grierſon* contra *Gordon*, expreſs Conſent or Preſcription ſeem'd neceſſary to infer a Thirlage of Farms or Corns ſold by the Heretor: And *July* 11, 1621, *Keith* contra Tenants of *Peterhead*, Tenants were only found liable for abſtracted Multures of Corns grinded by them at other Mills than that to which they were aſtricted. 2. *Et ſeparatim, dato non conceſſo*, that the Defender and his Tenants had been liable to ſuch an Aſtriction as the Purſuer pretends to, it is preſcribed *non utendo*, ſince it was never claim'd within the Memory of Man. And as they have preſcribed Immunity from performing Mill-ſervices, the natural Conſequences of Thirlage; much rather may they preſcribe Immunity from ſuch an odious Servitude as dry Multure.

Replyed for the Purſuer. 1. Thirlage ſimply conſtituted being a Servitude upon the Fruits of the Ground that are grindable, either into Malt or Meal, whereby they are ſaid to thole Fire and Water, it muſt affect the whole Fruits or growing Corns, except ſuch as are appropriated to other Uſes than for Malt or Meal, as Seed and Horſe-corn. For now *Multura* is not granted ſimply *pro Molitura*, but Thirlage is a beneficial Servitude upon another's other's Property, which ſometimes is ſold dear enough. My Lord *Stair* lays down for a Rule, That Thirlage ſimply expreſt, without Mention of *omnia Grana creſcentia*, extends to all Corns growing upon the Ground abſtracted to other Mills or ſold: And ſo it was decided, *June* 26, 1635, Laird of *Wauchtoun* contra *Hume* of *Ford*. It is to no Purpoſe, to urge that this is only a preſumptive Thirlage: For where ever a Thirlage is once found, it hath all the Conſequences naturally ariſing from it; And therefore ſo hath this as well as any other indefinite Aſtriction. Again, If the Purſuer's Thirlage were reſtricted to what ſhall actually be grinded within the Thirl, it would be of no Value, and could be eaſily evacuated by ſelling the Growth of the Ground, and buying Meal and Malt. The Purſuer doth not here ſeek dry Multure; For by that we underſtand a certain Quantity of Multure, preciſely payable without Reſpect to the Quantity of the Growth of the Ground: Whereas the Purſuer claims no ſpecial Quantity of Multure, but only that the growing Corns which are deſtined to thoſe Fire and Water, ſhould pay the ordinary Multure conform to the Deciſion, *January* 14, 1662, *Nicolſon* contra Feuars of *Tullicultry*. Beſides, there is the ſame Reaſon for the Aſtriction of the Farm in this Caſe, as if it were payable in Meal: And Farm-meal would be certainly aſtricted. And tho while the King remained Proprietar of the Lands, the Farm payable by the Tenants was not aſtricted, or rather the Aſtriction thereof could not take Place, becauſe it was payable to him who had the Right of Aſtriction: Yet how ſoon the Defender's Lands were feued out, the Thirlage took Effect as to the Farm-duty payable by the Tenants to the Feuar, who was not Heretor of the Mill. For where a Baron thirles his Lands to his own Mill, the Farm ſo long as in the Tenants Hands is thirled, tho by the accidental Circumſtance of being paid to the Maſter (who cannot exact Thirl from himſelf) it becomes free: And therefore if a Mony-rent be paid in Lieu of Farm, the whole grindable Corns in the Tenants Hands remain aſtricted. 2. The Servitude it ſelf being found conſtitute, and preſerved from Preſcription, the natural Conſequences of it are likeways preſerved; Except as to Bygones preceeding Fourty Years, as it is in annual Preſtations. There is a great Difference betwixt Mill-ſervices, and the aſtricted Multure: For ſuppoſe the former are generally Conſequences of Thirlage. they are local, and being of a different Kind from Multure, could not be preſerved by Poſſeſſion of the Multure; tho Poſſeſſion of the Multures of a Part, preſerves and keeps up all Multures ariſing from the Nature of the Right. As to the Caſe betwixt *Keith* and the Tenants of *Peterhead*, it is ſingular and contrary to ſubſequent Deciſions. And yet it doth not meet the Caſe: For there the Tenants were not found liable for the Farm bought by them from their Maſter, and ſold to others; Becauſe, the Maſter was liable for the Multure thereof himſelf.

Duplyed for the Defender. The Deciſions founded on by the Purſuer are not to the Purpoſe: For in the Laird of *Waughtoun*'s Caſe, there was a Thirlage of an Heretor's whole Lands, and the *invecta et illata* conſtituted in Writ, under which it is no Wonder that Farms or Corns ſold were brought; And in that of the *Feuars* of *Tullicultry*, the Baron was infeſt in the Mill of the Barony, and proved Fourty Years Poſſeſſion of Multures. There is not the ſame Reaſon for Farm-victuals being liable to Thirlage, as there is for Farm-meal. Becauſe, this is extended to Farm-meal, in Reſpect the Tenants are undoubtedly thirled *quoad* all Corns growing upon the Ground, which they have Occaſion to grind: But as Tenants have no Occaſion to grind Farms payable in Victual; So to put them under ſuch a Neceſſity, were to make them liable to dry Multure, which is abſurd. It's frivolous to object that the Thirlage would be of no Value; If the Maſters

Farms and the Tenants Spare-bolls were exeem'd : Seing the Thirlage is of he ſame Value as at its firſt Conſtitution ; And nothing hath occurred ſince o make the ſame heavier upon the Defender. Seing *Incommodum non ſolvit Argumentum*, Caſes muſt be decided according to the Principles of Law, without Reſpect to Inconveniencies that may attend the Deciſion : So *November* 24, 1680, Sir *Andrew Ramſay* contra Town of *Kirkcaldy*, It was ound that a Thirlage *quoad Invecta et Illata*, could not hinder the Town o furniſh their Families with bought Meal upon Pretence that the Thirlage would thereby be evacuated.

The Lords found, That the Thirlage of the Defender's Lands to the Purſuer's Mill, was to be underſtood with the Exception, not only of Seed and Horſe-corn, but alſo of ſo much of the Victual payable by the Tenants in Name of Farm, as is not conſumed in the Heretor's Family reſiding within he Thirl : But that the Aſtriction reacheth what of the Farms is ſo conſumed. And found that any Excreſce-bolls more as may be a ſufficient Maintenance for the Tenants and other Inhabitants upon the Ground, being ſold by them, are free of Thirlage, but that they could not elude the Thirlage, by ſelling the *Grana creſcentia*, and buying Meal to maintain heir Families. And that foreign Corns bought in Place of any of the Growth of the Ground ſold, muſt pay Multure : Yet it was found that if he Tenants, by Reaſon of the Scantneſs of the Crop, not having Corns ſufficient for the Maintenance of their Families, be obliged to buy for that Uſe, heſe bought Corns are free of Aſtriction.

January 20, 1709. *The Creditors of* Langtoun *Competing.*

SEveral of *Archibald Cockburn* of *Langtoun*'s Creditors having procured Infeſtments of Annualrent upon his Eſtate, all the reſt did thereafter djudge within Year and Day of one another : Some of which Adjudgers ad uſed Inhibition againſt the common Debtor before his granting the Infeſtments of Annualrent, and ſome had not Inhibited, but their Debts were ontracted before the others Inhibitions. In the Ranking of theſe Creditors, t was alledged for the Inhibiting Adjudgers : That they by their Inhibitions eing in a Caſe to reduce, and clear the Eſtate of the poſterior Annualrents, hould by Virtue of their Adjudications come in Place of the excluded Annualrenters, and draw full Payment of the Sum for which they did inhibit ; otwithſtanding that in a Competition with the ſimple Adjudgers, they ould not obtain full Payment, had there been no poſterior Annualrenter, but theſe ſimple Adjudgers would have come *in pari Paſſu*. V. G. ſuppoſing the common Debtor's Eſtate to be 12000 Merks, affected by Adjudications at the Inſtance of three Creditors for 5000 Merks each, after the granting an Infeſtment of Annualrent effeiring to 6000 in Favours of another Creditor, one of which Adjudgers had inhibited the common Debtor before the Date of the Infeſtment of Annualrent : The Rule of Diviſion is, The Annualrenter firſt draws his 6000 Merks, but then the Inhibiter removes the Annualenter, and ſaves his whole 5000 Merks, and ſo has 1000 Merks more as his third Part of the 12000 Merks ; Thereafter the Annualrenter recurs upon the ſimple Adjudgers and draws his 6000 Merks, leaving them only 1000 Merks betwixt them. For tho' Inhibition is no poſitive, it is not ſimply a prohibitory Diligence, but alſo it is preparatory, and operates fully in Behalf of the Uſer for Security of his Debt, *ut Nihil illi deſit* ; And he *qui ſibi vigilavit* by uſing Inhibition, ſhould reap the ſole Benefit of it. So that the Inhibiters may juſtly alledge againſt the Co-adjudgers *Vinco Vincentem*, viz. The Annualrenters, *Ergo multo magis vinco te* the ſimple Adjudger, excluded by the Annualrenter without Recourſe: Seing the Brocard *Vinco Vincentem* takes always Effect except when it runs in a Circle of Creditors ſupplanting one another; And tho' the Inhibition cuts off the Annualrents in ſo far as they prejudice the Inhibiter, theſe are good Rights againſt the ſimple Adjudgers affecting *unamquamque Glebam* of the Remainder of the Eſtate. Seing the ſimple Adjudger hath nothing common with the Inibiter, but what remains of the Eſtate after Deduction of the preferable Annualrent, which is as real a Diminution thereof, as if it were a partial Right of Property or Wadſet: Whereas an inhibiting Adjudger is bound to acknowledge neither Annualrent nor Reverſion; Yea, he would even remove an Annualrent exhauſting the whole Eſtate, tho' the ſimple Adjudger in ſuch a Caſe would get nothing, as having nothing to affect by his Adjudication. Again, If the ſimple Adjudgers cut off by the Annualrenters were brought *in pari Paſſu*, with the inhibiting Adjudgers who removed theſe Annualrenters, in the Caſe of ſimple Adjudications to the Value of the Eſtate, theſe whom the Annualrenters, had it not been for the others Inhibitions, would have quite excluded, would reap by the Inhibiters Diligence equal Benefit as themſelves, which is abſurd. But on the contrary, to clear that the ſimple Adjudgers can have no Benefit by the Inhibitions; If an Infeſtment of Annualrent were granted after one of four or five Adjudgers had inhibited, before the reſt adjudged, when theſe Adjudgers have divided and exhauſted the Eſtate with the Burden of the Annualrent, the Inhibiter may come after the Year and Day and adjudge; and then by reducing the Annualrent may carry the whole Value of it without any Regard or Relief to the prior Adjuders. Beſides, Inhibition is a legal Diligence ſecuring the Inhibiter againſt all poſterior voluntary Deeds of the inhibited Debtor, till the Inhibition be ſatisfied by Payment.

Anſwered for the Annualrenters, and ſimple Adjudgers. No inhibiting Adjudger can receive Advantage, more than he can have Loſs by the contracting of Debts after the Inhibition; Nor doth the Security or Diligence of the poſterior Creditors accrew to him, as come in their Place: But ſeing the ſimple Adjudgers Debts were contracted before the Inhibitions, and their Adjudications by the Act of Parliament 1661 come *in pari Paſſu* with thoſe led by the Inhibiters, the latter hath no further Benefit by the Inhibitions, than to draw their Shares of that Proportion of the common Burden of the Annualrents, that otherwiſe would affect them, as if theſe Annualrents were not in being. *V. G.* An Eſtate worth Six thouſand Pounds being to be divided betwixt two Adjudgers, whereof each is Creditor in Four thouſand Pound, and an Annualrent correſponding to the like Sum anterior to the Adjudications, but poſterior to an Inhibition uſed by one of the Adjudgers; The Annualrenter gets Two thouſand Pound, the ſimple Adjudger One thouſand Pound, and the inhibiting Adjudger Three thouſand Pound. Becauſe, the Four thouſand Pound of Annualrent left but Two thouſand Pound of the Eſtate free to both the Adjudgers, One thouſand Pound to each, whereby the Inhibiter wanted Two thouſand Pound of what he ſhould have got, had there been no Annualrenter in Competition, which therefore is made up to him out of the Annualrenter's Share. This was made the Rule of Ranking *Anno* 1692; hath been ever ſince obſerved, except in the ſingle Caſe of the Creditors of *Dunce*, which reſolved in a Conſent; and was confirmed *in Foro contradictorio*, *Anno* 1698, in the Caſe of *Carrin* competing with the Creditors of *Nicolſon*: So that being eſtabliſhed by Authority *Rerum perpetuo ſimiliter judicatarum* for a Matter of Eighteen Years (except in a ſingular Inſtance) it is turned into a cuſtomary Law, *L.* 34. *L.* 38. *ff. de Legibus*, *L.* 1. *C. Quæ ſit longa Conſuetudo*; And there are ſufficient Reaſons for obſerving this Standard in the Ranking of Creditors. That Inhibition doth not communicate the Right inhibited, is clear from the Stile thereof, which *diſcharges the granting Rights in Prejudice*, &c.

And the Style of Reduction thereon, which *reduces in ſo far as prejudicial*, &c. So that an Inhibition cannot be imagined to convey any Thing, unleſs we could fancy Contradictions, That a Prohibition is a Conſtitution, or a Reduction, a Creation: Yea, a Communication of Right betwixt Co-adjudgers needed a particular Statute in the Year 1661. How can Adjudgers on Debts prior to the Inhibitions, be prejudiced by the Inhibiter's taking up the Annualrenter's Place, and throwing them back upon the ſimple Adjudgers? 2. Had the Annualrenter renounced his Annualrent before the Competition, muſt not the Inhibiter be content to take his equal Share with the Adjudgers? Or, might not the Annualrenters ly by till the Adjudgers are ranked, and get their Shares in Land or Money; and then require their Money from the ſimple Adjudgers? Which the inhibiting Adjudger, who derives no Right from them, cannot hinder. 3. It is *Petitio Principii* that the Co-adjudgers upon Debts before the Inhibition affect only the free Subject, deducing the Annualrents: For they adjudge the Property with the Burden of theſe Annualrents, as Servitudes thereon. The ſame Rule holds, tho' the Eſtate were wholly exhauſted with Annualrents, ſo as the ſimple Adjudgers would in Effect get nothing: For ſtill the inhibiting Adjudger will draw no more from one of theſe Annualrenters inhibited, than he would have if no ſuch Annualrent exiſted. Again, it's the ſame Thing, tho', in Lieu of an Annualrent, the inhibited Debtor had diſponed a Part of his Property: For even in that Caſe, the Inhibiter can adjudge that Property only *in Quantum* he could draw thereof from the Co-adjudgers, if there had been no ſuch Diſpoſition prior to their Adjudications. 4. *Poſito abſurdo*, That the inhibiting Adjudger came fully in Place of the poſterior Annualrenter, and that the Right of Annualrent accrewed to the Inhibiter: The Annualrenter, after the Inhibiter has drawn his Proportion, cannot ſeek the ſame over again or its Price out of the Eſtate, in Prejudice of the ſimple Adjudgers; becauſe that were twice Payment of the ſame Debt. 5. Not a Farthing of what the Annualrenter loſes in a Competition with the prior inhibiting Adjudger, can come off the ſimple Adjudgers: Becauſe no Perſon who incurrs Eviction through his own Fault or Deed, has any Recourſe even upon real Warrandice againſt ſuch as were innocent thereof. Seing *Culpa cuique ſua non alteri nocet*; *Non debet uni per alium iniqua Conditio inferri*: And *ita eſt*, That the Annualrenter ſuffers only by his own Fault, in taking a Right of Annualrent after the Inhibition. 6. The Eſtate is to be conſidered as at the Time of the Ranking, when Creditors prior to the Inhibition have adjudged, and thereby carried away ſo much of the Property from the Inhibiter; and not as it was at the executing of the Inhibition. Becauſe the Inhibiter is no further eventually prejudiced by the Annualrenter, but his Prejudice ariſeth *aliunde*, from the Concourſe of Co-adjudgers. And if the Inhibiter were allowed more Benefit by the Annualrent than to ſalve his own Proportion of the Property, with Reſpect to the concurring Adjudgers; the Inhibition would not in the leaſt Prejudice the Annualrent which contraveened it, but only the innocent ſimple Adjudgers who did nothing contrary to it, upon whom the Annualrenter ſhifts forward, to repair what he wants by the Inhibiter; and *qui facit per alium, facit per ſe*. An Inhibition hath not in all Caſes its full Effect till Payment, but only to annul poſterior Deeds, in ſo far as Hurtful or Prejudicial thereto: Albeit an Arreſtment bear, *Ay till Payment be made, or Caution found for that Effect.* The Brocard, *Vinco Vincentem*, &c. holds only in a Subordination and Succeſſion of Rights depending upon one another, and not where every one's Right is independent, and contrived by Choice for his own Security. The Reaſon why the Annualrenters refuſed to go into the Scheme propoſed by the inhibiting Adjudgers, altho' apparently more beneficial to them, was, becauſe, there were as many inhibiting Adjudgers prior to the Annualrents, as would exhauſt the whole Eſtate; And the Annualrenters having once chaſed the ſimple

Adjudgers out of the Field, the Inhibiters would take all from the Annualrenters; Therefore the Annualrenters chuſed rather to join with the ſimple Adjudgers, from whom they would draw a Share, without being obnoxious to a Back-ſtroke from the Inhibiters, than by concurring with them in Proſpect of more, to ſerve but, as the Cat's Foot in the Fable, to pull out the Cheſnut for another.

Replyed for the inhibiting Adjudgers. All intended by the Act of Parliament 1661, was to ſupply the Diſtance or Ignorance of Creditors, by making all Appriſers within Year and Day to come in alike, as if they had been in one Appriſing, without any Innovation as to Inhibiters or Annualrenters: For Appriſers before that Statute might have come in *pari Paſſu*, had they either Appriſed *ſimul et ſemel*, or concurred to Appriſe by a common Truſtee. And the whole Adjudgers being in Effect only joint Proprietars of that Part of the Eſtate that is unexhauſted by the Annualrents, the Inhibiters removing the Annualrenters, have the ſole Benefit of their Diligences, and the Annualrenters are preferable for the Remainder, in ſo far as not carried away by the Inhibiters: For the Inhibiter reduceth the Annualrent *quoad* the Annualrenter, in Order to affect it by his Adjudication; And the ſubſequent Adjudgers are not wronged by the Inhibitions, but by the Annualrents that are preferable to them. 2. It's ridiculous to move a Queſtion about an Annualrent extinguiſhed: For who can doubt but the Annualrent being extinguiſhed, the Inhibiting Adjudger muſt come in contentedly with the ſimple Adjudgers, when he hath no Prize upon an extinct Annualrent, nor can by his Inhibition obtain Repetition of what is paid; ſeing *Debiti ſoluti nulla Condictio.*

The Lords found, That in the preſent Competition the inhibiting Adjudgers can only draw ſuch a Share, as would have belonged to them, if there had been no Annualrent granted poſterior to their Inhibitions: And that they cannot have Right to the Remainder of the whole Sums in their Inhibitions, before the Annualrenters can draw any Share in the ſaid Competition.

For explicating this Difficulty in the Ranking of Creditors, a third Scheme was offered to the Lords, ſuppoſing an Eſtate of 12000 Merks, to be divided amongſt three Perſons Creditors, in 5000 Merks each, *viz.* an inhibiting Adjudger, an Annualrenter prior to his Adjudication, and poſterior to the Inhibition, and a Co-adjudger within Year and Day of the Inhibiter's Adjudication for a Debt anterior to the ſame: The Inhibiter's 5000 Merks muſt *firſt be* laid aſide, becauſe Law prefers him to the Annualrenter; Then the Annualrenter draws his 5000 Merks, and thereafter the Co-adjudger draws his Share out of the Remainder, and what fell to the Inhibiter; So that the 7000 Merks muſt divide equally betwixt the Inhibiter and Co-adjudger. Nor can the Inhibiter grudge this, or come back upon the Annualrenter: Becauſe, here the Annualrent-right did him no Prejudice; His Prejudice ariſing only from the Act of Parliament bringing in the Co-adjudgers *pari Paſſu*, which is *Res inter alios.* This Scheme was learnedly and ingeniouſly illuſtrated by Inſtances out of the *Roman* Law, and a Deciſion of the Court of *Frizeland.* But becauſe the Lords did not conſider it Adviſing, I ſhall no further inſiſt in it, to perplex a Matter, that is already but too much embarraſs'd.

Eodem Die, *Doctor* Alexander Pennicook *of* Romanno, *contra* Anna Campell *and Captain* David Scot *her Husband*; *and* Anna Edgar *and* Robert Swintoun *Chirurgion*, *her Husband*.

IN an Action againſt *Anna Campbell*, and *Anna Edgar*, and their Husbands, at the Inſtance of Doctor *Pennicook*, for reducing a Teſtament made by Captain *Robert Pennicook* his Brother, in Favours of the Defenders, upon this Ground; That the ſame was intrinſically null, for Want of Date and Place, Writer's Name, and Witneſſes, and alſo the Granter's Deſignation.

Alledged for the Defenders. They offered to prove that the Teſtament is holograph: And neither Date, nor Place, nor Writer's Name, are eſſential to a Holograph Writ; It being more eaſie to forge three Subſcriptions, and adject a Date or Place, than to counterfeit exactly the Body of a Writ. For the *Act* 5. *Parl.* 1681, concerns only Writs requiring Witneſſes: And holograph is a ſurer Teſt of the Verity of a Writ, than all the ſtatutory Solemnities in other Writs put together. Yea, in a late Caſe betwixt *Doctor Pitcairn* and *Doctor Trotter*, an Addreſs upon the Back of a holograph Letter to the Writer's Niece, wanting Date and Place, was ſuſtained to carry a Legacy in Favours of the *Lady Pitcairn*. So an Indenture for Succeſſion betwixt *Brigadeer* and *Colonel Cuninghames*, bearing no Place, was ſuſtained to afford Action and affect Subjects in *Scotland*. And other Writs equivalent to holograph, as Bills of Exchange, ſubſiſt without either Date or Place. 2. *Holographum nec probat Datam, nec Locum*, tho' expreſt, therefore theſe cannot be thought neceſſary to a holograph Writ: Seing *nec Lex nec Natura facit quidquam fruſtra*. 3. Proving holograph, doth more aſcertain the Writer, than if he had been deſigned in the Writ it ſelf, *July* 1, 1631, *Inglis contra M'ubin*, and *Eliot conta Ellies*. 4. It is in vain to diſpute the Deſignation of the Granter of the Writ, *cum conſtat de Perſona*, by his ſubſcribing *Captain Robert Pennicook*, and deſigning his Effects and Relations in the Body of the ſhort Teſtament.

Replyed for the Purſuer. For preventing Falſhood, Date and Place are neceſſary Solemnities in all Writs in general, by Immemorial Cuſtom. *Craig P.* 156, *and Stair Lib.* 4. *Tit.* 42. are of Opinion, That Date and Place are de *Subſtantialibus* of a Writ. This is agreeable to the civil Law, *Nov.* 47. *Cap.* 1. *Nov.* 107. *Cap.* 1. *L.* 14. *C. de contrah. et Commit. Stip.* And *Mornacius ad L.* 30. *de Pig. et Hypoth.* finds it to be ſo, not only in his own Country, but even among the old *Grecians*, *Covarruvias Pract. Queſt. Cap.* 20. *N.* 5. *Gudelinus de Jure noviſſimo, Cap.* 11. *N.* 23. 2. Holograph Writs can plead no Privilege, they deſerving leſs Faith than others. The civil Law indeed allows them, but with much Caution and Circumſpection, *L.* 20. *C. de Fide Inſtrument.* And upon further Experience rejects them in all Caſes above 30 Pound *Sterling* Value, *Nov.* 73. §. *oportet.* Our Law cuts them off by a ſhorter Preſcription than other Writs, and doth not allow them to prove their Date, nor the Granter: And what proveth leaſt, muſt be of leſs Faith. Take away Date and Place from Writs, there is effectual Mean left to detect Forgery, whereof there have been notable Artiſts in all Ages; as *Priſcus Emeſenus* mentioned by *Suidas*, *Baptiſta Ilico*, cited by *Maſcardus de Probationibus Concluſ.* 330. *N.* 3. *Concl.* 720, *N.* 21. Not to mention the repeted Inſtances of counterfeiting Exchequer Notes, Malt-tickets, Lottery-tickets, &c. 3. Holograph Teſtaments require more Caution than other Writs, being made Uſe of after the Deceaſe of the ſuppoſed Teſtator, who beſt could diſcover the Impoſture. The Teſtaments of ſuch as die Abroad, are therefore liable to the more Suſpicion: Upon which Account the *Dutch* Law requires ſuch to be written, and ſigned in a Book, kept Aboard of Ships for that Purpoſe. The Prattick betwixt the two Doctors doth not meet; For the Letter no Doubt had a Date, and the indorſed Direction was a Part of the Letter. The Indenture betwixt *Colonel and Brigadeer Cuninghames*, had a Date, and the Form of the Writ in ſome meaſure determined the Place: Beſides, being a mutual Indenture, each Copy was a Check upon the other. 4. Tho Holographs prove not their Date, to the Prejudice of any Perſon hurt by them, the Date ſupports the Verity of them againſt Reduction: For he that quarrels the Date of a Writ, impugns not to the Writ, but the legal Effect of it; whereas he that reduceth a Writ for Want of a Date, impugns the Verity of the Writ.

Duplyed for the Defenders. If a Writ be not null by Law, ſome accidental Difficulty in improving thereof, is no ſufficient Ground to reject it: Otherwiſe no Faith ſhould be given to Bills of Exchange; But proving holograph excludes all Pretence of Forgery. *Craig Page* 180. ſays, *In jure de Loco quod neceſſario exprimendus ſit non reperio.* And of ſo great Credit is Holograph with us, that it is ſufficient to prove the Subſtantials of a Writ to be holograph, tho' the Body thereof be write with another Hand, *January* 23, 1675. A Date is indeed neceſſary in Writs that depend upon it, ſuch as Diſpoſitions or Aſſignations in Competition with others, or conveying Subjects that cannot be made over on Death-bed, or Writs capable of Preſcription: But neither Date nor Place are eſſential to a holograph Teſtament, which hath no Dependence on either, if another Teſtament of a particular Date be not competing. As to the Alledgeance, That a Teſtament requires more Solemnity, than other holograph Writs, it is not agreeable to our Conſtitution, where holograph Teſtaments are not only authorized by Cuſtom, but more generally uſed than others, for Secrecy ſake.

The Lords repelled the Reaſon of Reduction, and ſuſtained the Teſtament, tho' wanting Date, Place, Writer's Name, and Witneſſes; the Defenders proving it holograph: In reſpect there was not any more formal Teſtament produced to compete therewith.

January 21, 1709. James Houſtoun *Brother to Sir* John Houſtoun *of that Ilk, contra* Agnes Niſbet *Lady* Kinkaid *and her Husband.*

James Houſtoun having charged *Agnes Nisbet* and her Huſband with Horning, upon a Bond of 125 Pound granted by *Agnes Nisbet* before her Marriage, payable to *David Fitzgerald*, ſometimes Merchant in *Glaſgow*, and aſſigned by him to the Charger: They ſuſpended, and raiſed Reduction upon this Ground, That tho' the Bond bear Mony reſting owing by *Agnes Nisbet* to *Fitzgerald*, yet truly ſhe owed him no Mony, but granted the Bond to him *Intuitu Matrimonii*, which was offered to be proved by his Oath; And ſhe had Reaſon not to marry him, when ſhe diſcovered him to be an *Iriſh* Papiſt.

Alledged for the Charger. The Cedent's Oath can't prejudice him an Aſſigny for an onerous Cauſe.

Anſwered for the Suſpender. The Charger can be in no better Caſe than his Cedent, in reſpect before the Aſſignation the Bond was rendred litigious by an executed Summons of Reduction thereof. For a Citation makes a Thing litigious, being a challenging of one to a Trial at Law: As is clear from the civil Law, *Nov.* 112. *Cap.* 7. and *Cap.* 3. And by our Law, Citation interrupts Preſcription, and makes a depending Plea, *Arg. Act* 54. *Par.* 7. *J.* 3.

Replyed for the Charger. No Reſpect to the executed Summons, ſeing it was never called nor libelled; for by the civil Law *Lis*, whence *litigioſum* comes, is never underſtood in a proper Senſe, till after *Res in Judicium eſt deducta, L.* 31. *§.* 1. *ff. de Novat. L. Un. C. de Lit. Con.* 2. The Summons of Reduction not having been called within a Year after elapſing of the laſt Diet of Compearance, it expired, and the Inſtance periſhed: For my Lord *Stair Inſtit. Lib.* 4. *Tit.* 34. *N.* 4. allows Wakning after the Year only, when the Proceſs has been called within the Year; and Denunciation cannot proceed upon a Charge of Horning after Year and Day. It was lately decided betwixt *the Lairds of Megginſh* and *Innernytie*, That a Summons not called within a Year of the Day of Compearance expired, ſo as it could not be awakened:

And *November* 7, 1684, *Belſhes* contra Earl of *Loudoun* and his Truſtees, The Lords found no Proceſs upon a Summons not called within Year and Day after the Days of Compearance, and found that the Inſtance periſhed and could not be wakened. 3. The Lords will ſuſtain a Summons for Interruption, upon which they would not ſuſtain Proceſs, as was lately decided in the Caſe of *Forbes* of *Tolquhon*.

Duplyed for the Suſpenders. If *Vitium litigioſi* were only contracted after a Summons is called, he who is Maſter of an unjuſt Bond, may, how ſoon he finds himſelf attack'd by a Citation, aſſign the Bond, and ſo diſappoint the Debtor's juſt Objections againſt the Cedent. 2. The 9 *Act*, *Parl.* 1669, ſuppoſeth that every Citation that would have made an Interruption may be wakened within Five Years.

Triplyed for the Charger. 1. *Incommodum non ſolvit Argumentum*: Beſides, it would be a greater *Incommodum* to Commerce, to make an Aſſigny for an onerous Cauſe loſe his Mony upon ſuch a Pretext. 2. The Act 1669 muſt be underſtood *in Terminis Juris habilibus, viz.* That the Cauſes to be ſo wakened were called in due Time: And the Stile of a Summons of Wakening is, *That the Judge ſhould proceed where he left off*; but *in ſimplici Poſtulatione*, or Citation, *nulla Pars Judicis*.

The Lords found, That a Summons executed only, and lying over for Year and Day without a Calling, was not competent to found the Exception of *Res litigioſa* againſt an Aſſigny for an onerous Cauſe.

Eodem Die. Robert Farquharſon of Finzean, *againſt* Sir Peter Frazer *of* Doors.

IN the Reduction, Imrobation and Declarator at the Inſtance of *Finzean*, againſt Sir *Peter Frazer*, the Defender having produced a Charter and Seaſin upon an Appriſing, *Anno* 1653, of the Lands in Controverſie, a Year prior to the eldeſt Right produced by the Purſuer: The Purſuer crav'd *Aviſandum* might be made with the Production, and Certification *quoad ultra*. Becauſe, the Charter produc'd could not exclude his Title, unleſs the Appriſing on which it proceeded were alſo produced: Seing the Charter is but a relative Writ.

Alledged for the Defender. Tho' this Charter and Seaſin *per ſe* within the Years of Preſcription, would not ſuffice to exclude the Purſuer, the ſame is a good Title of Preſcription in the Terms of the Act of Parliament 1617, which doth not diſtinguiſh whether the Charter be an original or relative Writ: And the Defender and his Authors have poſſeſſed thereby for the Space of Fourty Years.

Replyed for the Purſuer. He muſt have Certification *contra non Producta*, unleſs the Defender could exclude his Title *inſtanter* by the Writs produced. For Preſcription is not competent to be alledged in this State of the Proceſs to ſupport the Defender's Right, which would lead the Purſuer into an Act of Litis-conteſtation, while he is only in an Act of Production, and can only be obliged to debate upon excluding in the Terms of that Act: Seing in a Proceſs of Improbation, till the Production be ſatisfied, there can be no Diſpute except upon Dilatories againſt the Intereſt of the Purſuer, or his Title. Nor can Litis-conteſtation be made in this Caſe, unleſs Poſſeſſion and Preſcription had been alledged *in Initio*, which would have occaſioned a complex Act of Production and Litis-conteſtation.

The Lords granted Certification *quoad ultra*.

Eodem Die. *My Lord Juſtice Clerk and his Lady, againſt* John Hamilton of Bangour.

IN the Proceſs at the Inſtance of the Lord Juſtice Clerk and his Lady, againſt *John Hamilton* of *Bangour*; the Purſuer inſiſted for Payment of 200 Pound *Sterling* as the Aliment of Sir *William Hamilton*'s Family due to the Lady from his Death, to the firſt Term thereafter, when her Liferent Proviſion did commence.

Alledged for the Defender. Whatever might be pretended for the Servants left in *Whitelaw*'s Family at his Deceaſe, no Aliment could be due to the Lady and her neceſſary Servants: Becauſe, ſhe had a ſeparate Proviſion from the Defunct, *viz.* The 7000 Pound *Sterling* Bond, whereof *Dies ceſſit* at his Death, which was a ſufficient Fund of Credit to Aliment her ſelf; and Aliment ſuppoſeth a previous Neceſſity in the Perſon to be alimented in all Caſes. So an Heir cannot pretend to an Aliment from the Liferenter, if he have a ſeparate Eſtate; nor Children from their Parents, if they can by their Imployments or otherways ſuſtain themſelves; yea a Relict provided to a Liferent of Lands will have no Aliment from the Heir to the Term of Payment of the Rents, 30 *Deciſ.* obſerved by *Gilmore*: For *Proviſio hominis tollit Proviſionem Legis*; And the Maxim, *Nemo alitur de præterito*, goes upon this Foundation in Law, That none can claim Aliment who have of their own. 2. As the Lords have found, 16 *November* in this ſame Cauſe that the 7000 Pound *Sterling* Bond is imputable in Satisfaction of the Liferent Proviſion; it muſt likeways be aſcribed to extinguiſh the Aliment: Becauſe, *Debitor non præſumitur donare*, takes Place againſt Implicite, as well as expreſs Obligements; and the Aliment coming only in Place of the Liferent Proviſion to the Term ſubſequent to the Husband's Death, is extinguiſhable in the ſame Manner.

Anſwered for the Purſuers. Aliment doth not in all Caſes preſuppoſe Neceſſity in the Perſon to be alimented: For a Husband is bound *ex Officio* during the Marriage to Aliment his Wife, tho' ſhe hath a reſerved *Peculium* of her own ſufficient for her Maintenance; an Heireſs has Right to Aliment till the next Term off her Husband's Heir, tho' ſhe hath a Fund of Credit; a Wife will have Right to an Aliment after the Death of her ſecond Husband, albeit her Jointure by the firſt would ſupply her Neceſſity in that Interval; and the ſame Tie that is upon the Husband to maintain his Wife during the ſtanding of the Marriage, continues by our Cuſtom till the next Term, for till then the Family is not underſtood to be diſſolved. 2. The Lords preſumed the Bond to have been granted in Place of the Proviſion in the Contract; becauſe, Sir *William Hamilton* at the Date of the Bond knew himſelf to be under ſuch a former Obligement: But he could not then have in his View an Obligement which did not exiſt, and was ſo caſual as that it might have never exiſted by his ſurviving his Lady, or living till the Day before the Term.

The Lords found an Aliment due, and modified 100 Pound *Sterling* to the Lady for Maintenance of the Lord *Whitelaw*'s Family from the 14 *December* 1704, to *Whitſunday* thereafter.

January 26, 1709. *Mr.* Swynton *as Factor to the Executors of the deceaſt* William Bonnar *Clerk of the Mint, againſt the Repreſentatives of* John Tom *Merchant in* Dundee.

IN the Purſuit at the Inſtance of the Executors of *William Bonnar*, againſt the Repreſentatives of *John Tom*, for Repetition of 20 Pound *Sterling* intrometted with by Mr. *Tom*, conform to his Receipt upon the following Order;

illiam Dippie (at Length) *Pleaſe deliver to* John Tom *bearer hereof Twenty ound* Sterling, *take his Receipt, and this ſhall be your Warrant*, *William Bonnar*. hich Order the Purſuers contended was preſumed to have been given to r. *Tom* under Truſt to receive the Contents for the Behoof of Mr. *Bonnar*. ecauſe, albeit Value is preſumed to be given for Bills in the ordinary known ile, that Preſumption is taken off by the extraordinary Tenor of this, which, . Bears not, *Pleaſe to pay*, but only, *Pleaſe to deliver*: And tho' Payment nplies Right in the Creditor who receives it, Delivery does not, but may be ade for Cauſes obliging to compt, as Loan, *&c.* 2. The Drawer orders is Correſpondent to take Mr. *Tom*'s Receipt, which was needleſs for *Bonnar*'s wn Security, ſince the ſimple getting up of the Bill, *ut Inſtrumentum apud ebitorem*, was ſufficient Inſtruction of Payment by the Merchant Law: nd if a Receipt was needful to *Dippie*, he needed not an Order to look to his wn Security. 3. It bears, Deliver to *John Tom* Bearer, and not to him or is Order: And it's a common Rule, that an extraordinary Clauſe in a Writ *ebet aliquid operari præter Jus commune.*

The Lords aſſoilzied the Defender: Becauſe, Value is preſumed to have een given by *Tom*, unleſs the contrary were proved; ſeing *Pay* and *Deliver* re Words promiſcuouſly uſed in Bills and Bonds of borrowed Mony. And he Deſign of taking a Receipt from *Tom*, was both to ſerve for an Inſtruction f Payment againſt him, and for a Rule of compting betwixt *Dippie* and *onnar.*

odem Die. Charles Menzies *Writer to the Signet, againſt* Alexander Gordon *of* Pitlurg.

N the Action at the Inſtance of *Charles Menzies* againſt *Pitlurg*, for Damage and Expences ſuſtained by him in a former Proceſs of Reduction and Dearator againſt the ſame Defender: The Lords refuſed to allow any ſuch xpences to the Purſuer; in Regard there was a Decreet in that former Proceſs xtracted and no Expences therein decerned, which did terminate the Plea. lbeit it was alledged for the Purſuer, That his firſt Summons contained a oncluſion of Damage and Expences againſt *Pitlurg*, and he might legally ſiſt in that Concluſion whereon nothing was done, notwithſtanding of the ecreet extracted upon other Points: As is daily obſerved in general and pecial Declarators, Actions againſt Principals and Cautioners, paſſing from *ro Loco & Tempore*, &c. Becauſe, albeit different Concluſions for different ffects may be inſiſted in after extracting Decreet in other Points; the Article f Damage and Expences is but a Conſequence of the Proceſs, which is unerſtood to be paſt from when not demanded and modified in the Decreet.

Eodem Die. Andrew Brown *of* Braid *and his Curators, againſt* John Brodie *Coachman.*

IN the Action at the Inſtance of *Braid* and his Curators againſt *John Brodie*, for Payment of an Accompt of Ale furniſhed to the Defender by the Purſuer's Father, extending to 360 Pound *Scots*: The ſaid Accompt was found preſcribed *quoad Modum probandi*, by the *Act* 83. *Parl.* 6. *Ja.* 6. Notwithſtanding the Purſuer's Minority. In Reſpect the ſaid Law doth not except Minors, as they are excepted from ſome other ſhort Preſcriptions: And Minors have not that Prejudice by the ſhort Preſcription which cuts off the Manner of Probation only, as by the long Preſcription which *funditus* extinguiſheth the Debt.

Eodem Die. *Mr.* James Hill *Miniſter at* Kirkpatrick, *and* Agnes Muirhead *his Spouſe, againſt* George Muirhead *Son to the deceaſt* James Muirhead *late Baillie of* Drumfreis.

BAillie *Muirhead* having taken an heretable Bond for 7500 Merks Principal ‘from Sir *Robert Grierſon* of *Lag* and others, in Favours of himſelf and his Aſſignies whatſoever; and failing of him by Deceaſe, to *Robert*, *Samuel* and *George Muirheads* his Sons equally and proportionally amongſt them, and the lawful Heirs of their reſpective Bodies; and failing one of theſe by Deceaſe without any ſuch Heir, to the other two and the Heirs of their Bodies; and two of them ſo failing, to the Surviver, and *Iſobel*, *Jean* and *Agnes Muirheads* the Baillie's Daughters equally and proportionally, their Heirs and Aſſignies whatſoever: After the Death of the Father, and *Robert* and *Samuel* who died before him without Children, *Agnes Muirhead* and her Husband purſued Sir *Robert Grierſon* for Payment of a Fourth Part of the Sums in the Bond.

Compearance was made for *George Muirhead*, who alledged, That by the Deceaſe of the Brother who died firſt, he came to have Right to the Half of the Bond: So that afterwards upon the other Brother's Death the Subſtitution in Favours of him and his Siſters could only extend to the Defunct's Half, whereof *Agnes* could claim only a Fourth Part. It is not to be ſuppoſed, that the Father who provided a Third Share to *George* in Caſe his Two Brothers had lived, deſigned to reſtrict his Portion after their Death in Favours of the Daughters, who were only brought in with him upon ſuch an Event in the laſt Place: And no Subſtitution can exceed the Share of the Inſtitute to whom the Subſtitution is made. 2. *George* muſt at leaſt have as much as all the Siſters: Becauſe, he is put in one Sentence by himſelf; and the three Siſters are contained in a ſeparate Sentence, and ſo are to Share but as one Perſon, *Arg.* §. *6. Inſtit. de Hæred. Inſtit. Vinnius Ibid.*

Anſwered for the Purſuers. 1. We are not to inquire into the Father's Deſign, where his Words are clear, That the Mony ſhould be divided equally betwixt the ſurviving Son and his three Daughters; and the Father had the free Diſpoſal of his own without rendering a Reaſon for his Deſtination. And albeit *George* might have pretended Right to the Half of the Brother's Portion who died firſt, had he ſurvived the Father, and thereby eſtabliſhed *the Fie* in his Perſon: The Father who was Fiar of the Mony having ſurvived the two Sons, *George* and his Siſters muſt be conſidered ſimply as joint Succeſſors to their Father. 2. *George* and his Siſters are all conjoined in one Sentence of Subſtitution, without any other Diſtinction, except that of Male and Female.

The Lords found, That *Robert* and *Samuel Muirheads*, two of the Subſtitutes in the Bond, having died before *James Muirhead* the Father who was Fiar, the Sums contained in the ſaid Bond fell to *George Muirhead* the ſurviving Son and his three Siſters equally and proportionally; and that the *Purſuer* one of theſe Siſters had Right to an equal Fourth Part thereof.

Eodem Die. *Mr.* James Colvil *Advocate, againſt* Alexander Irving *of* Drum.

IN an Action at the Inſtance of Mr. *James Colvil*, againſt the Laird of *Drum*, for Payment of bygone Annuities contained in a Bond granted by the Defender's Predeceſſor to the Purſuer's Author by Progreſs: In the which Bond the Debtor *acknowledged the Receipt of* 1000 *Pound* Scots, *and obliged himſelf, his Heirs or Aſſignies to pay to the Creditor, his Heirs or Aſſignies heretably the Sum of* 80 *Pound Mony foreſaid yearly, at two Terms of the Year by equal* *ortions, with 13 Pound of Penalty for each Term's Failzie; with this Proviſion, hat the Debtor might free himſelf and Eſtate of the ſaid Burden, by Payment the 1000 Pound and the Arrears of the ſaid Annuity reſting at the Time;* ut no Clauſe, whereby the Creditor might demand Payment of the ſaid 1000 ound, or charge for it.

Alledged for the Defender. He ought to be aſſoilzied from the Sums purſued r, becauſe the Bond is uſurious: Seing Eighty Pound of Annuity is thereby yable for 1000 Pound of Stock, which is 8 *per Cent.* for ever.

Anſwered for the Purſuer. Here is no Uſury, becauſe no *Mutuum*, but only Annuity or Rent of 80 Pound bought for 1000 Pound *Scots* of Stock, which as ſunk, and could not be required back again by the Creditor: And ſuch Annuity was found not to be uſurious in the Caſe of Dam *Chriſtian Stuart* ady *Kettingſtoun*, againſt Sir *Alexander Home* in *Anno* 1676; yea Annuities 8, 10, and 12 *per Cent.* are allowed by Law, and warrantably bought. Where the Creditor undergoes any Loſs or Hazard, Law hinders not the king more than the ordinary Intereſt, as is in the Caſe of a proper Wadſet: nd the Purſuer not only runs the Hazard of the Debtor's Inſolvency, and e raiſing of Annualrents higher than 8 *per Cent.* but alſo loſes his principal um. 3. *Eſto* the Bond were uſurious, the Penalty of Uſury is taken off by e Sovereign's Indemnity.

Replyed for the Defender. 1. If this were allowed under the Notion of a le, the Laws for preventing of Uſury would be eluded: All covetous Lenders ould take this Method with neceſſitous Borrowers. It imports nothing that e Creditor could not exact his principal Sum: For Uſury is not founded in e Creditor's having a Faculty to require the Principal, but in taking more nnualrent for the Uſe of Mony than is allowed by Law; and it is Uſury in improper Wadſet, to take more than the ordinary Annualrent, tho' Requiſion be ſuſpended for many Years. Beſides, albeit the Creditor cannot rectly charge for the principal Sum; yet he hath directly inſured to himſelf e Payment of it, by having put it in the Power of the Debtor to redeem pon Payment, which the exorbitant yearly Uſury will oblige him to do how on he is able. And tho' Liferent Annuities above the legal Intereſt might be llowed, where the Stock is ſunk, becauſe of the Hazard depending upon the reditor's Life: Perpetual Annuities of that Kind are juſtly reprobated. 2. It only *Periculum Juris* that excludes Uſury, where the Creditor has no Perſon gally obliged for any Loſs he may ſuſtain, as in proper Wadſets and Tacks hat may fall under the Value of the Annualrent: But where the Debtor ands obliged, any accidental Risk by his turning inſolvent will not excuſe the aking more than the ordinary Annualrent.

The Lords ſeem'd to be clear that the Bond was uſurious: But found the enalty of Uſury taken off by the Indemnity.

Eodem Die.

THE Lords ordained the Advocates for the Poor to be named yearly in *November* for the ſubſequent Year, and thoſe named to continue till others be put in their Place: And any Advocate who begins with a Poor Cauſe, to continue therein *uſque ad Sententiam*, or till it be brought to a Concluſion.

January 28, 1709. William M‘guffock *of* Ruſco *and his Lady, againſt* David *and* James Blairs, *Sons of the ſecond Marriage to* Hugh M‘guffock *the ſaid* William*'s Father.*

H*Ugh Blair* alias *M‘guffock* of *Ruſco* in his Contract of Marriage with Miſtreſs *Margaret Dumbar*, Daughter to Sir *David Dumbar* of *Baldoon* his ſecond Lady, provided her to a Liferent Annuity of 1000 Pound Scot and the Children of the Marriage to 50000 Merks. Thereafter in Au 1695, in a Contract of Marriage betwixt *William M‘guffock* his eldeſt Son o the firſt Marriage, and Miſtreſs *Elizabeth Stuart* Daughter to the Laird o *Ravenſtoun*, he diſponed the Eſtate of *Ruſco* in Favours of *William* and th Heirs-male of the Marriage, with the Burden of 45000 Merks of Debt and obliged himſelf to Warrand the Lands diſponed to be worth 800 Merks of yearly Rent, and burdened his other Eſtate with makin the ſame good and effectual, in caſe the Rent of the Lands diſponed fel ſhort. *Hugh M‘guffock* after his eldeſt Son's Contract, before his Marriage entred into a Tranſaction with him: Whereby the Father gave him ſome Land and Moveables not contained in the Contract; And the Son obliged himſelf to pay all his Father's juſt and lawful Debts, and diſcharged the Obligement to make the Lands diſponed to him worth 8000 Merks yearly and the Father, with Conſent of his Son the Bridegroom, diſponed to *David* and *James Blairs* two Sons of the ſecond Marriage under Pupillarity at the Time, ſome Lands out of which the Father ſtood obliged to make thoſe diſponed to the eldeſt Son worth 8000 Merks of Rent. *William M‘guffock* now of *Ruſco* raiſed Reduction of the Diſpoſitions to *David* and *James Blairs*, as granted *contra Fidem Tabularum nuptialium.*

Anſwered for the Defenders. They were Creditors by their Mother's Contract of Marriage in 50000 Merks, in Prejudice of which Proviſion the Father could do no voluntary gratuitous Deed in Favours of his eldeſt Son of the firſt Marriage, but what not only they might quarrel upon the Act of Parliament 1621; But did ſubject him, who was *alioqui ſucceſſurus* paſſive, to the Payment of their previous Debt: For by our Law and Prattick, a Diſpoſition of Heretage to an eldeſt Son even in his Contract of Marriage is reckoned *Præceptio Hæreditatis*, and inſers the paſſive Title of *Succeſſor Titulo lucrativo poſt contractum Debitum*: Seing, tho ſuch a Contract of Marriage be onerous *quoad* the Wife's Liferent, it is lucrative and for Love and Favour, in ſo far as concerns the eldeſt Son, *Stair* §. 3. *Title lucrative Succeſſor.* 2. Tho any Deed in Favours of the Father might be reduced as *contra Fidem Tabularum nuptialium*, the Deeds quarrelled muſt ſtand: Becauſe, made to the Defenders who had no Acceſſion to the Fraud, which is perſonal in the Father, and no *Vitium reale.* A Ground of Reduction upon Fraud cannot militate againſt innocent third Parties acquiring for onerous Cauſes, *July* 16, 1672, *Duff* contra *Fowler*: And the Defenders (who were no ways Partakers of their Father's Fraud, yea by Reaſon of their Non-age incapable to know any Thing of the Tranſaction) have the Diſpoſitions in Implement of the Proviſion in their Mother's Contract of Marriage, which is a moſt onerous Cauſe.

Replyed for the Purſuers. It is irregular and incongrous *in hoc Statu*, to argue concerning the Purſuer's being liable perſonally for the Debt claimed by the Defenders: Becauſe, the preſent Queſtion is not about the Cauſe of the Deed, for which the Defenders may purſue as accords, but the Reduction of the Deed it ſelf made fraudulently *contra Fidem Tabularum nuptialium*, which was reducible in the Father's Lifetime, when the Purſuer could neither really, nor by Fiction be his Heir; *Et quod ab Initio non valuit, Tractu Temporis non convaleſcit.* 2. Albeit the Defenders are not preſumed to have been conſcious of their Father's Deed in their eldeſt Brother's Contract of Marriage; His Knowledge and Deed is to be reputed theirs, who were Pupils under his legal Adminiſtration: Becauſe, *Nemo debet ex alieno Dolo lucrari.* And albeit a Tutor's Fraud cannot be a Ground to take from his Pupil what is already his Property; Yet *Dolus Tutoris nocet Pupillo in eo Negotio in quo Jus acquirit Pupillo*, L. 10. §. 5. ff. *Quæ in Fraudem Creditorum.*

By

y the ſame Analogy of Law, the Oath of a Wife *Præpoſita Negotiis* proves gainſt and prejudiceth her Husband, *December* 7, 1675, *Dallingtoun* contra *kenzie*, obſerved by *Dirletoun*. Yea, *July* 21, 1668, *Paton* contra *Paton*, being communed at a Contract of Marriage, That the Son ſhould not e ſubject to Debts or Childrens Proviſions; The Lords reduced a Bond aken from him betwixt the Contract and Marriage by the Father, in Favours of Creditors or other Children, as depending upon the Father's Deed, *ontra Fidem Tabularum nuptialium*. So that there is an evident Diſtinction etwixt directly acquiring to a third Party, by one who *in ipſo Negotio in mala Fide*; and a third Partie's purchaſing *bona Fide* for an onerous Cauſe, from a Perſon, what he *mala Fide* had formerly acquired to him- lf.

Duplyed for the Defenders. The Right to them for onerous Cauſes cannot e taken from them by the Fraud of their Adminiſtrator in Law, who was ebtor in the very Deed, and obliged to implement their Mother's Contract: Which is not like a fraudulent Deed done by a Tutor in Favours of is Pupil, to whom he is not Debtor. And the Deciſion, *Paton* contra *Pa- n* is not to the Purpoſe, for there the Bond was taken by the Father from s Son without a preceeding onerous Cauſe.

Triplyed for the Purſuers. A Tutor who is Debtor to his Pupil, acquiring him fraudulently in Satisfaction of that Debt, puts his Pupil in a worſe Caſe, an if the Tutor were not Debtor: Becauſe, a Tutor who is Debtor is un- r ſtronger Temptation to do ſo, than one who is diſintereſſed; And a utor Bankrupt cannot by Partiality prefer his Pupil to other Creditors. Tutor who is alſo Debtor to his Pupil, *duplicem Perſonam gerit, et ego on ſum ego*; And tho he can't authorize his Pupil *in Rem ſuam*; Yet when *qua* Debtor *mala Fide* diſpones to his Pupil, *perinde eſt*, as if he did *mala ide* acquire from another for his Pupil, which Acquiſition would be reducible pon the Tutor's Fraud.

The Lords repelled the Defence, That the Diſpoſition in Favours of the hildren of the ſecond Marriage, was made by the Father with the Purſuer's onſent, for an anterior onerous Cauſe in their Mother's Contract of Marriage, ſo far as would extend to the Sums provided by the ſaid Contract: In Re- pect of the Obligement in the Purſuer's Contract of Marriage, to make up e Eſtate diſponed to be worth 8000 Merks of yearly Rent out of the Fa- er's other Lands and Eſtate; And therefore ſuſtained the Reaſon of Re- uction.

February 4, 1709. *Sir* Alexander Cuming, *contra* John *vere* Kennedy.

THe Lords, *December* 10, 1708, having found Sir *Andrew Kennedy*'s Deprivation upon Malverſations, had the ſame Effect as his natural Death, againſt his Son *John* vere *Kennedy*: He objected that Sir *Alexander*'s Gift was null, Becauſe the Warrant thereof was razed and vitiated in two Places; Theſe Words *Paſt per Saltum* being ſuperinduced, and a Clauſe therein, *Whereby Her Majeſty doth annul Sir* Andrew *and his Son*'s *Right upon Malverſations* ſcored, and the Margin oppoſite thereto ſubſcribed by the Keeper of the Great Seal, bearing, *That ſuch Lines were deleted by my Chancellor*'s *Order, with Conſent of Sir* Alexander Cuming.

Alledged for Sir Alexander Cuming, 1. Seing the Queen doth not impugn Sir *Alexander*'s Gift, but on the contrary hath authorized his Purſuit by a Letter, and given him a new Gift ratifying the former, and diſpenſing with any Nullities or Informalities therein: It is *Jus Tertii* to Mr. *Kennedy* to Object; any pretended Right he had being terminated and out of Doors by the Decreet of Reduction againſt his Father. 2. *Et ſeparatim*, ſuperinducing the Words *per Saltum* is an Objection of no Moment. Seing, 1. The equivalent Words are there not ſuperinduced, viz. *Without paſſing any other Seal or Regiſter*. 2. The Words deleted in the Warrant being not material, and in Sir *Alexander Cuming*'s Favours, and the Docket, which is an Epitome of the Gift, being full and entire: The Chancellor (who is Judge of what might be ſuperfluous) might warrantably ſcore the ſame. For in Countries where the Chancellor is remote from the Sovereign, he (as the Exchequer doth with Writs directed to them) may lawfully ſcore what is ſuperfluous, and not in the common Stile, without reporting the Matter to the Sovereign. It was ordinary for the Exchequer to ſtrike out even ſubſtantial Parts of Signatures, when quarrelled by third Parties having Intereſt: And when the Queen truſts the Chancellor (in Place of the Exchequer) with the ſole Power of expeding the Signature *per Saltum*, he has the ſame diſcretionary Judgment they would have had for that Effect; Yea, the Etymology of the Word from *Cancellare* imports as much.

Anſwered for Mr. Kennedy. 1. Any Perſon who has Intereſt in the Subject conveyed by a Gift, may competently object any Nullity therein: And the new Gift can't ſupport the firſt null Gift, becauſe procured after Mr. *Kennedy* had pleaded his *Jus quaſitum* by the Nullities. 2. 'Tis too nice to diſtinguiſh here betwixt what is material, and circumſtantial. By our Conſtitution, the Chancellor is *Cuſtos magni Sigilli* without any judicative or correcting Faculty: His Buſineſs being only to append the Seal upon Her Majeſty's Order; or at moſt if he find any Thing contrary to Law, the Rights of the Crown or the Subject, he may delay to affix the Seal till Her Majeſty be firſt acquainted. Mr. *Kennedy* thinks himſelf not obliged to Debate whether he was prejudiced by the Scoring or not: Seing the Writ is not the ſame as it paſt Her Majeſty's Hand, and conſequently null. There is no Parallel betwixt the Chancellor's Office and the Exchequer: Becauſe, when any Thing paſſeth Her Majeſty's Hand to be reviſed by the Exchequer, which is an eſtabliſhed Court of Judicature, it bears expreſly to be with Conſent of the Lords of Treaſury and Exchequer; Whereas no Grant under the Great Seal bears to be with Conſent of the Chancellor or Keeper. So ſacred is the Royal Subſcription, which no Man ſhould touch out of the ordinary and known Form: That *Gray* of *Hayſtoun*, *Anno* 1677, having acquired a Part of a Barony holding Ward of the King, and documented the Proportion of his Lands to the whole Barony, and procured a Signature blank in the Taxt-ward-duties; he was fined in 1000 ℔. *Sterling*, and the Gift anulled, for his filling up the Blank with the true Duties.

Replyed for Sir Alexander Cuming. Tho' no Perſon dare add to the Royal Will without a new Allowance, the Chancellor may ſcore what is ſuperfluous, without vitiating the Reſt: For Deletion doth not anull a Writ, where the Words ſcor'd can be read, or where it appears from what preceeds and follows, that they are not ſubſtantial, or the Margin authorized doth mention what is deleted, *Stair Lib.* 4. *Tit.* 42. *N.* 19. *Hayſtoun*'s Caſe is not to the Purpoſe: For he preſumed to add his own Taxt-duties with his own Hand, withour any Authority, and without telling how it was done.

The Lords repelled the Objections againſt Sir *Alexander Cuming*'s Gift.

Then it was alledged for Mr. Kennedy. Suppoſe his Father's Deprivation be found equivalent to his natural Death, the Son's Right is not thereby terminated; but ſurvives during Her Majeſty's Pleaſure.

Anſwered for Sir Alexander Cuming. The Queen hath ſufficiently ſignified Her Pleaſure to remove Mr. *Kennedy* from the Office, by Her new Gift in Favours of Sir *Alexander Cuming*.

Replyed for Mr. Kennedy. Her Majeſty cannot be underſtood to have re-

revoked his Gift, unleſs ſhe had declared Her Intention to revoke the ſame' after it became a Gift during Pleaſure, by the Lords Interlocutor, finding the Father's Deprivation equivalent to his natural Death: Whereas Sir *Alexander's* new Gift was prior to the ſaid Interlocutor, and ſo contrary to the Claim of Right, *viz.* A diſpoſing of *John* vere *Kennedy*'s Forfeiture before Sentence.

The Lords found, That the Queen's Gift to Sir *Alexander Cuming*, tho' nterior to the Interlocutor, finding Sir *Andrew*'s Deprivation to be equivalent o his natural Death, did vacate and extinguiſh *John* vere *Kennedy*'s Right: Becauſe, the ſaid Interlocutor was declaratory, and ought to be drawn back o the Date of Sir *Andrew*'s Deprivation, which preceded Sir *Alexander*'s laſt Gift.

Eodem Die. *The Lady* Cardroſs, *contra* John Hamilton *of* Pumpherſtoun.

IN the Proceſs of Removing at the Lady *Cardroſs*'s Inſtance, againſt *Pumpherſtoun*, a joint Probation being allowed for proving Meliorations: The Defender objected againſt ſome of the Witneſſes adduced by the Pur-uer, That they were Cottars or Sub-tenants to her moveable Tenants, and o *equally* inhabile Witneſſes as the moveable Tenants themſelves: Seing he Heretor hath the like Aw and Influence over both, and may remove hem at Pleaſure; yea, may remove the Sub-tenant or Cottar, with leſs Prejudice than the immediate Tenant, whoſe Removal may occaſion the Lands to lie waſt. 2. He objected, That one of the Witneſſes was the Lady's domeſtick Servant ſince he was cited to depone, and therefore cannot be received: Becauſe, it's preſumed the ſervile Aw he was in Uſe o be under doth ſtill remain; And probably he was induſtriouſly put ut of his Service to habilitate him to be a Witneſs for her. Our Law uards againſt ſuch Practices: For a moveable Tenant getting a Tack after Commencement of a Proceſs, is not ſuſtained as a Witneſs therein; Becauſe, t's preſumed he got his Tack in that View.

Anſwered for the Purſuer. Sub-tenants or Cottars are receiveable as Witneſſes, becauſe not reprobated by Law or Cuſtom. Whatever an Heretor ath Power to do in turning out Sub-tenants or Cottars, indirect and ſingular Methods are not to be preſumed; or if ſuſpected, may be cleared by he Oath of the Adducer or Witneſſes. 2. No Perſon *ſui Juris* was ever rejected from witneſſing in the Cauſe of his former Maſter.

The Lords repelled the Objections, and ſuſtained the Witneſſes.

Eodem Die. William Fead *Drover*, *contra* George Maxwell *of* Dalſwintoun *and others.*

IN *William Fead*'s Contract of Marriage with *Helen Watſon* Daughter to *John Watſon* in *Dalſwintoun*; John Watſon *obliged himſelf to pay to* William Fead *his Heirs, Executors or Aſſignies,* 900 *Merks of Tocher betwixt and a certain Term, and further conſtituted the ſaid future Spouſes and the Heirs of the Marriage, which failing, the ſaid* Helen *her Heirs or Aſſignies, his Aſſignies to all Goods and Gear belonging to him the Time of his Deceaſe.* After the Death of *John* and *Helen Watſons*, *William Fead* raiſed a Proceſs againſt *John*'s Relict, *Dalſwintoun*, and others his Debtors, libelling and concluding Exhibition, Delivery and Payment of all *John Watſon*'s Debts and Effects in their Hands.

Alledged for the Defenders. The Husband could claim no more than the

Liferent, the Wife being Fiar, in ſo far as, the laſt Termination is in Favours of her Heirs or Aſſignies, and the Subject came by her.

Anſwered for the Purſuer. According to the Opinions of my Lord *Stair, Inſtit. Lib.* 3. *Tit.* 5. *§. Heirs Pag.* 481. and *Dirletoun, Doubts Pag.* 68. *and* 69. *and* 184. Where there are diverſe Degrees of Subſtitution of Heirs of diverſe Perſons, and a Wife and her Heirs in the laſt Place; the Perſon whoſe Heirs are provided for in the firſt Place, is underſtood to be Fiar, and theſe *in ſecundis Tabulis*, in a remote Degree, to be only Heirs of Proviſion failing the former.

The Lords found the Wife to be Fiar: Not becauſe the Subſtitution did terminate upon her Heirs, but becauſe it was in Favours of her Heirs and Aſſignies, and none but who is Fiar can aſſign.

Eebruary 5, 1709, *The Magiſtrates of* Lanerk *contra the Earl of* Murray.

IN the Competition for the vacant Stipends of the Pariſh of *Longbride*, betwixt the Town of *Lanerk*, as having a Gift thereof from the Treaſury, and the Earl of *Murray*, who in Conſequence of his being Patron of the Church of *Alves*, whereof the Parſon was Patron of *Longbride*, pretended to the Right of Patronage of *Longbride*, according to that Rule of the Canon Law, *Patronus Patroni mei, eſt Patronus meus*: The ſame way as by our Cuſtom, *Vaſſalus Vaſſali mei, eſt Vaſſalus meus.* Becauſe, (as *Craig* obſerves) when the immediate Vaſſal fails, the mediate Vaſſal aſcends up in his Place, and holds by the ſame Tenure of the paramount Superior The Lords, without Regard to the Brocard, found that the Earl cannot pretend to the Right of Application of the vacant Stipends of *Longbride*, unleſs he inſtruct that he hath particular Right of Patronage of that Church. Albeit it was alledged for the Earl, That probably the Curacy of *Longbride* (which is a Pendicle of the Parſonage of *Alves*) was doted out of the Rents of the greater Benefice; and thereby the Earl, as Patron of the latter, was Entituled to the Patronage of the former, by the Rule *Patronum faciunt dos*, &c. and the Patron of the firſt Miniſter of *Haddingtoun*, was found to be Patron of the ſecond, tho' provided by the Town.

February 8, 1709. *Colonel* John Erskin *of* Carnock *contra Sir* George Hamilton.

IN the Competition betwixt Colonel *John Erskin* and Sir *George Hamilton* (mentioned *ſupra*, December 18, 1708,) for the Right of the Lands of *Tulliallan*, The Colonel founded on an Appriſing led at the Inſtance of *Duncan Lindſay*, againſt Sir *John Blackadder* the Heretor, and an Infeftment thereon under the Great Seal *Anno* 1633, conveyed by *Duncan Lindſay*'s Heir to the Earl of *Kincardin*, the Colonel's Author in the Year 1676, who, upon the Heir's Reſignation, obtained that ſame Year a Charter under the Great Seal. Sir *George Hamilton* produced an Appriſing led by *Patrick Wood* in *Anno* 1637, on a Contract of Salt betwixt Sir *John Blackadder*, *Patrick Wood*, *James Loch*, and other ſix Merchants, who, for the Price thereof, were all Infeft in *March* 1634, and aſſigned their Rights, with ſome other Debts, in Truſt to *Patrick Wood*, that he might lead an Appriſing for their reſpective Behoof: To *James Loch*'s eighth Share, of which Appriſing Sir *George Hamilton* derives Right from Sir *Robert Miln*, to whom *James Loch* diſponed it.

Sir *George Hamilton* pleaded his Preference to Colonel *Erskin*, thus, *Duncan Lindſay* diſponed his Appriſing in the Year 1634, to *Patrick Wood*, who had a partial Right to the Reverſion, which Diſpoſition, containing Procuratory of Reſignation and Precept of Seaſin, being regiſtred in the Regiſter of Reverſions, was 14 *January* 1704, found to have the Effect of a Redemption and Renunciation of the Appriſing, for ſecuring *Wood* the Reverſer's Right, againſt all poſterior Rights of the Lands diſponed, granted by or otherways derived from *Lindſay* the Diſponer: So that the poſterior Diſpoſition by *Duncan Lindſay*'s Heir in Favours of the Earl of *Kincardin*, was wholly null as to all Intents and Purpoſes, not only in ſo far as the ſame might prejudice *Patrick Wood* or his Heirs, but alſo in Competition with Sir *George Hamilton*, or any other Perſon having a ſeparate Intereſt in the Lands which are the Subject of the Competition. Becauſe, after Redemption made by *Patrick Wood* the Reverſer, nothing remained with *Duncan Lindſay* the Appriſer, that he or his Heirs could tranſmit to any other: For of all real Rights, Appriſings within the Legal are moſt eaſily extinguiſhed, *viz.* by Intromiſſion with the Rents of the Subject, or Payment of the Debt inſtructed by ſimple Diſcharges, *&c.* without Neceſſity of formal Reſignation or Renunciation in Favours of the Reverſer; And *bona Fides non patitur ut idem bis exigatur.*

Anſwered for Colonel Erſkin. 1. *Patrick Wood* had no Right to the Reverſion *Anno* 1634, when he took and regiſtred his Diſpoſition (being only a Creditor to *Blackadder* the Reverſer by an Infeftment for Security) and could not uſe any Order of Redemption till the Year 1637, when he came in *Blackadder*'s Place, by appriſing the Reverſion. For to allow the Right of redeeming to Creditors before they affect the Reverſion, were to make all ſecond Appriſings needleſs: Seing nothing but the Reverſion is carried by the ſecond Appriſing. But *eſto Patrick Wood* had been the Reverſer, when a Perſon having Right to the legal Reverſion, redeems or pays, the firſt Right is not diminiſhed or made worſe, but conveyed to him *tanquam cuilibet*, and becomes irredeemable in his Perſon. For otherwiſe Creditors ſhould be in a worſe Caſe than apparent Heirs are by the Act of Parliament 1661, in whoſe Favours the legal Reverſion expires in Ten Years, which is abſurd. And by the *Act* 22. *Par.* 1. *Seſ.* 3. *Ch.* 2. ſecond Appriſers redeeming and taking Rights to firſt Appriſings, are noways prejudiced of their Right to the firſt Appriſing: But on the contrary, it hath further Privileges in their Perſon, than it would have had while it continued with the firſt Appriſer. Now can it be imagined that *Patrick Wood* by taking a Conveyance to himſelf, intended to cut off the Legal in Favours of the Debtor, or other Creditors he was noways obliged to? Which is not only againſt the Maxim, *Res inter alios acta aliis non prodeſt*, but would caſt looſe moſt of the Purchaſes in *Scotland*, made up by Perſons, who, having partial or leſs preferable Rights, bought in the Rights of preferable Creditors. 2. The Diſpoſition in Favours of *Wood*, never having been completed by Infeftment, did not denude *Duncan Lindſay*, who ſtood infeft upon his Appriſing: And therefore his Heir might validly tranſmit the ſame to the Earl of *Kincardin*, or any other, *June* 20, 1676, *Brown contra Smith.* And my Lord *Stair* obſerves *Lib.* 3. *Tit.* 1. *N.* 21. That tho' Backbonds, Aſſignations, or even Diſcharges granted by Appriſers within the Legal might be good againſt their ſingular Succeſſors by Infeftment, if ſuch Deeds be rendred litigious within the Legal; Yet after expiring of the Legal, Infeftments upon Appriſings are in the ſame Caſe, as Infeftments upon irredeemable Diſpoſitions. 3. If the Diſpoſition to *Wood* could operate a Redemption, it could only be effeiring to his Proportion and Intereſt to redeem, which was but in Security of an eighth Part of the Sums in his Appriſing. As a Wife's regiſtred Renunciation of her Liferent Infeftment in Favours of a poſterior Wadſetter or Annualrenter, would only ſecure the Wadſetter or Annualrenter againſt ſingular Succeſſors deriving Right from the Wife: But after ſuch a Wadſetter or Annualrenter is paid, the Husband's Heir, or his other Creditors, could not debar the Wife or her Aſſigny from poſſeſſing. And one of three Cautioners taking Aſſignation to the Debt, and before Intimation thereof to the principal Debtor, or other Cautioners, another completing a Right to it by an intimated Aſſignation, or Decreet of Furthcoming upon Arreſtment: The Lords would ſave the Cautioner *quoad* his own Part wherein he was Debtor, as to which the Aſſignation had the Effect of a Diſcharge, but would prefer the Arreſter, or ſecond Aſſigny for the other two Cautioners Shares. And the Regiſtration of the Diſpoſition in Favours of *Wood*, was only for Publication, in ſo far as the Diſpoſition was virtually an Extinction and Renunciation for ſecuring *Wood*'s Right. 4. *Patrick Wood* might, notwithſtanding the Regiſtration, have paſt a Charter, and been infeft upon the Diſpoſition: And whatever the Diſpoſition could operate in his Favours, it muſt have the ſame Effect to prefer Colonel *Erskin*, who by Progreſs derives Right from *Patrick Wood*, who diſponed what Right he had to the Earl of *Kincardin*. Seing the ſhorteſt Way for *Patrick*, who never was infeft, to transfer *Duncan Lindſay*'s Diſpoſition, was either to get another Right from *Lindſay* or his Heirs, in Favours of the Perſon to whom he diſponed his own, to ſave the Pains of infetting himſelf, that he might be qualified to diſpone; or to ſubſcribe Conſenter to *Lindſay*'s Diſpoſition. And ſo it is, that Colonel *Erskin* has *Wood*'s perſonal Right by the Diſpoſition, and *Lindſay*'s real Right by Infeftment conveyed to him; and thereby as good Right to *Lindſay*'s Appriſing, as if he had never diſponed to *Wood*, but only to him, or as if *Wood* had been infeft on the Diſpoſition, and denuded in his Favours.

Replyed for Sir George Hamilton, 1. The Infeftment granted by Sir *John Blackadder Anno* 1634, to *Patrick Wood* and the other Co-partners, did include an Aſſignation to any Right of Reverſion competent to Sir *John*. The 22. *Act of the* 3. *Seſſ. of K. Charles the ſecond's firſt Parliament*, is not applicable to this Caſe: For there is a great Difference betwixt an Appriſer acquiring Right to a prior Appriſing within the Legal, and one having Right to the Reverſion by the Diſpoſition. Two Appriſings unexpired might very well conſiſt in one Perſon, and the Creditor take the Benefit upon the Legal's expiring before the common Debtor redeem: But where one having Right to the Reverſion by Diſpoſition and Infeftment, acquires an Appriſing within the Legal; The Appriſing is abſorbed in his Right of Property, and could no more ſubſiſt in his Perſon as a diſtinct ſovereign Right, than it could have ſubſiſted in Sir *John Blackadder*'s Perſon, had he acquired the Appriſing before he was denuded by the Diſpoſition and Infeftment in Favours of *Wood* and his Co-partners; during the ſtanding of whoſe Right (tho' redeemable) Sir *John* had only the Right of Reverſion from them. Beſides, in the conventional Right of Reverſion diſponed by Sir *John Blackadder* to the Co-partners in the Salt Contract, a Truſt was implyed, that the Receiver ſhould not make Uſe on't to exclude the Granter's own Right, or to diſappoint any Quality or Condition in the Diſpoſition, *viz.* That the Effect thereof ſhould ceaſe upon Payment of the Sums for Security whereof it was granted. And therefore the Appriſing acquired by *Wood* while he had the Reverſion, could only be ſuſtained as an acceſſory Security at furtheſt for the Sums truly reſting to *Wood*, and paid by him to *Duncan Lindſay* for the Right of Appriſing. 2. Tho' a ſimple Diſpoſition, being only a perſonal Right, would not convey the Infeftment, or denude the Granter, in Prejudice of a poſterior Diſpoſition completed by Infeftment: Yet Payment made by a Reverſer, in Satisfaction of the Sums in the Appriſing diſponed, with Publication of the Diſpoſition and Renunciation in the Regiſter of Reverſions, did intirely extinguiſh the Appriſing. 3. It doth not alter the Caſe, whether the Reverſer's Right was total or partial: Seing he had an Infeftment of Property in the whole Lands *pro indiviſo*; And albeit Payment of n Appriſing may be made in Part, there can be no Redemption in Part. Whether *Patrick Wood* could have retained *Duncan Lindſay*'s Appriſing as n irredeemable Right or not, it is certain that he neither acquired, nor deſigned to retain it as an expired Appriſing: In that he did not take Infeſtment hereupon, but did regiſter the Diſpoſition and Renunciation in the Regi- er of Reverſions, to publiſh to all the Lieges the Extinction thereof, and that was no longer to be conſidered as an Appriſing that could become Irredeem- ble, either againſt Sir *John Blackadder* the Debtor, or any other deriving Right om him to the Subject. Eſpecially conſidering, that, as ſaid is, there was a ruſt implyed in Sir *John*'s Diſpoſition to *Wood*; and whatever *Wood* acted in elation to the Subject of the Salt-contract, was to accrew to all the Partners cluded in the ſame Infeſtment, granted to *Wood* and them in Security of their ebts *pro Indiviſo*. Conſequently, *Wood* could not convey *Duncan Lindſay*'s ppriſing to the Earl of *Kincardin*, but as it ſtood in his own Perſon, that not as an expired Appriſing, or an irredeemable Right, but only as a ſimple deemable Security for Two thouſand four hundred Merks he paid to *Dun- n Lindſay.*

Duplyed for Colonel Erskin. In the Year 1634, when *Patrick Wood* got e Diſpoſition from *Lindſay*, there was no further Tie betwixt him and the her Creditors in the Salt-contract, ſave only, That their Securities were in e ſame Paper; Which inferred no Communication of Right, but only ſaved e Pains of writing the Contract, and what followed upon it eight Times ver: For, *quot ſunt Perſonæ, tot ſunt Obligationes.*

The Lords found, That *Duncan Lindſay*'s Appriſing being conveyed in Fa- ours of *Patrick Wood*, and regiſtred in the Regiſter of Seaſins and Reverſions, ny ſubſequent Diſpoſition by *Lindſay* the Appriſer, or his Heirs, in Favours f the Earl of *Kincardin* or his Authors, was null as to all Effects: But found, hat *Patrick Wood* could lawfully diſpone the Appriſing to the Earl of *Kin- rdin* or his Authors, to ſubſiſt as a Security for the Sums truly paid.

Eodem Die. John Shields *Brother and Executor to Mr.* Alexander Shields *late Miniſter at St.* Andrews, *againſt the Magiſtrates of that Burgh.*

IN the Action at the Inſtance of *John Shields* againſt the Magiſtrates of St. *Andrews*: The Lords found that *Ann* was due to the Purſuer as neareſt of Kin to Mr. *Alexander Shields* the Defenders late Miniſter; albeit the Defunct's Stipend was not payable out of the Tithes, but by Contribution of the Burgh conform to an Act of the Town Council. In Reſpect the Act of Parliament 1672, ſubjects all Perſons to the Payment of *Ann*, who are liable to pay Stipend, without diſtinction of Burghs Royal: And the Reaſon of the Law, *viz.* Becauſe Miniſters generally die poor, holds equally in Stipendiary as in beneficed Miniſters.

February 9, 1709. Robert Watſon *of* Muirhouſe *and his Tutors, againſt* Robert Smith *Merchant in* Edinburgh.

IN the Action at the Inſtance of *Robert Watſon* and his Tutors, againſt *Robert Smith*, for Payment of 402 Pound 16 Shilling *Scots*, contained in a Bill drawn by the deceaſt *Robert Watſon* of *Muirhouſe* the Purſuer's Father, and accepted by the Defender.

Alledged for the Defender. He had paid the whole Bill except 63 Pound 16 Shilling *Scots* to the Purſuer's Father, as is clear from the ſeveral Payments marked on the Foot of the Bill, and the Ballance of Sixty three Pound ſtated due in Figures, which he offered to prove by Witneſſes, was the Defunct's Hand-writ; And further, he offered to prove by Witneſſes, That he had made Payment conſorm to the ſtated Accompt. So the Lords in a like Caſe, *February* 19, 1708, *Miller* againſt *Bonnar*, found an Accompt neither ſubſcribed nor written in a Compt-book, but on a Scroll lying by the Writer at his Death, probative againſt his Heirs.

Replyed for the Purſuer. 1. The Accompt ſubjoined to the Bill, might have been relative to ſome other extraneous Affair, ſince it doth not expreſly relate to the Bill. 2. The proving Figures to be Holograph is impoſſible, and of dangerous Conſequence. 3. The Deciſion betwixt *Miller* and *Bonnar* differs *toto Cælo*, for in that Caſe there was a holograph Accompt of Debit and Credit: Whereas here there is no Mention of Payment made to the Defunct, but only ſome Figures ſet down, which ſeems rather a Scheme how Payment was deſigned by the Debtor in the Bill; Eſpecially conſidering that he hath no Receipt.

Replyed for the Defender. The deceaſt *Robert Watſon* acted herein like other rigid Creditors who uſe to note Payments made on the Bill, but not to grant Receipts, induſtriouſly to oblige the Debtor, out of Fear to be charged for the whole, to pay the Ballance more quickly. 2. Figures being mix'd with ſome Words may be proved to be Holograph, as well as Writ: The former being capable of as many Varieties by their peculiar Strokes, as Letters. 3. The Accompt exactly agreeing with the Sum in the Bill, and the Intereſt ſtated accordingly, doth clear that the one relates to the other: *Hoc maxime attento*, that it appears from the Defunct's Books, that he had no other Dealing with the Defender for ſeveral Years before; And it is not probable that he would have inſert an extraneous Accompt upon a principal Bill.

The Lords ſuſtained the Defence: In Reſpect the Bill whereupon the Accompt was ſtated, was ſtill in the Poſſeſſor's own Hand.

Eodem Die. Lydia Forbes *and* David Auchinmouty *of* Drumeldry *her Husband, againſt* Iean Forbes *and* John Monro *Chirurgion, her Husband.*

IN the Proceſs at the Inſtance of *Lydia Forbes* and her Husband againſt *Jean Forbes* and her Husband: The Purſuers condeſcended upon Women Witneſſes, for proving that Captain *Charles Forbes* was married to *Jean Price* the ſaid *Lydia*'s Mother, or at leaſt that they were habite and repute married Perſons.

Alledged for the Defenders. Women were excluded from Witneſs-bearing in all Caſes by our moſt ancient Law, *Cap.* 34. *Rob.* 1. And Exceptions from this have been ſuſtained by Cuſtom, allennerly in Caſes where Women only uſe to be preſent, or *in Criminibus domeſticis*, where there is Scantneſs of Proof: But in Caſes meerly civil, where Men uſe to be preſent as well as Women, the Lords don't admit Women Witneſſes, *July* 21, 1675, *Wilkie* againſt *Moriſon*. *Dirletoun* in his *Queſtions*, *Page* 225. ſays, That of fourty or fifty Proceſſes of Divorce for Adultery theſe hundred Years, Women Witneſſes were not received; And they were rejected by the Canon Law, *de Verb. Signif. Cap.* 10.

Anſwered for the Purſuers. Howbeit Women are not regularly admitted to give their Teſtimonies in every Caſe, they are not altogether rejected: And *Cauſa Matrimonii* is excepted, *Cap.* 1. *De Conſanguinitate*. Again, Women Witneſſes being always admitted for proving Grounds to diſſolve Marriage, or to ſeparate *a Menſa & Toro*: There is more Reaſon to ſuſtain their Teſtimonies for the Conſtitution of Marriage, which is more Favourable. 2. In a late Caſe betwixt Mr. *John Buchanan* and Mr. *Thomas Paterſon*, the Lords admitted

mitted Women Witneſſes to depone upon the Qualifications of Mr. *Thomas*'s liciting a Diſpoſition from his Wife, and making himſelf Maſter thereof: Con- equently, Women may more eaſily be allowed to depone either as to actual Marriage, or as to Cohabitation, or entertaining one another at Bed and Board, where Women-ſervants are neceſſarly preſent, and may be preſent at Enter- ainments, Viſits, or otherways. 3. The civil Law admitted of Women Wit- neſſes, except in the moſt ſolemn Caſe of Teſtaments: And our Law doth ot exclude them from any preſumed Defect in their Memories or Judgments: ut, as Sir *George Mackenzie* obſerves, becauſe the Law was unwilling to rouble them, and thought that thereby they might learn too much Confi- ence, and become too familiar with Men and Strangers, if they were neceſſi- ated to frequent Courts on all Occaſions.

Replyed for the Defenders. Tho' Carriage and Converſation within Doors ay be called domeſtick, yet it cannot be ſaid to be that to which Women ſe only to be preſent. 2. Tho' the Lords may, *ad indagandam Rei Veritatem*, xamine Women upon one ſingle Act of its own Nature hard to be expiſcat- d, and which perhaps a great Deal of Care is taken to cover, as in the Caſe f *Buchanan* and *Paterſon*, that is not to be extended to the examining Wo- en upon a long Series of Acts without any Care to conceal them, which arce could eſcape the Knowledge of Strangers. Now, Marriage, or habite d repute married, are Things moſt publick, which, in the Opinion of the octors, ought to be proved *per Turbam Teſtium, Maſcardus de Probationibus oncubitus*, 1017. As to the Purſuers Citation out of the Canon Law, the ueſtion there is not anent actual or preſumed Marriage, but anent the prov- g Conſanguinity *in Cauſa Matrimonii*, which the Law allows to be proved y Parents *utriuſque Sexus*; Becauſe, *Qui melius recipi debent, quam qui melius iant*? 3. There is a great Difference betwixt the proving of Grounds infer- ng the Diſſolution of Marriage or *Separatio Menſa & Thori*, which are nown only to the People in Family, and carefully concealed from Strangers; nd the Caſe of a voluntary Contract of Marriage, where habile Witneſſes ight and ought to have been called. 4. The Reaſon adduced by Sir *George ackenzie*, why Women Witneſſes are rejected, may perhaps not be the only ne, and probably *Infirmitas Sexus* was the principal Motive, ſince they are nked with *Pueri*, &c. But whatever was the Reaſon, *ita Lex ſcripta eſt*.

The Lords ſuſtained the Defenders Objection; and refuſed to ſuſtain Wo- en Witneſſes as habile to prove that Captain *Forbes* and *Jean Price* were arried, or habite and repute as married Perſons: Becauſe in Notorieties, *enuria Teſtium* cannot be preſumed.

February 11, 1709. *The Governour and Court of Directors of the Bank of Scotland, againſt the Commiſſioners of the Equivalent.*

THE Directors of the Bank, having, at the Deſire of the Privy Council, undertaken the Recoinage of all the current Coin of *Scotland*, upon the Conditions ſpecified in an Act of Privy Council; They received in the old Species from all Inbringers, for which they paid current Coin, and gave in the ſaid old Species to the Mint. As this was melted down and eſſayed in Preſence of the three Commiſſioners and Eſſay-maſter appointed for that End, the Bank was to receive a Certificate for the Loſs in Recoining, upon the Commiſſioners of Equivalent to be paid on Demand, and the Maſter of the Mint's Bond for the reſt, payable in Weight and Tale, in the Terms of the Act of Parliament 1686. There happened in the Coining ſometimes an Excreſce on the Tale of five or ſix Shillings or thereby in One hundred Pound, over and above the Sum contained in the Maſter of the Mint's Bond: Through its not being poſſible to keep every Piece of Mony to its due Proportion of Weight.

The Commiſſioners of the Equivalent being charged by the Bank to make Payment to them of 527 ℔. 7 ſh. 10 d. *Sterling*, as the Difference upon the Recoinage of the *Scots* and foreign Mony, with one Half *per Cent.* making in all 539 ℔. 9 ſh. 2 d. contained in a Certificate under the Hands of the Commiſſioners appointed by the Privy Council, for receiving in the old Mony: The Commiſſioners of the Equivalent ſuſpended upon this Reaſon, That the Bank was Debtor to them in a Sum exceeding the Charge, by the Excreſce of the Specie after Recoinage.

Anſwered for the Directors of the Bank. The Suſpenders have no Right to this Excreſcence, nor cannot upon Account thereof pretend Retention or Compenſation: Becauſe, had private Perſons imbraced the Privilege reſerved to them in the Bank's Agreement, and carried their own Mony to the Mint, and waited the Courſe of Recoining, they muſt have got their Certificates of Loſs inſtantly ſatisfied by the Commiſſioners of the Equivalent, without being queſtioned about the Excreſcence, or liable afterwards to quit it: And the Bank, by undertaking the Recoinage, came in Place of the private Perſons, who got their old Mony exchanged at the Bank.

The Lords found, That the Benefit by the Augmentation of the Tale, is to accrew to the Bank, as well as to any other private Proprietars of Bullion: And is not imputable *pro Tanto* in Payment of what is allowed in Satisfaction of the Loſs ſuſtained by the giving in, and giving out of the Mony.

February 15, 1709. James Forreſt *Merchant in* Edinburgh, *againſt* Mr. John Craig *Writer there.*

IN a Competition betwixt *James Forreſt* and Mr. *John Craig*; The Lords found a ſecond Extract of a Decreet of Adjudication at the Inſtance of *George Marſhal* Author to *Forreſt* Null, albeit conform to the Minutes: In Reſpect a firſt Extract in other Terms, and diſconform to the Warrant, had been judicially produced; and the ſecond was amended without Application to the Lords for that Effect.

February 19, 1709. Agnes Campbell *Shop-keeper in* Edinburgh, *againſt* James Campbell *of* Burnbank.

IN a Cauſe at the Inſtance of *Agnes Campbell*, againſt *James Campbell* of *Burnbank*, as Heir ſerved to *Mungo Campbell* his Father, for Payment of a Debt due by him to the ſaid *Agnes Campbell*.

Alledged for Burnbank. He ought to be aſſoilzied, becauſe he is ſerved *cum Beneficio Inventarii*, and the Inventory exhauſted by Debts.

Anſwered. *Burnbank* cannot claim the *Beneficium Inventarii*, becauſe Inventories were not given up by him, in the Terms of the Act of Parliament, before the Service.

Replyed. 1. The Service containing the ſpecial Lands to which the Heir was ſerved, is equivalent to an Inventory. 2. The Act of Parliament requires no more than that Inventories be given up within the *Annus deliberandi*, before the Heir intromet: As an Executor decerned in Moveables, may ſafely confirm and give up Inventory any Time within the Year. Inventories cannot always be given up at the Time of the Service, ſeing where Lands ly in ſeveral Shires, it is impoſſible that all the reſpective Sheriffs and Sheriff-clerks who muſt ſubſcribe the Inventories can be preſent at the Service: And here Inventories were made up, not only before the Heir intrometted, or was ited by any Creditor ; but alſo before his Service was completed by Infeſtment. 3. By the civil Law Inventories may be made up after the Service, . 26. *C. de Jure deliberandi.*

The Lords found *Burnbank* univerſally liable for the Debt.

February 23, 1709. *Earl of* Seafield, *againſt the Creditors of* Boyn.

IN the Declarator of ſingle and Liferent Eſcheat of Sir *Patrick Ogilvie* elder and *James Ogilvie* younger of *Boyn*, purſued by the Earl of *Seafield* : The Creditors alledged, That the Earl's Gift could not be declared, the xecution of the Horning whereupon it proceeded being null *quoad James gilvie.* In ſo far as it bears not, That the Meſſenger left a Copy, but only, *hat he left a juſt and authentick, in the Lock-hole of the moſt patent Door of* ames Ogilvie's *Dwelling-houſe.* Now ſeing the Execution bears not a Copy o have been left (which is a Subſtantial in Executions againſt thoſe not peronally apprehended) it muſt be preſumed that nothing was left to certiorate e Party : And one not certiorated cannot be ſaid to be cited ; eſpecially in e Execution of a Horning, which is the Foundation of a penal Diligence.

Anſwered for the Purſuer. The ſimple Omiſſion of the Word *Copy per Incu-iam* of the Writer, cannot annul the Earl's Diligence: Eſpecially conſidering, hat the Word *Authentick* doth ſufficiently import an authentick Copy. Be-auſe there is Mention of *a Copy* in the former Part of the Executions: And e Word *Authentick* is to be taken *ſecundum ſubjectam Materiam.* For as by *uthenticks* ſubjoined to the imperial Conſtitutions, are underſtood legiſlative uthentick Conſtitutions : So *an Authentick* delivered in an Execution, muſt e underſtood of ſuch an Authentick as the Matter requires. Nor doth it lter the Caſe, that this is an Execution of Horning : Tho' in ſome material oints, Executions of Horning are more ſtrictly interpreted, than theſe of ummons.

The Lords repelled the Objection againſt the Execution.

Eodem Die. William Hamilton *Writer in* Edinburgh, *and* Colin Mackenzie *Goldſmith there, againſt Sir* James Campbell *of* Aberuchil.

IN a Competition betwixt *William Hamilton* and *Colin Mackenzie*, as Aſſignies by Sir *David Thoirs* Advocate, to a Debt due to him by the Lady *Greenock*, and Sir *James Campbell*, who craved to be preferred upon an Arreſtment poſterior to the Intimation of their Aſſignation, upon this Ground, That the Aſſignation was granted by Sir *David* in the Abbey after a Charge of Horning given to him by Sir *James Campbell*, and ſo reducible upon the Act of Parliament 1621.

Alledged for the Aſſignies. 1. An unregiſtred Horning could have no Effect, more than an unregiſtred Inhibition, againſt onerous ſingular Succeſſors: Eſpecially conſidering, That Sir *David Thoirs* was not inſolvent, *Stair, Inſtit. L.* 4. *Tit.* 35. §. 18. And the Act of Parliament 1621 concerns Dyvors. 2. If *Aberuchil*, who is ſecured for his Mony by other Rights and Diligences, ſhall be preferred to the Aſſignies, as to the Debt due by the Lady *Greenock*, he ought to aſſign to them his other Rights and Diligences for operating their Payment. As a Creditor, who, having an univerſal Infeſtment, attacks and carries away a particular Subject, whereto another Creditor had Right by a poſterior Infeſtment, is bound to aſſign to that other for making up *quod illi deeſt* by the Eviction.

Anſwered for Sir James Campbell. 1. Horning without Denunciation or Regiſtration, is a ſufficient Ground to reduce upon the Act 1621, *February* 21, 1623, *Craw* contra *Irving*, and in the Caſe, *Cheap* and *Betman* contra Creditors of Provoſt *Drummond.* 2. Sir *James* is not bound to aſſign, in Reſpect his Payment is out of the Debtor's own Effects, whereby the Debt is extinguiſhed.

Replyed. Tho' the Effects out of which Sir *James* is ſeeking Payment were once the Debtor's, they belonged to the Aſſignies at the Time Sir *James* affected the ſame: And therefore he who comes in upon their Right *per Æmulationem*, ſhould aſſign his other Funds to them.

The Lords ſuſtained the Reaſon of Reduction, and preferred Sir *James Campbell*; but ordained him to aſſign his other Security to *William Hamilton* and *Colin Mackenzie* upon receiving Payment from them.

February 24, 1709. Jean Burnet *Daughter to the deceaſt Mr.* Alexander Burnet *of* Craigmyle *and* Andrew Burnet *her Husband, againſt Mr.* Alexander Maitland *of* Pittrichie *one of the Barons of Exchequer, and* Robert Young *of* Auldbar.

THE deceaſt Mr. *Alexander Burnet* of *Craigmyle* in the Year 1667 granted a Bond in Favours of *Jean Burnet* his youngeſt Daughter, an Infant only a few Days old, for the principal Sum of 3000 Merks, payable at the Term of *Whitſunday* 1680, with Annualrent thereafter; and in the Year 1677 having granted her another Bond for the principal Sum of 4000 Merks, payable at *Martimas* 1677, with Annualrent thereafter: Both which bear to have been granted in Satisfaction of all that ſhe could claim by his Deceaſe, and that in Caſe ſhe ſhould happen to die before ſhe were Year and Day married without Children, the Sums ſhould return to the Father's Heirs; but the Clauſe, in Satisfaction of all that the Daughter could claim in the poſterior Bond, hath theſe Words ſubjoined, *Except what the Father ſhould pleaſe of his own Accord to leave her. Jean Burnet* and her Husband purſued Baron *Maitland* and the Laird of *Auldbar*, as coming in the Place of the Heirs Portioners of *Craigmyle*, for Payment of both Bonds.

Alledged for the Defenders. Both Bonds cannot ſubſiſt as diſtinct and ſeparate Rights, but the ſecond was a clear Innovation of the firſt: Becauſe, the ſecond contains 1000 Merks more than was in the firſt, and bears Annualrent two Years and a Half ſooner than the firſt, but mentions not the Sums therein provided to be over and above thoſe in the firſt. 2. *Debitor non præſumitur donare, November* 1685, *Robertſon* contra her Father's Heirs. 3. Both Bonds bear to be in Satisfaction of all the Purſuer could ask by her Father's Deceaſe: Couſequently the laſt muſt be underſtood in Satisfaction of the former. It doth not alter the Caſe, that the ſecond Bond bears an Exception of good Will, which looks only forward, and cannot be drawn Ten Years back, to ſupport a Bond ſo plainly innovated.

Anſwered for the Purſuers. Albeit both Bonds bear in Satisfaction of what the Daughter could ask by her Father's Deceaſe, the ſecond cannot include the firſt, which falls not to her by his Deceaſe, but was payable at *Whitſunday* 1680, with Annualrent thereafter, whether he were dead or alive. Had the Father intended the laſt Bond to be in Implement of the firſt, it was eaſie to have expreſſed that, or to have cancelled the firſt Bond: Neither of which being done, he is preſumed to will that his Daughter ſhould have Right to both Bonds. Eſpecially conſidering, That both do make but a moderate Proviſion with Reſpect to the Father's Eſtate; and Innovation is never preſumed, unleſs it be expreſſed, *March* 29, 1626, *King* contra *Taylor*, *July* 23, 1633,

633, *Lawſon* contra *Scot* of *Whitſlead*. My Lord *Stair*, *Lib.* 1. *Tit.* 8. *Pag.* 68.
clear, that poſterior Bonds of Proviſion granted to Children are not inter-
reted to be in Satisfaction of prior Bonds: Becauſe, Bonds of Proviſion are
eckoned Donations. And for the like Reaſon, Legacies left by a Debtor to
s Creditor are not underſtood in Satisfaction of the Debt, *June* 16, 1665,
ruickſhank contra *Cruickſhank*, *November* 13, 1679, *Anderſon* contra *Anderſon*.
o that the Brocard, *Debitor non præſumitur donare*, ceaſeth here, where
ræſumptio cedit Veritati. 2. The Exception in the laſt Bond of what the
ather ſhould pleaſe to leave his Daughter, has probably been added to clear,
hat the ſecond Bond ſhould not be interpreted in Satisfaction of the firſt:
nd tho' the Exception be reſtricted to ſubſequent Deeds in Favours of the
aughter; the firſt Bond muſt be conſidered as ſuch a Deed, in Reſpect it
as not delivered to the Mother for the Daughter's Behoof till after the
anting of the ſecond Bond; and it is Delivery that makes a Bond effectu-

The Lords found, That the Purſuers had no Right to purſue for the 3000
erk Bond, as being innovated by, and comprehended in the 4000 Merk
ond.

odem Die. Hary Dow *Writer in* Edinburgh, *againſt Mr.* David Seaton *of* Northbank.

H*Ary Dow* as Curator to *Caſſie* of *Kirkhouſe*, having obtained a Decreet of
Compt and Reckoning againſt Mr. *David Seaton* late Co-curator and
ctor, as a Perſon ſuſpected and Debtor to the Minor in a great Ballance:
r. *David* procured a Suſpenſion of the Decreet upon conſigning a Diſpoſition
all his Means and Eſtate for Security of the foreſaid Ballance; during the
ependence of which Suſpenſion he was diſcharged to meddle in the Minor's
fairs. After the Ordinary, in the Suſpenſion, had conſtituted the Charge
ainſt the Suſpender, which was very conſiderable, and before his Articles of
iſcharge could be particularly diſcuſs'd; *Hary Dow* having repreſented
the Lords by Bill, That Mr. *Seaton*'s Affairs were turned altogether in
iſorder; That himſelf had abſconded, and his Creditors were going on with
iligence againſt his Eſtate.

The Lords appointed the conſigned Diſpoſition to be regiſtred, and given
to *Hary Dow*, to take Inſeftment thereon, for ſecuring to the Minor what
allance Mr. *David Seaton* ſhould be found Debtor in at the Event of the
ompt and Reckoning. Albeit it was alledged for the Suſpender, That In-
ſtment could not be taken for a Debt not yet conſtituted.

February 26, 1709. John Stuart *of* Innernytie *and his Lady*, *againſt Sir* Lawrence Mercer *of* Aldie *and his Lady*.

I*Nnernytie* and *Aldie* and their Ladies having ſubmitted all Differences betwixt them, particularly that about the Lady *Innernytie*'s heretable Bond of Proviſion for 10000 Pound *Scots*, Annualrents and Penalty, dated 12 *June* 1669, with full Power to the Arbiters to determine in the ſaid Matters as they ſhould think fit: They decerned the Laird of *Aldie* and his Lady to pay to *Innernytie* 26000 Merks in full Satisfaction of the principal Annualrent and Expences, and of whatever the Lady *Innernytie* could pretend to through her Father Sir *James Mercer* of *Aldie*'s Deceaſe, and decerned *Innernytie* and his Lady to grant to Sir *Lawrence* a general Diſcharge to the foreſaid Effect, and ordained the Parties to refer themſelves to the Determination of the Lady

Dowager of *Aldie*, as to the Lady *Innernytie*'s Aliment the Time ſhe ſtayed with her Mother. Sir *Lawrence Mercer* and his Lady raiſed Suſpenſion and Reduction of this Decreet-arbitral upon theſe Grounds, 1. The Arbiters had only determined one Article of a general Submiſſion, and left another undecided, which is contrary to the civil Law, L. 25. ff. *de Receptis Arbitr.* and *Jun. ult.* 1625, *Falconer* contra *Wiſheart*, The Lords found a Decreet-arbitral null, becauſe the Arbiters had decerned only upon one of the Partie's Claims and left the other undecided. 2. The Arbiters not only left an Article of the Submiſſion undecided, but alſo delegated their Power to a third Party for the Deciſion thereof, which no Arbiters could effectually do: For *impune non paretur, ſi Arbiter jubeat ad alium Arbitrum ire, ne Finis non ſit*, L. 32. §. 16. *ff. Eod.*

Anſwered for Innernytie. 1. *Eſto*, a Submiſſion ſimply general, required a total Decreet: The Submiſſion here being both general and ſpecial, a Decreet upon the ſpecial Article is valid, tho nothing is done upon the General. Becauſe *utile per inutile non vitiatur*: As a Decreet upon one Head of an articulate Libel, would ſubſiſt, tho the reſt be undetermined. So a Decreet-arbitral upon a Submiſſion containing ſome ſpecial Controverſies and a general Compromit, determining the ſpecial Articles was ſuſtained; tho one Article that fell under the general Submiſſion was remitted to the Judgment of two Lawyers. Nor doth this contradict the Deciſion betwixt *Falconer* and *Wiſheart*: For the Submiſſion there was altogether general; And Arbiters decided only upon one Side, remitting the other Partie's Claim intirely to the Judge ordinary. Again, In this Caſe the Arbiters, having Power to determine as they thought fit, were at Liberty both as to the Juſtice of the Cauſe, and the Manner of Determination. And if the Delegation as to the Aliment was null, as the Suſpenders plead, then the general Diſcharge ordained by the Decreet-arbitral to be granted to them, excludeth the Charger's Pretenſions upon the Account of Aliment: So that all Matters are in Effect determined. Beſides, the Chargers do judicially paſs from the Aliment, which obviates any Prejudice to the Suſpenders thro' the Arbiters delegating the ſame. 2. Suppoſe the Arbiters by the Delegation had exceeded *Vires Compromiſſi*; that would only annul *quoad ultra*: *Cum utile per inutile non vitietur.* And *December* 24, 1702, *Hamilton* contra *Crawford*, Arbiters going beyond their Powers, was found not to annul what they determined within their Powers.

Replyed for Aldie. A Partie's voluntary Reſtriction of his Pretenſions cannot be ſuſtained to ſupport a null Decreet. 2. Arbiters having determined what was ſubmitted, muſt in ſome Caſes remit the executive Part to Lawyers or Perſons experienced: But here the Arbiters referr'd the Point of Aliment, without determining any Thing about it, which was in Effect a new Submiſſion contrary to Law.

The Lords found, That *Aldie* had no Prejudice by the Arbiters Delegation of the Lady's Aliment claimed by *Innernytie*: In Reſpect he paſt from the ſame judicially; And therefore ſuſtained the Decreet-arbitral, except as to the Penalty.

Eodem Die. *The Lord* Bowhill *and Sir* James Naſmyth *of* Davick, *againſt* Thomas Jackſon *Tenant in* Meiglepats.

IN a Purſuit at the Inſtance of the Lord *Bowhill* and Sir *James Naſmyth*, againſt *Thomas Jackſon*, for Payment of his Rent aſſigned to the Purſuers by Sir *James Scot* of *Galla* the Defender's Maſter, for Relief of a Debt they ſtood ingaged for as his Cautioners: The Defender crav'd Compenſa-

tion

on and Retention of the Rents of his Poſſeſſion till he were relieved of 2000 Merks he was liable to pay for his Maſter, as Cautioner to *Alexander Horſe-rgh* of that Ilk, before the Date of the Purſuer's Aſſignation; and till he ot Payment of 1000 lib. lent by the Defender to his Maſter. Becauſe, henever the Tackſman came to be Creditor to his Maſter by the Bond d Clauſe of Relief, there was *Concurſus Debiti* and *Crediti*, comprehending l the ſubſequent Tack-duties: In Reſpect they were due by the original bligement in the Tack; As to which *dies ceſſerant, etſi non venerant*; nd in Obligations *in Diem*, Compenſation takes Place before the Term of yment.

Anſwered for the Purſuers. The Obligement in a Tack for Payment of the ent, is more a conditional Obligation, than an Obligation *in Diem*: Se-g the Tack-duty is only payable, on Condition the Maſter or Setter per-rm his Part; And conditional Obligements never afford a Ground of Com-nſation. And as Arreſtment (tho it affects all moveable Sums due to the rreſter's Debtor) carries no more of a Tack-duty than the current Term; more can be the Subject of Compenſation.

The Lords ſuſtained the Compenſation and Retention only for the Tack-ties that fell due before Intimation of the Purſuers Aſſignation: But pre-rred Aſſignies to the ſubſequent Rents.

odem Die. William Junkiſon *Tenant in* Newtoungrange, *contra the Lady* Ardvorlick.

N the Cauſe at the Inſtance of *William Junkiſon*, againſt the Lady *Ardvor-lick*, the Execution of a Wakening of the Proceſs being quarrelled as ll, for that the Defender's Houſe was not deſigned; And *William Junkiſon* ving afterwards produced another more formal Copy of the Execution, where-the Dwelling-houſe was expreſly deſigned: The Lady alledged that the Exe-tion firſt produced and given out in the Proceſs being null, the Meſſen-r could not ſupply the Defect thereof, either by a new Execution, or by ending the old one.

The Lords Repelled the Objection, and ſuſtained the new Execution, in eſpect *Junkiſon* offered to abide by the ſame. Albeit ſuch mending of an xecution of Horning, whereof the Concluſion is penal, inferring the Con-cation of one's whole Effects, would not be allowed.

June 7, 1709. *Captain* John Wightman, *againſt the Creditors of* Bonhard.

CAptain *Wightman* being Creditor to *Walter Cornwall* of *Bonhard*, arreſt-ed, in the Hands of the Directors of the *African* Company, his Debtors roportion of their capital Stock after the Article of the Union relating o the Company was approved in Parliament, and purſued a Forthcom-ng: Compearance was made for ſome other Creditors, who, as aſſignies o the Gift of the common Debtor's Eſcheat, craved to be preferred to the rreſter, in Reſpect their Gift was declared long before the Date of the Ar-eſtment. Seing the Stock of its own Nature bore no Annualrent, and In-ereſt is become due only by the Treaty after the Eſcheat fell: Conſequently he Stock muſt fall under Eſcheat; at leaſt, the Annualrents thereof, as come n Place of the Profits, belong to the Donatar.

Alledged for Wightman. The capital Stock of the *African* Company fell ot under Eſcheat, becauſe it was not like Shares in other private Companies r Manufactures, that are under the abſolute Diſpoſal of the Owner: But was deſtinated and mortified by Act of Parliament erecting the Company to a perpetual Uſe; and alſo at the Time of the Denunciation, was exempted from all Eſcheat and Forfeiture by an expreſs Clauſe in the Statute. And tho' eventually it is now upliftable, it was not originally ſo; Nor even at the Time of the Gift. Again, Annualrent being now given for it, from the Time of the Advance, it is at leaſt of the ſame Nature with Bonds bearing Annualrent; and ſo cannot in any View fall under Eſcheat.

Anſwered. Suppoſe the Company had ſtood, and there had been Profits, theſe could never have fallen under Eſcheat, by Reaſon that the Act of Parliament allows ſuch Profits only to be affected with the Diligence of Creditors: But *ita eſt* there are no Profits, and ſo nothing can come in Place thereof; the Equivalent Mony being ſtipulated betwixt the *Scots* and *Engliſh* in Conſideration of the Rights and Privileges of the Company then to be extinguiſhed.

Replyed. We are not in this Caſe to notice, upon what Conſideration the the Equivalent Mony was given by *England* to *Scotland*; but upon what View the *Scottiſh* Parliament Refounded to the Proprietars of the Company their advanced Shares, with Intereſt at five *per Cent.* viz. to compenſe their Loſs by wanting the Intereſt of their Mony, which would have fallen under Eſcheat, had the ſame been current upon any other Fund of Credit.

The Lords found, That the Stock of the Subject in Controverſy was arreſtable and belong'd to the Arreſter; but that the Annualrents thereof conſtituted by Act of Parliament in Place of the Profits fell under Eſcheat, and belonged to the Donatar.

June 10, 1709. John Moir *Merchant im* Stirling, *againſt the Creditors of* Alexander Jack.

IN a Competition, for a Debt due by *John Moir* of *Craigarnal* to *Alexander Jack*, betwixt *John Moir* Merchant in *Stirling*, who had obtained a Decreet of Furthcoming before the Stuart-depute of *Monteith* againſt *Craigarnal*, upon two Debts due to him by *Jack*; and the other Creditors of *Jack* who had Aſſignations to the Subject: The Aſſignies repeted a Reduction of the ſaid Decreet upon theſe Grounds, 1. Nothing was produced for inſtructing the firſt Debt of 55 *lib.* but only a Horning and Execution of Arreſtment proceeding on a Decreet of the Commiſſary of *Dumblain*, and not the Decreet it ſelf: Whereas a Horning, tho' it ſufficiently warrand Arreſtment, doth not inſtruct or conſtitute the Debt, without producing the Ground thereof. 2. The Arreſtment for the other Debt of 250 Merks was unwarrantable, being uſed upon a Bond regiſtred in the Stuart-court-books of *Monteith*, containing a Precept in the End thereof in theſe Terms, *Attour Ordains all neceſſary Execution to paſs hereon within ſix Days in due and competent Form as effeirs, next after the Charge hereby warranted to be given, is orderly given and expired:* which Precept doth not warrand Arreſtment, but imports only that Horning containing Arreſtment may, after elapſing of the Days of the Charge given, be directed thereon. Nor is Arreſtment Execution of a Decreet of Regiſtration, but a new Diligence, requiring an expreſs Warrant, as Letters under the Signet, or a ſpecial Precept by the inferior Judge, for directing the Officers and Meſſengers in their Execution, *Stair Inſtit. Pag.* 370, 371 §. 24. *Spotſwood Tit. Arreſtment Pag.* 17. as well as Inhibitions, Adjudications, and other legal Executions require ſpecial Warrants.

Anſwered for the Arreſter. 1. Horning, being the warrant of Arreſtment, is a ſufficient Title to found a Furthcoming, without Neceſſity to produce the Bond or other Ground of the Horning; unleſs the ſame be ſpecially called for.

And

nd in this Caſe, the Decreet of Conſtitution was not called for: The princi- l Debtor and the Party in whoſe Hand the Arreſtment was laid on, (who nly had the Intereſt to call for it) being convinced of the Verity of the ebt. Beſides, the Objection is inſtantly taken off by Production of the id Decreet of Conſtitution. 2. *John Moir* was *in bona Fide* to arreſt upon e foreſaid regiſtred Bond and Warrant, becauſe it is offered to be proved, hat it is the conſtant Cuſtom within the Stuartry of *Monteith* ſo to do: nd tho' ſuch a Cuſtom were unreaſonable, the Lords are not in Uſe to annul ygones, but only to declare what ought to be done in Time coming.

The Lords found the producing the Decreet of Conſtitution in the Compe- tion, ſufficient to ſupport the Decreet of Furthcoming as to the 55 ℔. But ſtained the Objection againſt the Arreſtment for the 250 Merks, and found at the ſame was unwarrantable.

odem Die. *The Children of the ſecond Marriage of the deceaſt* John Wilkie *Taylor in* Edinburgh, *againſt the Creditors of the deceaſt* John Wilkie *Merchant there, his Son of the firſt Marriage.*

N the Competition betwixt the Children of the ſecond Marriage of old *John Wilkie*, and the Creditors of young *John Wilkie*: The Lords found, hat the accumulating Annualrents in a Decreet of Adjudication at a Term receeding the Date thereof, without mentioning from what Time Annual- nt of the accumulate Sum ſhould run, was no Nullity, or Ground of Re- riction, in Reſpect *de Jure* the Sums in an Adjudication bear Annualrent om the Date of the Decreet only, and not from the Time of the Accumu- tion, when the Term of Commencement is not expreſs'd.

une 11, 1709. *Miſtreſs* Griſſel Bruce *Lady* Riddoch, *againſt* Hugh Forſyth *of* Garvel.

N the Action of Compt and Reckoning for Tutory Intromiſſions mentioned *ſupra, December* 31, 1708, at the Inſtance of the Lady *Riddoch*, gainſt *Garvel*: The Tutor was found liable for any Annualrents of the Pupil's Mony run on unuplifted by him during his Office, and not allowed to diſcharge imſelf with the Annualrents, as yet reſting in the Hands of reſponſal Debt- rs; tho he offered Warrandice and Caution that they are not uplifted. In Reſpect Law obligeth Tutors to ſtate their Pupil's Annualrents in a principal Sum bearing Annualrent once during their Office: And warranding the ſame to be ſtill reſting, doth only found a ſecond Plea to the Minor upon the Tutor's Warrandice. But the Purſuer was ordained to furniſh the Defender with the Bonds for procuring Payment of theſe outſtanding Annualrents. And the Defender was to have Allowance for Ceſs, Teind and Feu-duty of theſe Years, for which he holds Compt for the Rent of the Land: Upon procuring Declarations from the Collectors of the Ceſs, the Chamberlains of the Titular of the Teinds, and Superior of the Lands, that the Ceſs, Teind and Feu-duties of ſuch Years were paid; And finding Caution to relieve the Purſuer thereof; albeit the Defender had not the particular Receipts to produce. But he got no Allowance for incident perſonal Charges in the Pupil's Affairs, not particularly inſtructed: In Reſpect Inventories were not given up in the Terms of the Act of Parliament 1672. Albeit it was alledged that the Tutor had done the Equivalent, by ſigning an Inventory of the Pupil's whole Eſtate, Writs and Evidents, in Preſence of her neareſt Relations on the Father and Mother's Side; and giving up the ſaid Inventory to be kept by them, as a Charge and Check againſt him.

June 15, 1709. Margaret Bonnar *Brother Daughter to Mr.* John Bonnar *of* Greigſtoun, *againſt the ſaid Mr.* John Bonnar *and* James Maxwell *of* Leckiebank *his Tutor* dative.

MR. *John Bonnar* of *Greigſtoun* being paſt Sixty Years of Age, unmarried, and ſeveral Years ago found by an Inqueſt to be Fatuous or not *Compos Mentis*, and therefore put under the Care of a Tutor *dative* : *Margaret Bonnar* an indigent Fatherleſs Infant, his apparent Heir of Line, purſued him and his Tutor for an Aliment.

Anſwered for the Defender. That no Aliment was due to the Purſuer, there being no Precedent for it in our Law or Cuſtom.

Replyed for the Purſuer. The Lords are in Uſe to decide Matters of Aliment upon the Principles of Equity, and the Law of Nature : And therefore obliged an eldeſt Brother ſucceeding to his Father in a competent Eſtate, to Aliment his younger Brethren and Siſters during their Minority, *January* 24, 1663, *Children of* Wedderlie *againſt his Heir*, June 29, 1676, Row *contra* Row ; *and Heirs-male to aliment the Heirs of Line*, January 8, 1665, *Lady* Otter *contra the Laird of* Otter, *November* 12, 1664, *the Daughters of Balmerino againſt the Heirs-male* ; Albeit no Statute or municipal Law could be urged in either of theſe Caſes. Again, Liferenters are bound to aliment apparent Heirs : Conſequently, nothing is more agreeable to Law or Equity than that an Aliment ſhould be modified to the Purſuer, out of her Uncle's Eſtate, who is upon the Matter a Liferenter, through his Incapacity to Exerce any Act of Property ; ſhe being his apparent or preſumptive Heir, and there being Fond ſufficient to aliment both.

Duplyed for the Defender. *Non ſequitur*, That becauſe Law appoints Liferenters to aliment the Fiars, Proprietars ſhould aliment their preſumptive Succeſſors : For this were in Effect to deſtroy Property, and make apparent Heirs partial Proprietars. And ſeing Fatuity or Furioſity diveſts no Man of his Property, Mr. *John Bonnar* cannot be ſubjected by his Fatuity, to a Burden he would not otherwiſe have been obnoxious to : On the contrary, it is the Deſign of Law to protect, and not to deſtroy, the Rights and Intereſts of thoſe who are incapable to look to themſelves, by appointing them Tutors. The Pratticks cited are not to the Purpoſe : For the Obligation on the eldeſt Son as repreſenting his Father, to aliment his indigent Brethren and Siſters, to which the Father was liable *Jure Naturæ*, is not extended beyond a ſuitable Aliment during their State of Incapacity to provide for themſelves : And therefore as the Purſuer's Father being arrived to Manhood, could not, were he alive, have pretended to Aliment from his Brother ; Neither can his Daughter pretend to an Aliment from her Uncle ; There being no natural Tie upon any collateral Relation to aliment or provide for another, tho' in the neareſt Degree. Nor is the Obligement upon the Heir-male to aliment the Heir of Line, which ariſeth from the ſame Topick of his repreſenting the Father, who was bound to do it, to be drawn in Conſequence, to fix a Tie upon an Uncle to maintain his Niece out of his own Property.

The Lords refuſed to modifie an Aliment to the Purſuer ; in Reſpect there was no Law, or Precedent for it.

June 22, 1709. Thomas Lawſon *Son to the deceaſt* James Lawſon *Baillie in* Anſtruther, *againſt* Charles Gilmor *Merchant there.*

IN the Action of Declarator and Removing at the Inſtance of *Thomas Lawſon*, as Heir to *Janet White* his Mother, againſt *Charles Gilmor* her ſecond

Husband, for removing him from a Houſe purchaſed by *Janet* in her Widowhood.

Alledged for the Defender. His Wife having died infeſt in the ſaid Houſe, he had a right of Courteſie, and ſo could not be diſpoſſeſſed.

Replyed for the Purſuer. The Courteſie could not take Place in this Caſe; in Reſpect the Houſe belonged not to the Wife as an Heireſs, but was purchaſed by her; and Courteſie is only due to the ſurviving Husband of an Heireſs, *Reg. Majeſt. Lib.* 2. *Cap.* 58. *Skene de Verb. Signif. Verb. Curialitas.* *Craig Lib.* 2. *Dieg.* 22. *Verſ. Fin. Mackenzie Inſtit. Lib.* 1. *Tit.* 6. The Reaſon is, Becauſe an Heireſs is ſuppoſed to have a Rank and Dignity to be kept by her Husband after her Deceaſe, which a Woman purchaſing is not ſuppoſed to have.

Duplyed for the Defender. Probably the Courteſie was brought into *Scotland* from the Practice of *England*, as ſeveral other feudal Cuſtoms and Obſervations were: And *Littleton* the great *Engliſh* Lawyer, *Inſtit. Lib.* 1. *Ch.* *Sect.* 35. holds a Courteſie to be due, if the Wife was ſeiſed in Fie, and there was Iſſue alive of the Marriage; without diſtinguiſhing if ſhe had the Right by Succeſſion, or by ſingular Titles. Again, *Leg. Burg. Cap.* 44. No ſuch Diſtinction is made: Nor doth *Craig Pag.* 312. and 313. mention the word *Hæres*, in Contradiſtinction to a Proprietar by ſingular Titles, but only as what falls out moſt frequently, that Womens Heretage comes by Succeſſion. And it is equally reaſonable, that a Husband ſhould liferent the Wife's Lands that ſhe acquired *ſingulari Titulo*, as theſe ſhe ſucceeded to as Heireſs: Eſpecially conſidering, that Law gives her a Terce of all Lands wherein he died infeſt, without Diſtinction, whether the ſame came by Purchaſe or Succeſſion. It is of no Import, That the Courteſie is more extenſive than the Terce: Seing the Nature of the Subject, and not the Quantity, is debated.

Duplyed for the Purſuer. There's no arguing in this Caſe from a Terce to the Courteſie, which not only differ from it in Quantity, but alſo was introduced upon a different Account: the former being in Place of a Marriage Proviſion to the Wife, and the latter a meer Favour indulged by Law to the Husband of an Heireſs.

The Lords found that the Courteſie doth not extend to Lands acquired by the Wife by ſingular Titles, but only to thoſe ſhe ſucceeded to as an Heireſs.

Eodem Die. *The Earl of* Lauderdale *againſt the Lord* Yeſter.

THe Earl of *Lauderdale*, upon a ſpecial Retour as Heir-male to *Charles* Earl of *Lauderdale* his Father, and his Father's general and ſpecial Retour as Heir-male to *John* Duke of *Lauderdale* his Brother; purſued *John* Lord *Yeſter*, as charged to enter Heir to, or otherways repreſenting the deceaſt *Mary* Marchioneſs of *Tweddale* his Mother, to denude of an Appriſing led againſt the Eſtate of *Dumfermling* in *Anno* 1653, and conveyed to the Duke in the Year 1668, for his Relief of Cautionry for *Charles* Earl of *Dumfermling* in the Year 1648, upon this Ground: That the Duke having in the Year 1665, and 1666, diſponed to the ſaid Marchioneſs his only Child, his Honours and Eſtate of *Lauderdale*, with all other Lands and Rights whatſoever pertaining and belonging, or that might be known to pertain and belong to him, under Reverſion to his Grace, and his Heirs-male, and of Tailzie; and having, upon an Order of Redemption uſed by him, obtained a Declarator againſt her; ſhe in *Anno* 1676, renounced all Right and Intereſt in the Eſtate of *Lauderdale*, with all Rights of Lands and others whatſoever pertaining, or which might pertain and belong to the ſaid Duke, in Favours of him and his Heirs foreſaid.

Anſwered for the Defender. 1. No Proceſs can be ſuſtained at the Purſuer's Inſtance, becauſe, the Renunciation is only in Favours of the Duke's Heir-male and of Tailzie: And the Purſuer cannot ſubſume, That he is Heir of Tailzie, as well as Heir-male; ſeing he produceth only a Retour as Heir in ſpecial to his Father, and his Father's Retour as Heir-male in general and in ſpecial to his Brother. Now the Defender offers to prove, That the Duke made a Tailzie in Favours of his Brother Earl *Charles* in Liferent, and to Earl *Richard* his eldeſt Son in Fie: So that no Action can proceed at the Purſuer's Inſtance till he be ſerved Heir to the Fiar, or ſome Way connect a Title from him. 2. *Eſto* the Purſuer had a ſufficient Title to found upon the ſaid Renunciation, it carries no Right to the Appriſing in Queſtion. Becauſe, the Duke had no Right to it when he made the Diſpoſitions to his Daughter; And the Renunciation, being only granted in Obedience to a Decreet of Declarator of Redemption, proceeding upon a Faculty reſerved in theſe Diſpoſitions, the Renunciation could go no further than the Rights diſponed; And the Appriſing fell as a ſeparate Eſtate to his Daughter, unaffected with the Renunciation. For ſhe could not renounce what ſhe had no Right to, as not belonging to her Father when the Diſpoſition was made in her Favours: Nor could ſhe renounce her Hope of Succeſſion as Heir to her Father, who was then alive, and might have had a Son.

Replyed for the Purſuer. 1. All Heirs-male are Heirs of Tailzie, ſeing they cut off the direct Line: Eſpecially in Contradiſtinction to the Heir of Line, with whom the preſent Controverſie is managed. The Purſuer's Father was both Heir-male and of Tailzie, being ſerved and retoured Heir-male to his Brother, by Virtue of the old Infeſtments Tailzieing the Eſtate and Dignity to Heirs-male. If there was ſuch a Tailzie in Favours of Earl *Richard*, as the Defender mentions, it never took Effect, for he was never infeſt: Beſides, it is *Jus Tertii* to the Defender, who no ways repreſents him. 2. The Duke having, for the Preſervation of his Family, made a Settlement of his Dignity and Eſtate, under the General of *all Lands and Rights pertaining, or that might be known to pertain and belong to him*, in Favours of his only Child, who could not ſucceed but as Heir of Line, and to certain Heirs of Tailzie after her; and having charged her with all Debts and Legacies that ſhould be reſting by him at his Deceaſe, and with the fulfilling all Contracts and Obligements he ſhould then be liable to, in the ſame Manner as if ſhe and her foreſaids were to ſucceed to him as Heirs of Line, with a Clauſe, That in Caſe of Redemption, he and his Heirs-male ſhould be bound to relieve his Daughter of Debts, Burdens, and Legacies: This was plainly an univerſal Diſpoſition of his Succeſſion; And the Heir-male was in the Event of Redemption, to ſucceed univerſally in Place of the Heir of Line; Conſequently ſhe did renounce, and ought to denude as univerſally in Favours of the Purſuer as Heir-male by Progreſs. Beſides, the Right of the Appriſing was even radically in the Duke's Perſon at the Date of the Diſpoſition: In ſo far as there was then competent to him, as Cautioner for the Debt in the Appriſing, a Right of Relief againſt the principal Debtor's Eſtate of *Dumfermling*, whereof the poſterior Acquiſition of the Appriſing was but a Conſequence. Again, tho' the Appriſing was not in the Duke's Perſon, the Time of the Diſpoſitions in Favours of his Daughter, the ſame was in his Perſon when ſhe renounced: Her Renunciation being fuller and broader than the Diſpoſition, and induſtriouſly calculated to comprehend the Appriſing, or any other heretable Right then in his Grace's Perſon.

Duplyed for the Defender. 1. It is not *Jus Tertii* for him to impugn the

Purſuer's Title; ſeing any Perſon ſerving afterwards Heir to Earl *Richard*, might diſquiet him tho' aſſoilzied from this Proceſs. Nor is my Lord *Teſter* concerned, whether the Tailzie was completed by Infeſtment in the Perſon of *Richard*: It being ſufficient that the Duke made a Tailzie, which was not altered, and the Renunciation is conceived in Favours of thoſe he ſhould appoint Heirs of Tailzie. 2. The Words, *Pertaining, or which might be known to pertain and belong*, &c. are but exegetick Stile to convey all Right of the Lands then in the Duke's Perſon, or Rights thereof that might afterwards accrew to him; and cannot be extended to new Rights of Lands to be acquired: For when an univerſal Succeſſion is intended, the Diſpoſition carries all that pertain, or ſhall pertain and belong to the Diſponer the Time of his Deceaſe. Nor can any Argument from the Deſign of Parties, be of much Weight in this Caſe, ſeing Rights of Lands are not to be made up from ſtrained Deſigns or Intentions. Again, the Right of Relief, which was only *Jus Obligationis* before the Appriſing was acquired, can never be underſtood tranſmitted to the Lady: For after the Diſpoſition to her, the Duke might have been diſtreſſed as Cautioner for *Dumfermling*; And in Caſe of ſuch Diſtreſs, he might have ſought his Relief and Repayment, which would not have accrew'd to his Daughter.

The Lords ſuſtained the Earl of *Lauderdale*'s Title to purſue. And thereafter *July* 20, 1709, upon adviſing the Extent of the Renunciation, found the Defender, as charged to enter Heir to, or otherways repreſenting the Lady Marchioneſs his Mother, bound to denude of the Appriſing upon the Eſtate of *Dumfermling*, in Favours of the Purſuer.

Eodem Die. *Dam* Helenor Nicolſon *Lady* Greenock, *againſt Sir* John Schaw *of* Greenock *her Son*.

THE Lords *January* 5, 1709, having ordained a Proceſs at the Inſtance of the Lady *Greenock* againſt her Son, to be inrolled, albeit the Defender was attending the Parliament; In Reſpect the Advocate that was marked for him at the firſt Calling, refuſed to take out the Proceſs: When the Cauſe came in by Courſe of the Roll, the Defender alledged no Proceſs, Becauſe, he had neither ſeen the Proceſs, nor was obliged to ſee or notice it, during the ſitting of the Parliament, conform to the 12 and 13. *W.* 3. *Cap.* 3.

Replyed for the Purſuer. That Statute doth not expreſly provide, That Proceſs ſhould not be commenced and proſecuted againſt Members of Parliament, during the ſitting thereof; but only that Suits may be commenced and proſecuted after the riſing of the Parliament: Which Argument *a Contrario*, and from Implication, ought to be underſtood of commencing and proſecuting *cum Effectu* by judicial Acts, that oblige the Party to appear in Judgment, and make Defences under a Certification in Caſe of Failzie; and not of the Preliminaries of a Proceſs for bringing it into Judgment, which is performed by the Clerk, without Trouble or Diverſion to the Party. And albeit by the *Engliſh* Law effectual Proſecution commenceth from the Day to which the *Sub Pœna* is ſerved, or at which the Defendant is to appear, and give in his Anſwers or Defences; Yet in *Scotland*, where the firſt Diet of Appearance is not peremptory, and the Defender is not obliged to put in Defences till after the uſual *Inducia* of ſeeing, returning and inrolling the Proceſs, a Cauſe cannot be underſtood commenced till after elapſing of that preparatory Interval, which is not obſerved in the *Engliſh* Form, to which the Statute is adapted. 2. The moſt that the Defender can claim, is only to ſee the Proceſs ſix Days, without any new Inrollment: Seing after returning of the Proceſs, he is preſumed and ought to be ready. The Inrollment was not introduced as a Privilege to the Defender, but only to prevent anticipating of Cauſes, by ſome Purſuers unjuſtly getting the Start of others, whoſe Proceſſes were firſt returned: And the reſt of the Lieges who are purſuing Cauſes, have no Ground of Complaint; ſeing the Lady *Greenock*'s hath already run the Courſe of the Roll, by Order of the Lords Interlocutor.

Duplyed for the Defender. When a Proceſs is returned by an Advocate as not for the Party, or when the Advocate marked for the Party refuſeth to take out the Proceſs, it ought to be called *de novo*, and inrolled in the Regulation Roll. The Act of Parliament doth not diſtinguiſh betwixt preparatory Interlocutors, and thoſe *in Cauſa*: And tho' it may be queſtioned, if Citations paſſing of Courſe may be ſuſtained, ſure it is, That no Interlocutor of a Judge can be pronounced againſt a Member of Parliament claiming his Privilege. So in the Caſe of Sir *Andrew Kennedy* againſt Sir *Alexander Cumming*, the Lords would not ſo much as ordain Sir *Andrew*'s Petition offered againſt Sir *Alexander*, to be ſeen and anſwered; in Reſpect the latter was attending the Parliament.

The Lords ſuſtained the dilatory Defence founded on Sir *John Schaw*'s being a Member of Parliament; and therefore found the Proceſs muſt be given out to be ſeen and inrolled again in common Form.

June 24, 1709. Euphan Bartoun *Relict of* John Beiglie *Stationer*, *againſt* Charles Duncan *Jeweller in* Edinburgh.

IN a Reduction at the Inſtance of *Euphan Bartoun* againſt *Charles Duncan*, for reducing a Decreet of Removing from a Shop in *Edinburgh*, obtained by *Duncan* againſt her, upon this Ground; That ſhe was no other ways warned than by an Officer chalking the Door at his own Hand, without any Warrant from a Magiſtrate, or Intimation to her: And a verbal Order at leaſt from a Baillie, is neceſſary to authorize an Officer to chalk Doors in Order to removing, *Craig de Feud. Lib.* 2. *Dieg.* 9. *Pag.* 112. *Stair Inſtit. Lib.* 2. *Tit.* 9. *Pag.* 322.

Anſwered for the Defender. Perſonal Intimation of Warnings within Burgh was never thought neceſſary, *Craig*, *Pag.* 197. And chalking the Door, which bears the publick Officer's Name, is a better Intimation, than executing at the Dwelling-houſe by putting a Copy in the Lock-hole of the Door. The Warrant of a Baillie is not neceſſary to authorize an Officer to chalk Doors: But that Burgher Solemnity is executed of Courſe by the Town-officers, by Virtue of their Office, upon Application of Heretors and others intereſſed.

The Lords repelled the Reaſon of Reduction, and found no Neceſſity of a particular Precept or Order from a Magiſtrate to authorize an Officer to warn Perſons within Burgh, by chalking their Doors. In Reſpect, 1. The publick Town-officers are in Uſe to ſummon Perſons to the Baillie Court without a Magiſtrate's Warrant. 2. As a Precept under the Maſter's Hand is a ſufficient Ground to warn Tenants to remove from Land in the Country; an Heretor's verbal Order to an Officer within Burgh (where a verbal Order to warn ſufficeth, is ſufficient without the Warrant of a Baillie. 3. The Magiſtrates of *Edinburgh* in the Beginning of the Year, uſe to give a general Order to their Officers, to chalk Doors, when required by Landlords: And what *Craig* ſays, may be underſtood of that general Order.

Eodem Die. George Brown *younger of* Thornidikes *and others*, *againſt* Alexander Brown, *ſecond Son to* Alexander Brown *of* Thornidikes *Elder*.

IN the Reduction at the Inſtance of *George Brown* younger of *Thornidikes*, and the Creditors of Mr. *Alexander Brown* his Father, againſt *Alexander*

Brown

rown his ſecond Brother, for reducing a Diſpoſition of the Lands of *Baſſinean*, granted to him by Mr. *Alexander* their Debtor, upon the Act of Parliament 1621.

Alledged for the Defender. The Purſuers being only Creditors to old *Thor-dikes* by perſonal Bonds, had no Title to reduce an heretable Right granted y him.

Replyed for the Purſuers. Albeit Reductions upon controverted Preferences, ullities and Inſufficiency of Rights, muſt have a Title of the ſame Kind and erfection with that of the Writ craved to be reduced: Yet Reduction upon the ct 1621, is competent to all Manner of Creditors, real or perſonal, whether r onerous Cauſes or not; and even to conditional Creditors, before Exiſt-ce of the Condition; or to Creditors *in Diem*, before the Term of Payment; to Creditors by a perſonal Clauſe of Warrandice, tho' the Lands ſold were t evicted.

Duplyed for the Defender. The Lords never ſuſtained Reduction upon per-nal Bonds, unleſs where Diligence by Inhibition or Adjudication followed ereon. And if perſonal Creditors, or Creditors *in Diem* or *ſub Conditione*, n't effectually purſue the Debtor himſelf, far leſs can they, by an extraor-nary Remedy, reduce real Rights granted by him to third Parties. If it ere otherwiſe, the Subject diſponed would in ſuch Caſes turn many Years ſte, and unpoſſeſſed: Seing the Reducer could not poſſeſs before the Term Payment, or the Exiſtence of the Condition; and neither could the Party hoſe Right is reduced, nor the Debtor himſelf who is denuded, poſſeſs.

The Lords found perſonal Bonds, whether for Payment of Debts, or Re-f of Cautionry, not a ſufficient Title to reduce a Diſpoſition of Lands grant- by the Debtor, altho no Infeſtment had followed thereon.

ne 30, 1709. *Earl of* Galloway *againſt Mr.* Baſil Hamilton *of* Baldoon *and Lady* Mary Hamilton *his Mother.*

N the Reduction and Improbation at the Earl of *Galloway*'s Inſtance, againſt Mr. *Baſil Hamilton* and Lady *Mary Hamilton* his Mother: The Lords und no Proceſs againſt the Lady. In Reſpect the Execution bore only that e deceaſt Lord *Baſil Hamilton* her Husband was perſonally cited at *Edin-rgh*; and that ſhe was cited by delivering a Copy to him for himſelf and in ame of his Lady, who was then at *Hamiltoun*: Which the Lords found did t import a legal Citation of the Lady, who ought to have been cited, by ving a Copy to her ſelf perſonally, or leaving a Copy at their Dwelling-houſe the Terms of the Act of Parliament. Albeit it was alledged for the Pur-uer, That delivering a Copy to the Husband, who was Curator in Law to his Lady, was equivalent to the giving a Copy to her ſelf, and a better Certiora-ion, than if a Copy had been left with any Servant in the Houſe: For the Lords were of Opinion, that a Copy given to any Curator in Name of the Minor, is null.

uly 1, 1709. *The Adminiſtrators and Treaſurer of* Heriot's *Hoſpital, againſt* John Angus *Tackſman of the* Canon-mills.

IN a Purſuit at the Inſtance of the Adminiſtrators and Treaſurer of the Hoſpital, againſt *John Angus*, for Payment of his Tack-duty of the *Canon-mills*, poſſeſt by him as Aſſigny to a Tack thereof ſet by the Purſuers to the eceaſed *Margaret Murray* his former Wife.

Alledged for the Defender. At the Date of the Tack, the Inhabitants of the *Canongate* of *Edinburgh*, were in Uſe to grind all their Grains for Baking, and Brewing at, and thought to have been thirled to the *Canon-mills*; Which Thirlage was ſince then reſtricted in a Proceſs againſt them, to what tholes Fire and Water within the Sucken; and is now utterly evaded by Kilning and Cobling in *Leith* and elſewhere: Therefore ſeing the Extent of the Multure is exceedingly diminiſhed, the Defender ought to have a proportionable Eaſe or Abatement of the Tack-duty, conform to Law, *L.* 9. *Pr. L.* 15. §. 1. *ff. locati Conduct.* Stair *Inſtit. Lib.* 1. *Tit.* 15. *N.* 1. *in Fin.*

Anſwered for the Purſuers. No more was ſet but the Mills and Multures thereto belonging; And the Defender has all the Multures that belong to the ſaid Mills: And if he was diſappointed of his Expectation by the Lords Interlocutor, that, being no Deed of the Purſuers, can be no Ground for any Abatement of the Tack-duty. The Citations out of the civil Law, and my Lord *Stair's Inſtitutions*, meet not the Caſe, for theſe concern only Eviction or Periſhing of the Subject ſet: Whereas here the Mills and Land are ſtill Extant and intire, and the conſtituted Thirlage continued according to what the Lords found juſtly to belong to the ſaid Mills; And the Purſuers ſet only the Multures belonging thereto. Beſides, the Lords have frequently found, That accidental Loſs through Sterility or the like, are no Cauſe for an Eaſe of the Tack-duty, more than extraordinary Increaſe would occaſion an Augmentation thereof: Seing the mutual Hazards of Loſs and Gain redound by the Nature of the Tack to the Setter or Tackſman.

The Lords repelled the Defenders Alledgeance, in Reſpect of the Anſwer; and found no Abatement due.

Eodem Die. ACT *of* SEDERUNT *Ordaining the Principal Clerks of Seſſion to put out Boxes for receiving Bills, Anſwers, and Informations.*

THE Lords of Council and Seſſion conſidering, That Bills are frequently offered to the principal Clerks of Seſſion, during the ſitting of the Lords, to be moved in the ſame *Sederunt*, or ſo ſhort Space before, that there is not ſufficient Time for the Clerks to conſider the Bill with the Proceſs to which it relates; and that oft-times Parties neglect to give the Clerk Informations in Cauſes to be Reported: For Remeid whereof, the ſaid Lords do Ordain each of the ſaid Clerks, to have a Box ſet out at the ſame Diets, and in the ſame Place appointed for the Lords of Seſſion's Boxes, and Ordain all Parties concerned in Proceſſes, to put their Bills or Anſwers in the Clerk's Box, who is to read the ſame, and Informations of Cauſes to be Reported, into the principal Clerk of the Proceſs his Box, at the ſame Time, that the ſaid Bills, Anſwers, or Informations, are put in the Lords Boxes; And diſcharge the Clerks to move any Bill or Anſwer to the Lords, that have not been put in his Box, as aforeſaid; except Bills which paſs of Courſe, or where Bills relate to Acts or Decreets ready to be Extracted, and when there is no Time to make Copies for the Lords, in which Caſe the Clerks are allowed to move the ſaid Bills in the next *Sederunt* only, and not after.

July 2, 1709. *Mr.* James Inglis *of* St. Leonards *againſt Lord* Alexander Hay.

AT adviſing the Reaſons of Reduction of a Decreet of Preference obtained by Lord *Alexander Hay*, againſt the Creditors of Mr. *Cornelius Inglis* of *Eaſtbarns*, purſued againſt Lord *Alexander*, by Mr. *James Inglis*, as

aving Right by Progreſs to an Infeſtment of Annualrent for 184 ℔. out of the
ſtate of *Eaſtbarns*, upon an heretable Bond granted by Mr. *Cornelius Inglis*
e Heretor, to Mr. *Patrick Kelly* for the Sum of 4600 Merks; The Defend-
having objected, That the Purſuer did not connect a Proceſs of Right to
e Infeſtment of Annualrent, by producing the Precept of *Clare conſtat*,
on which *Janet Kelly* his immediate Author was infeft as Heir to Mr. *Pa-*
ick Kelly the original Creditor: The Lords would not allow the Purſuer
repeat a proving the Tenor thereof *incidenter* in the Proceſs of Reduction;
beit the Defender in a Proceſs is ſometimes allowed to repeat *Incidenter* a
enor of Writs founded on for his Defence. Becauſe, the Purſuer, before
conveened the Defender in his Reduction, ought to have made up a ſuf-
ient Title for proſecuting his intended Action, and cannot be allowed an
cident for making up his Title.

ly 5, 1709. Archibald Ker *Brewer in* Edinburgh, *againſt* Nicol Gibſon
Ferrier and Smith there.

N the Action at the Inſtance of *Archibald Ker*, againſt *Nicol Gibſon*, for
Payment of Ale furniſhed to the Defender's Wife, and ſold by her in his
welling-houſe.

Alledged for the Defender. He could not be liable for any Ale taken by
Wife; in Reſpect ſhe ſtood inhibited at his Inſtance.

Replyed for the Purſuer. He was *in bona Fide* to furniſh Ale to the Defend-
s Wife after the Inhibition, as he had done before, not being ſpecially in-
pelled or diſcharged by the Defender; whoſe allowing his Wife *Exercere*
bernam, to keep an Ale-houſe after the Inhibition, was a tacit paſſing from
ſame.

Duplyed for the Defender. Inhibitions at the Inſtance of a Husband, againſt
Wife, need only to be executed at the Market-croſs, and are not to be
imated to every particular Perſon. Nor can ſuch ſolemn regiſtred Writs
taken away, but by as ſolemn a Diſcharge, or Renunciation thereof in
it.

The Lords found it Relevant to make the Defender liable, That his Wife
s allowed to Tap and receive in Ale after the Inhibition; And that it con-
ed with the Husband's Knowledge that ſhe received Ale from the Purſuer;
d found the Alledgeance probable by the Husband's Oath.

ly 7, 1709. William Hamilton *of* Wiſhaw, *and other Creditors of* Cle-
land *Suplicants.*

Pon a Bill given in by the Creditors of *Cleland*, repreſenting, That in
the Proceſs of Sale of that Eſtate, albeit many Diets had been kept
the Roup, yet no Offerer had appeared, or was like to appear, who would
the Length of Nineteen Years Purchaſe, which was the Price put upon it
the Lords; And therefore craving that their Lordſhips would lower the
andart-price: The Lords conſidering that the Lands held Black-ward with-
a Regality; that the Debts exceeded the Value thereof; And that a Di-
ibution of the Eſtate among the Creditors was impracticable, and had been
vain attempted in the Caſe of *the Creditors of* Kennet; Therefore they
anted Warrant to expoſe the Eſtate at Eighteen Years Purchaſe as their
ice, and ordained the ſame to be intimated in commom Form.

Eodem Die. Lydia Forbes *and* David Auchmouty *of* Drummeldrie *her Huſband, againſt* Jean Forbes *and* John Monro *Chirurgion in* Edinburgh *her Husband.*

IN the Action at the Inſtance of *Lydia Forbes* and her Husband, againſt *Jean Forbes* and her Husband, mentioned *ſupra, February* 9, 1709, one Captain *Halyburton* being adduced as a Witneſs for proving *Lydia Forbes's* Legitimacy; The Defenders objected that he could not be admitted, becauſe under Sentence of Death, for aſſiſting in defending and keeping out the *Baſs* againſt the Government.

Alledged for the Purſuers. Captain *Halyburton* is a habile Witneſs, notwithſtanding the criminal Sentence againſt him: In Reſpect the ſame was taken off and and diſcharged by the publick Articles of the Capitulation betwixt the Government and the Gariſon; Whereby it was expreſſy ſtipulated on the Government's Part, That none of the ſaid Gariſon ſhould ſuffer any Manner of Way on Account of their Oppoſition.

Anſwered for the Defender: Tho' a Remiſſion had been paſt in the Terms of the Capitulation, that could not have render'd *Halyburton* a habile Witneſs: Becauſe, a Remiſſion exempts only from Puniſhment, and takes not away the Infamy of the Crime, L. 6. L. 7. C. *de Sentent. Paſſ.* L. 3. C. *de Gen. Abol. Oddus de Reſt. in Integ.* Q. 49. Art. 4. N. 2. Stat. 2. Rob. 1. Cap. 34. *M'kenzie* Crim. Part 2. Tit. 26. N. 6. *Dirletoun*'s Doubts *Verb. Witneſſes remitted.* Seing the Sovereign cannot Repone a Man to Integrity and Innocency, which Fame requires, or cannot make a Man good: Conſequently cannot make him a ſufficient Witneſs.

Replyed for the Purſuer. The Caſe of the Remiſſion of a Crime and its Puniſhment *ex Gratia*, and the Preſent, are different *toto Cælo*: For here the Captain's Crime was indemnified by Way of Capitulation for an onerous Cauſe, *viz.* The ſurrendring the Gariſon; And it were againſt the Law of Nations to pretend, That a Sentence pronounced againſt him on the foreſaid Account, ſhould have any penal Effect.

The Lords repelled the Objection againſt Captain *Halyburton*; as being taken off by the Articles of Capitulation betwixt the Government and the Garriſon of the *Baſs*.

July 8, 1709. *ACT of SEDERUNT anent Subſcribing Interlocutors in the Outer-houſe, and Bills Reclaiming againſt them.*

THE Lords of Council and Seſſion, for the better Diſpatch of Juſtice, Enact and Ordain, That all Interlocutors pronounced by the Ordinary in Abſence, be ſigned the ſame Day they are pronounced; And that where Interlocutors, Acts, Decreets or Proteſtations are pronounced upon *Debate*; The ſame be preſented by the Clerk to be ſigned by the Ordinary, within ſix Days immediately after pronouncing at furtheſt; within which Time the Clerk is to be careful to extend the Minutes with Certification, That any Warrant ſigned more than ſix Days after the Debate, ſhall be void and null: Excepting always the two laſt Days of the Seſſion, upon which all Intelocutors to be pronounced theſe Days are to be ſubſcribed the ſame Day of pronouncing; and all Interlocutors to be pronounced the four Seſſion Days preceeding the two laſt Days of the Seſſion, are to be ſigned within Fourty eight Hours after pronouncing, otherways to be void and null. *And Diſcharg* all Interlocutors to be Subſcribed after the Riſing of the Seſſion, under the ſame Certification: And where the ſaid Interlocutors are not ſigned of the

Dat

ate they are pronounced ; *Ordain* the Clerk to prefix to the Minute the ue Date of the Debate and pronouncing the Interlocutor, and below the nterlocutor the Date of Signing. *And Ordain* all Acts, Decreets and Pro- ſtations to be put up in the Minute-book of the Date they are ſigned ; And hen any reclaiming Bill is offered to the whole Lords againſt the Interlo- utor of the Ordinary, the ſame is not to contain any new Alledgeance in aw or Fact, not inſerted and ſet down in the Minutes, and inſiſted upon fore the Ordinary ; or contained in a Repreſentation refuſed by him ; with- t Prejudice to Parties, to urge their Alledgeance offered to the Ordinary upon w Arguments ; *And Diſcharge* the Clerk to receive any reclaiming Bill ainſt the Ordinary's Interlocutor, unleſs the ſame be preſented within ght *Sederunt* Days after ſubſcribing the Interlocutor ; and that the ſame expreſly bear, That the Alledgeances in Law or Fact therein mention- were inſerted in the Minutes, and inſiſted upon before the Ordinary, or ntained in a Repreſentation refuſed by him, and the Lords Anſwer upon Amand craved and refuſed. *And further Ordain* the Clerk of the Pro- ſs carefully to Compare reclaiming Bills, that they may be in a Condition Repreſent to the Lords, whether the Grounds of theſe reclaiming Bills ve been alledged upon before Ordinary, and inſert in the Minutes or Re- eſentation or not, and ordain thir Preſents to be Printed.

odem Die, *and* 23 July 1709. *Lady* Rankeillor, *againſt the Lady* Aytoun.

N the Proceſs at the Inſtance of the Lady *Rankeillor*, Aſſigny conſtituted by the deceas'd Lord *Rankeillor* her Husband, confirmed Executor Cre- tor to Sir *John Aytoun* of that Ilk, againſt Sir *John's* Lady, as Intrometter ith Goods and Gear belonging to the Defunct : The Defender contended, hat by her Contract of Marriage, ſhe had Right to the juſt and equal Half the whole Pleniſhing and Furniture of his Houſe, as well Heirſhip as o- er Moveables, free of all Debts.

Alledged for the Purſuer. 1. The Defender can have no Share of uncutted ebs of Cloth lying by the Defunct : Becauſe, theſe not being formed to ny particular Uſe, but applicable to many Uſes, or to Sale, are not reck- ed Houſhold-furniture or Pleniſhing, which by the *Romans* is called *upellex* ; and defined *Domeſticum Patris-familias Inſtrumentum Rerum ad quo- dianum Uſum paratarum.* 2. Veſſels of Silver of a larger Size, as the great aſon, Laver and Caddel-pot, fall not under Diviſion, as Houſhold furni- ure : Becauſe, theſe were not for daily Uſe, but for Ornament or Oſtentati- n, and had been long in the Family, L. 3. §. *ult. ff. de Supellectile Legata.* o the Court of *Frizeland*, *Sande Lib.* 2. *Tit.* 5. *Def.* 5. In the Caſe of a Di- iſion of Houſhold-furniture betwixt married Perſons, *Supellectili id tantum dſcripſit, quod Conjugibus fuit in quotidiano Uſu, non illud quod non in quoti- diano Uſu, ſed in Argentario repoſitum habuerunt.* 3. The Defender ought to eſtore without Diviſion two Gold Medals, *viz.* An *Elizabeth* valued about Two Pound *Sterling*, and a Medal on the Siege of *Breda* valued about Ten Pound *Sterling*, except ſhe can inſtruct they were Gifted to her by her Huſband at or before her Marriage : With the proving whereof ſhe ought to be burdened ; Since giving is not to be preſumed from her Poſſeſſion, 'cauſe of the eaſy Acceſs ſhe had thereto after her Husband's Death.

Anſwered for the Defender. 1. The uncut Webs muſt fall under Diviſion, and be rekoned Houſhold-furniture, tho' not actually formed and ſhaped to that Uſe : Becauſe, they were made and provided for the Uſe of the Family, as to be Hangings to Rooms, Bed-clothes, Table-linens, *&c.* and not for Sale ; And it were hard to exclude the Lady from a Share of her own

Virtue, to which ſhe has ſo clear a Right. The Word *Suppellex* in the civil Law was not ſo extenſive as Houſhold-furniture in ours: There being in the Pandects a Title *de Auro, Mundo, Ornamentis, Veſte vel Veſtimentis Legatis*, (whereof ſeveral Species come under the Denomination of Houſe-furniture) diſtinct from the Title *de Supellectile Legata*. 2. Albeit when the *Romans* affected to live *Ritu et More veterum Sabinorum*, Silver work did not with them fall under *Supellex*; Yet when, under their Emperors, they became Maſters of the World, they ridiculed that ancient Auſterity, and had ſcarcely any Houſhold-veſſels that were not of Silver and Gold, L. 3. §. 5. L. 8. L. 9. §. 1. *de Supellectile Legata*: And here there can be no Doubt, but the larger Veſſels fall under Diviſion, conſidering that the Lady is provided to a Half of the Heirſhip, as well as of the other common Moveables. The Diſtinction betwixt what is deſigned for daily Uſe, and that for Ornament or extraordinary Occaſions is frivolous: For what ever is kept in the Houſe and Family to be made Uſe of, whether daily or upon ſolemn Occaſions, muſt be reckoned Houſhold furniture; Otherwiſe it were as reaſonable to diſtinguiſh betwixt Table and Bed-linens, or the like uſed daily, and thoſe kept for extraordinary Occaſions. So that if the Purſuer's Argument prove any Thing, it proves too much. Again, had *Aytoun* deſigned no Share of the great Silver Veſſels to his Lady, he would either have expreſly excepted them, or tailzied them with the Eſtate to his Son: as ſome Noblemen have tailzied their Jewels with their Eſtate; and one tailzied a Silver Salt of immenſe Weight and Bigneſs, that had been made to prevent giving Offence to ſome by the ſuperſtitious Omen of overturning the Salt. 3. The Medals are preſumed to be the Defender's, ſince they are in her Poſſeſſion; For it is not poſſible that ſhe can prove that theſe *Jocalia* were her Marriage Gifts, as indeed they were; It not being ordinary for the like to be given in the Preſence of Witneſſes.

Replyed for the Purſuer. The Parallel betwixt finer Linen and the greater Silver Veſſels, doth not hold, becauſe the former, tho not daily uſed, is not of the Kind of what is of neceſſary Uſe: Whereas theſe laſt were never intended for neceſſary Uſe, but only for Ornament, as *Res pretioſæ*. And as an Argument that the Defunct had no Thoughts of giving his Lady any Share thereof, ſhe is provided to the Half of the Houſhold-furniture, or 500 *Merks* in her Option: Whereas the Silver Veſſels in Controverſie are of far greater Value, abſtracting from the other Houſhold-furniture.

Duplyed for the Defender. The Alternative of 500 Merks can have no Influence upon the Point of Right: Seing that was adjected only in Caſe the Half of the Pleniſhing had proved to be of leſs Value, which indeed might have happened: Seing no Man can tell what Houſhold-furniture, or other Effects he will leave at his Death.

The Lords found, That the Clauſe in the Defender's Contract of Marriage, carried her to a Share of all Heirſhip moveable that was Houſhold-*pleniſh*ing; but no other Heirſhip moveable; Nor to the Medals, unleſs *they* were gifted to her by her Husband at or before the Marriage. And *found* that the uncut Cloth was not to be reckoned Houſhold-pleniſhing; *But* that the Silver Plate, tho not deſtined for daily Uſe, falls under the Denomination of ſuch Pleniſhing. Here it was obſerved by one of the Lords, That the Deciſion of the Court of *Frizeland* obſerved by *Sande*, was only in the Caſe where a Wife claimed her legal Share of Pleniſhing, under which Heirſhip Pleniſhing doth not fall, and therefore doth not meet the preſent Caſe.

July 9, 1709. *Mr.* David Drummond *Treaſurer to the Bank, againſt* Alexander Kennedy *of* Glenour, *and* John Reid *Taylor in the* Canongate.

N an Action at the Inſtance of the Treaſurer of the Bank upon the Act of Parliament 1621, for reducing a voluntary Aſſignation granted by *Alex- der Paxton* Stabler, when Inſolvent, in Favours of *Glenour* and *Reid*, within en Days after he was charged with Horning by the Purſuer, for Security of Debt contracted before the Charge.

Alledged for the Defenders. The Purſuer having charged the common Debtor th Horning on the 2 *February*, Ten Days before the Aſſignation to the efenders, and intimated the 23, and uſed no further Diligence for a Matter Five or Six Months after the Charge; he was *in Mora*, and his inchoat Dili- nce by a ſimple Charge, ſo neglected to be conſummated by Denunciation, Poinding, *&c.* to affect the common Debtor's Lands and Goods, can be no ound to reduce the Right made to the Defenders.

Anſwered for the Purſuer. The Act of Parliament 1621 requires only to und Reduction thereon, that a Bankrupt make a voluntary Right in Defraud the lawful and more timely Diligence of another Creditor having ſerved hibition, or uſed Horning, *&c.* And the Purſuer hath uſed Horning by ving a Charge, which is uſing thereof in a proper Senſe; Denunciation be- g only the Effect of Diſobedience to the Charge. Law requires not con- mmated and complete Diligence actually affecting the Subject, which *per ſe* ould be a Title to reduce after voluntary Deeds without the Benefit of the atute 1621; but ſuch as may thereafter affect, and be completed, *January* , 1681, *Bathgate* contra *Bowdoun*, and *December* 11, 1691, *in the Competition the Creditors of Langtoun*, where the Execution of a Charge of Horning ainſt a Debtor was found relevant in the Terms of the Act 1621 to reduce ſterior voluntary Rights.

Replyed for the Defender. By inchoat Diligence in the Statute 1621, is eant where the Creditor is *in Curſu Diligentiæ*, and goes on without Delay complete it in due Time, *Stair, Inſtit. Lib.* 1. *Tit.* 9. *Pag.* 83. *Lib.* 4. *Tit.* 5. §. 17. *July* 21, 1627, *Hamilton* contra *M'culloch* obſerved by *Spotſwood*, ag. 43. And can the Purſuer be underſtood to have been *in Curſu Diligentiæ*, ho forbore to denounce for Six Months after the Charge? Again, by orning we underſtand Denunciation, or ſuch a Diligence as can affect the yvor's Lands or Goods, *November* 11, 1675, *Veach* contra *Pallat*, *July* 18, 677, *Murray* contra *Drummond*, which a ſimple Charge can never do.

Duplyed for the Purſuer. Seing the Statute preſcribes no definite Time for completing Diligence, in Order to found Reduction thereon; it ſufficeth to proſecute the ſame within the Year, which Law and Cuſtom allows for de- nouncing upon a Charge of Horning. 2. The Defender cannot obtrude *Mora* to the Purſuer, ſeing the Aſſignation made to him within Ten Days of the Charge, would have been unqueſtionably reducible, had Denunciation followed a few Days after the Aſſignation, as in Major *Betman* and Provoſt *Drummond*'s Caſe: And the Purſuer's delaying to denounce could not validate the null Aſſignation; for that, *quod ab Initio vitioſum eſt, Tractu Temporis convaleſcere non poteſt.* Beſides, it is the Intereſt of a trading Place, that Creditors be not forced immediately to the outmoſt Step of rigorous Diligence; but left to uſe their Diſcretion in allowing ſome reaſonable Time to the Perſon charged, to recover and extricate himſelf before the fatal completing of Diligence againſt him. The Pratticks cited by the Defender, are not to the Purpoſe. For in that betwixt *Veach* and *Pallat*, Denunciation had been uſed before the Date of the voluntary Right: And a ſimple Charge would not have been good in Competition with a voluntary Right, granted a Year after the Charge, upon which no ſubſequent Denunciation could have followed effectually. When it is ſaid in *Murray* and *Drummond*'s Caſe, that Horning has a general Effect both as to Lands and Moveables; that is not ſo to be underſtood, as if Denunciation anterior to the voluntary Right were neceſſary; but only that a Charge of Horning may lawfully affect theſe when completed by Denunciation. What is cited out of *Spotſwood*, is as little to the Purpoſe: For there the Acquirer of the voluntary Right had not taken the ſame in Security or Payment of bygone Debt, but for a Price payed long after the Reducer's Appriſing.

The Lords repelled the Reaſon of Reduction upon the Act of Parliament 1621; in Reſpect that, albeit the Purſuer had uſed Horning by a Charge before the Aſſignation, yet he had not connected and completed his Diligence by Denunciation for Five Months thereafter.

Eodem Die. ACT *of* SEDERUNT *Prohibiting Advocates to uſe indecent and diſreſpectful Expreſſions.*

FORASMUCHAS of late indecent and diſreſpectful Expreſſions are ſo frequent in Informations, Petitions and Anſwers, That it is neceſſary an effectual Remedy be provided againſt the ſame: Therefore the Lords of Council and Seſſion, Ordain all Advocates to be careful, That all Petitions, Anſwers, Informations and other Papers, to be put in the Boxes, be formed and drawn with all decent and reſpectful Expreſſions towards the Judges and Parties; with Certification to any Advocate who ſhall tranſgreſs the Premiſſes, he ſhall be debarred from the Parliament Houſe during the Time of the Seſſion after he tranſgreſſes, or further puniſhed according to his Offence.

Eodem Die. ACT *of* SEDERUNT *anent Bills againſt Interlocutors in Preſence.*

THE Lords of Council and Seſſion, conſidering the great Inconveniency by offering reclaiming Bills againſt Interlocutors *in Præſentia* after long Intervals, when the State of the Proceſs, and Grounds upon which the Lords did proceed are out of Mind, and the Delay of Juſtice, by multiplying Bills upon the ſame Points: Do ordain all Perſons who conceive they have any Ground to complain of Interlocutors *in Præſentia*, to offer their reclaiming Bills within Six *Sederunt* Days after pronouncing Decreets, Acts or Interlocutors, reclaimed againſt at furtheſt; and Declare, They will not in any Caſe receive or admit of more than Two reclaiming Bills from the ſame Party, after their ſaid firſt Bill againſt an Interlocutor *in Præſentia*; and Diſcharge the Clerks to receive or preſent to the Lords any Second or Third reclaiming Bills above Six Days after the Date of the Deliverance written upon the *Firſt* or Second Bills *reſpective*; or to receive or preſent more than Three Bills from the ſame Party againſt one Interlocutor. And Ordain theſe Preſents to be printed.

Eodem Die. Margaret Dalglieſh *Lady* Riccartoun, *againſt* Thomas Gibſon *Writer in* Edinburgh.

T*Homas Gibſon* Factor appointed by the Lords for the Eſtate of *Riccartoun*, having obtained a Decreet before the Sheriffs of *Edinburgh* againſt *Robert Cleghorn* one of the Tenants, for his Rent of the Crop 1703, and in Time coming,

oming, the Terms of Payment being firſt come and bygone: In *November* 704 he charged and denounced thereon. In *December* thereafter the Lady *iccartoun* denounced this *Robert Cleghorn* who was her Debtor, and about *eptember* 1705 Mr. *Gibſon* took a Diſpoſition from him to the Corns then on e Ground for Payment of Three Years Rent, *viz.* For the Crops 1703, 704, and 1705, and by Virtue thereof recovered Payment.

The Lady raiſed Reduction of the ſaid Diſpoſition againſt Mr. *Gibſon* upon e Second Part of the Act of Parliament 1621, as made to him in Prejudice f the Purſuer's lawful and more timely Diligence: And craved that in the erms of that Statute, he might be ordained to make forthcoming to her what as voluntarily paid to him, by the common Debtor's partial Favour, for e Crop 1704; which neither the Decreet obtained by the Defender before fell due, nor his Hypotheck for the ſubſequent Year could warrand the Pay- nent of.

Anſwered for the Defender. He having received Payment of his own Rent it of the Product of the Ground, by Virtue of the Diſpoſition taken for pre- enting the Expence of Poinding, had no ways contravened the Act of Par- ament 1621; whereof the grand Deſign was only to prevent fraudulent iſpoſitions, in Prejudice of anterior lawful Diligence uſed by others. For beit it mentions that the Doer of the Diligence has Action to recover what as voluntarily paid, in Prejudice thereof, by the Debtor to his Creditor; Inſtance can be given where ever the Law took Effect as to that Clauſe, ing as a Perſon under Diligence can, for the Favour of Commerce, ſell and iſpoſe of his Moveables for what Price he pleaſeth to a Creditor as well as to other: So he may likewiſe ſell and diſpone them to his Creditors in Order be ſold and applied for their Payment. And it were out of Meaſure hard if Maſter, who for Security of his Rent takes a Diſpoſition from his Tenant, ould ly open to the Tenant's Creditors, who having ſimple Obligements are a Capacity to do more timely Diligence. Eſpecially conſidering, That the dical Right of all the Product of the Ground is in the Maſter for his Rent, nd the Tenant has only the Excreſce *pro Cultura & Cura.* Tho' our Law lows the Maſter a Hypotheck but for one Year's Rent; yet he has ſuch an tereſt in his Tenant's Goods even for other Years Rents, as may always xclude his taking a Diſpoſition for Payment from the Conſtruction of Fraud.

Replyed for the Purſuer. Albeit in a Competition, a Donatar of Eſcheat who is preferable to an Aſſigny obtaining Right *ſtante Rebellione*) could not epete from a Creditor getting Payment in that Interval: Yet in the Caſe of iſpoſitions granted by Bankrupts (which are moſt unfavourable) there is o Diſtinction betwixt a Competition and Repetition, *November* 11, 1675, *each* contra *Pallet*, *November* 14, 1679, *Pollock* contra Kirk Seſſion of *Leith*, *February* 10, 1685, *Brown* contra *Watſon* and *Drummond.* Nor doth it alter the Caſe, that the Diſpoſition here was by a Tenant to his Maſter: For a Maſter (who hath a Hypotheck but for one Year) ſuffering mo Years Rent to ly unuplifted in the Tenants Hand, is conſidered *quoad* theſe only as another common Creditor; and any voluntary Right granted to him in Security thereof, falls under the Act of Parliament 1621. If Maſters were preferable for the Rents of precedent Years, the Credit of all Tenants would be quite ruined: For no Body would deal with or truſt them, as not knowing what Rents may be owing to their Maſter. Nor doth the Factor's *bona Fides* in accepting the Diſpoſition avail him: Becauſe, that might be pretended by any other Creditor, *qui ſuum recipiendo nulli videtur Fraudem facere*, and Law, without Regard thereto, preferreth the anterior Diligence of another Creditor, *qui ſibi vigilavit.*

Duplyed for the Defender. He is not pleading upon his Right of Hypotheck, but upon his Diſpoſition which he lawfully took, and diſpoſed of the Subject, by Virtue thereof, for Payment of his Rent, without any Trouble or Interpellation from the Purſuer. The *D*iſpoſitions mentioned in the *Deciſio* cited by her, were not granted by Tenants to their Maſters; and the Subje diſponed were ſtill extant unuplifted.

The Lords found, That in the Caſe of a Maſter obtaining a *Diſpoſitio* from his Tenant, tho' in a Competition another Creditor doing *Diligen* might be preferred; yet the Maſter having obtained Payment *bona Fide* b Virtue of the *D*iſpoſition, he cannot be liable to repete what he received more than if he had poinded.

July 14, 1709. *Poor* Katharin Graham *Relict of* John Murray *ſometim Gunner in the Caſtle of* Edinburgh, *againſt the Earl of* Leven *and Maj* Colt.

IN the Action at the Inſtance of *Katharin Graham* as Executrix to h Husband, againſt the Earl of *Leven* Governour of the Caſtle of *Edinburg* and Major *Colt* Paymaſter to the Gariſon; for Payment of 41 lb. 15 ſh. 1 *Sterling* reſting of her Husband's Pay as Serjeant for ſeveral Months preced *September* 1698, at 1. ſh 8 d. *per Diem*, conform to the Eſtabliſhment: Th Purſuer offered to prove by the Muſter Roll, or by Witneſſes, that her Husband ſerved ſo long as Serjeant; which ſhe contended was ſufficient to found her Claim, unleſs the *D*efenders prove Payment.

Alledged for the Defenders. The Action is preſcribed *quoad Modum probandi*, not being commenced within Three Years, conform to the *Act* 83. *Parl.* 6. *Ja.* 6. concerning the Preſcription of Servants Fees, and the like *D*ebts not founded on Writ. For a Soldier's Pay is a *D*ebt like unto a Servant's Fee: Both being alimentary, and neither uſing to be founded on or diſcharged by Writ, or preſumed to ly long over unpaid. So in a Caſe betwixt Captain *Dundas* and Lieutenant General *Holburn*, the Captain was preſum'd to have got his Share of Levy-mony; ſince he did not queſtion it *de recenti*.

Anſwered for the Purſuer. There is no Parity betwixt an ordinary Servant's Fee, and Arrears of Pay due to the Queen's Servants, or Soldiers: Becauſe, no Lieutenant General or Colonel can be purſued for theſe till he receive them from the Government, which is ſometimes Eight, or Nine or mo Years, as the Government thinks fit to delay the ſame. So a Soldier's Arrears were found not to fall under the Three Years Preſcription, in the Caſe of Captain *Slezer* and *Robert Forreſt*, *Anno* 1701, and in that betwixt General *Ramſay* and Serjeant *Heriot* in the Year 1705.

The Lords found, That the Three Years Preſcription takes not Place in the Caſe of a Soldier's Arrears, which is not like an ordinary Servant's Fee.

Eodem Die. James Vallange *of* Poſſils, *againſt* Patrick M'dowal *of* Freugh *and* William M'dowal *his Brother.*

P*Oſſils* having, before his Marriage with *Barbara Fullarton* Lady *Freugh*, writ and ſubſcribed a Renunciation of her Jointure, containing an Obligement to renew the ſame in Favours of her Aſſignies, when and how oft he ſhould be required; and ſhe having, many Years after the Marriage, aſſigned her Jointure to *Patrick M'dowal* of *Freugh* and *William* his Brother, her Children of the firſt Marriage; *Poſſils* purſued an Action of Mails and Duties againſt the Aſſignies and other Intrometters with the Rents of the Jointure Lands, who founded on the Renunciation to exclude him *ab agendo*.

Alledged for the Purſuer. No Reſpect can be had to the Renunciation. Be- uſe, 1. It is null, for that it bears not the Place where it was writ. 2. The dy had tacitly paſt from the Benefit thereof, not having diſpoſed of her inture before the Marriage; and ſhe could not do it afterwards: In Reſpect e Marriage was a legal Aſſignation to the Purſuer of all that belonged to Wiſe, or ſtood in her Perſon at the Time they entred into the State of atrimony; and the Right renounced recurred to him *Jure Mariti*.

Anſwered for the Defender. As it cannot be controverted, but had the Re- nciation been tranſmitted by the Wife to a Third Party before the Marriage, e Conveyance would have been effectual, *January* 15, 1669, *Hamilton* ntra *Bain*: So in the preſent Caſe, the Husband having obliged himſelf to ew the Renunciation in Favours of his Wife's Aſſignies, there ſeems to be *Jus quæſitum* to them when ever ſhe aſſign'd.

Replyed for the Purſuer. The Clauſe in the Renunciation obliging the usband to renew the ſame in Favours of the Wife's Aſſignies, muſt be under- ood *poſitis Terminis habilibus*, in the Terms of Law, ſhe exercing the Faculty aſſigning *debito Tempore* before her Marriage, which was a legal Aſſigna- on in Favours of the Husband of all ſhe had not otherwiſe diſpoſed of. So at the Defenders in this Proceſs, are to be conſidered only as ſecond or ſterior Aſſignies, competing with the Husband's firſt legal Aſſignation inti- ated by the Marriage.

The Lords did not regard the Objection againſt the Renunciation, that it entioned not the Place where it was granted; ſeing it was written and ſub- ribed by the Husband himſelf: But found, That the Renunciation of the ferent recurred to the Husband *Jure Mariti* after the Marriage.

July 15, 1709. William Baillie *of* Lamingtoun, *againſt Mr.* Alexander Menzies *of* Culterallers.

IN a Reduction, Improbation and Nonentry at the Inſtance of *Lamingtoun*, againſt *Culterallers*, his Vaſſal; The Defender alledged, That no Proceſs uld be ſuſtained againſt him; in Reſpect there is more than Year and Day twixt the Citation for the Second Diet, and the Day of Compearance.

Alledged for the Purſuer. In Executions, the Day of Compearance for the firſt iet muſt be within Year and Day of the Citation; but it ſufficeth that the ay of Compearance for the ſecond Diet, be within Year and Day of the firſt iet of Compearance.

Anſwered for the Defender. Albeit when different Citations were given for he firſt and ſecond Diets, it was ſufficient to make the firſt Day of Compear- nce within Year and Day of the Citation, and the ſecond within a Year of he firſt: Yet now when Citations to both Diets are allowed to be given at once, the Day of Compearance ſhould be caſt within Year and Day of the Date of the Execution, otherwiſe Wakenings would be unneceſſary in any Caſe.

The Lords repelled the dilatory Defence.

Eodem Die. Beatrix Colvil *Lady* Roſſie, *againſt Colonel* Patrick Ogilvie.

IN a Competition betwixt the Lady *Roſſie*, who had arreſted a Debt due to *Colvil* of *Kincardin* in my Lord *Bargany*'s Hand; and Colonel *Ogilvie*, who pretended Right to the ſame Debt by Virtue of a Precept drawn by my Lord upon his Chamberlain, payable to *Kincardin*, and indorſed by him to the Colonel, the Precept being of a Date anterior to the Arreſtment, and the

Indorſation wanting a Date: The Lords found, That the Indorſation is preſumed to be of the ſame Date with the Precept, unleſs the contrary were proved; and therefore preferred Colonel *Ogilvie*. Albeit Aſſignations Blank in the Date, in a Competition with legal Diligence, are preſumed to have been made after the Diligence. Becauſe, Writs of that Nature are ordinarily dated, and it is a Kind of Fault to omit what is ordinary: Whereas Indorſations of Bills of Exchange are commonly Blank in the Date; and all the Privileges of theſe are by the Act of Parliament 1696, extended to Inland Bills and Precepts.

July 16, 1709. *The Executors Creditors of* John Stuart *Merchant in* Edinburgh, *againſt Mr.* Robert Stuart *Profeſſor of Philoſophy in the* College of Edinburgh.

JAmes *Stuart* Advocate, one of the Town Clerks of *Edinburgh*, having before his Deceaſe in *January* 1704, diſponed and made over all his Means and Effects in Truſt to Sir *James Stuart* of *Goodtries* his Uncle, and Sir *Hugh Cuninghame* of *Craigend* his Father in Law, for the Ends mentioned in the Diſpoſition; with a Clauſe ordaining what remained of his Eſtate, after Payment of his Debts and Legacies, to be made forthcoming to his two Brothers *John* and Mr. *Robert Stuarts* equally betwixt them; and *John Stuart* chancing to die a little after *James*, before the Truſtees had executed his Will: Theſe Truſtees the 25 *March* 1705, ordered 6029 ℔. the Superplus Ballance of *James*'s free Gear to be put in Mr. *Robert*'s Hands, to be kept and made forthcoming by him to ſuch as ſhould be found to have beſt Right. *John Stuart*'s Creditors confirmed his Share of the Mony as Executors Creditors to him, and purſued Mr. *Robert* for Payment.

Alledged for the Defender. He being Creditor to his Brother *John* in a liquid Bond of 730 Pound of Principal and ſome bygone Annualrents, ought to have Retention in his own Hands for his Payment: Eſpecially conſidering, That the Share of *James Stuart*'s Eſtate falling to his Brother *John*, was never *in Bonis* of *John*, but in the Perſon of the Truſtees who had the abſolute Diſpoſal thereof after *John*'s Death, and were only liable to an Action of Truſt at the Inſtance of his Creditors, or Repreſentatives. And theſe Truſtees having put the Mony in the Defender's Hands to be forthcoming to *John*'s Creditors, he might juſtly pay himſelf in the firſt Place by Virtue of the Delegation: As well as the Truſtees might have immediately paid the Creditors with the Mony as far as it would go, without Neceſſity of Confirmation.

Replyed for the Purſuers. Their Debtor's Share of his Brother's Means was *in Bonis* of the Debtor, at his Deceaſe, and not then in the Defender's Hands: So that whatever way thereafter he attained Poſſeſſion, he could not retain for his own Payment, without eſtabliſhing a Title, by confirming himſelf Executor Creditor. Creditors cannot by any indirect Means prefer themſelves to other Creditors doing Diligence after the common Debtor's Deceaſe, *February* 8, 1662, *Crawford* contra Earl of *Murray*, and *February* 14, 1662, The Children of *Mouſwal* contra *Laurie*. And the Truſtees could not tranſmit any Title to *John Stuart*'s Effects, from whom they had no Truſt or Powers to pay his Debt. Beſides, whether the Right of *John*'s Share was *in Bonis ejus*, or in the Perſon of the Truſtees, they could never evacuate the Truſt, by giving his Share, after his Death, to any Perſon wanting a Title.

Duplyed for the Defender. Creditors cannot indeed by indirect Means prefer themſelves to others, and it is certainly a moſt indirect Method, for a Debtor to take an Aſſignation to his deceas'd Creditor's Debts, in order to compenſe againſt the Defunct's other Creditor's doing Diligence, which is the

Caſe of the cited Deciſions: Seing this Courſe would open a Door to any Creditor to operate his own Preference, by colluding with a Debtor. But ere there is no ſuch Practice: On the contrary, the Defender got the Mony airly in his Hand by the Truſtees, who had the only Right thereto; and did ruly apply it for the Uſe he received it. 2. Suppoſe *John Stuart* had lodged n Mr. *Robert*'s Hand, a Sum to be expended by him in paying *John*'s Creitors, is it to be imagined that Mr. *Robert* could not in that Caſe have paid imſelf after the Debtor's Deceaſe without Confirmation? Seing *qui ſuum reipit, Condictione non tenetur*. Much more muſt Retention be allowed in this Caſe, where in Effect the Mony was never *in Bonis Defuncti*, but the Truſt lowed from others. Again, as had the Mony been put by the Truſtees in Mr. *Robert*'s Hand while *John* was alive, he, Mr. *Robert*, would have good Right of Retention: So he muſt be allowed the like *Jus Retentionis* againſt *ohn*'s Executors Creditors.

Triplyed for the Purſuers. The Diſparity is manifeſt: For putting the Mony n Mr. *Robert*'s Hand in *John*'s Lifetime would *ipſo Facto* have made an extinuiſhing *Concurſus Debiti & Crediti*, which could not happen by his getting he Mony after *John*'s Deceaſe, which nothing but a legally eſtabliſhed Title ould affect.

The Lords found, That Mr. *Robert Stuart* had no Right of Retention for is own Payment; and that the Creditors of *John Stuart* ought to be prefered to his Share of the depoſited Mony, according to the Diligence uſed by hem to affect the ſame.

Eodem Die. Janet Cochran *Relict of* James Allan *Writer in* Edinburgh, *againſt* John Pringle *Litſter there.*

IN the Action at the Inſtance of *Janet Cochran*, as having Right to all her Husband's moveable Debts, againſt *John Pringle*, for Payment of Ninety ound *Scots* contained in a Bill drawn by *David Forreſter* upon, and accepted y the Defender, payable to *James Allan* the Purſuer's Husband: The Lords ound it not relevant to aſſoilzie the Defender, that the Purſuer's Husband had ritten and ſubſcribed upon the Bill a Receipt of the Contents. In Reſpect he Bill with the Receipt upon it was found among the Husband's Papers after is Death: And therefore the Receipt was preſumed to have been writ *Spe umerandæ Pecuniæ*; And not being delivered, Law preſumes that Payment vas never made.

July 22, 1709. *The Feuars of* Dundaff, *againſt* David Madril *of* Muirmill.

IN the Proceſs of Declarator at the Inſtance of the Feuars of *Dundaff*, againſt *David Madril*, for declaring the Purſuer's Lands free of any Aſtriction to the Defender's Mill called the *Muirmill*; The Purſuers Charters bearing this Clauſe, *They always coming to the ſaid Mill with all Corns grindable growing upon their Lands, which they ſhould happen to grind, and paying Multures and Knaveſhip, and doing other Duties for grinding thereof Uſed and Wont, and upholding the ſaid Mill, Mill-houſe, Dam, and Watergang thereto, conform to Uſe and Wont, and alſo bringing all other Corns as well Malt as others, which they ſhould happen to bring within the Bounds of theſe Lands, to be grinded thereat for Out-ſucken Multure allennerly*: The Lords found the ſaid Clauſe to import a Thirlage, and that the Purſuers could grind none of the foreſaid Corns at any other Mill.

Eodem *Die.* Alexander Duncan *of* Strathmartin, *againſt Mr.* Alexander Graham *of* Methie.

IN the Ranking of the Creditors of *Wintoun* of *Strathmartin*, *Alexander Duncan*, who had a Diſpoſition of the Lands from the Debtor's Heir, objected againſt an Intereſt produced by Mr. *Alexander Graham*, *viz.* two heretable Bonds with Infeſtment granted to his Author by *Wintoun*, that the ſame muſt be underſtood ſatisfied and paid. In ſo far as, he the common Debtor aſſigned, *Alexander Graham*'s Author, for the more ſecure Payment of his Mony, to a Tack of Lands paying more Duty than his Annualrent amounted to, by Virtue whereof he entred to Poſſeſſion, and ought, or is preſumed to have continued to uplift the whole Rents, unleſs he can make appear, That he was debarred by Another Creditor.

Anſwered for Alexander Graham. His Author intrometted with no more than ſatisfied the Annualrent of his Mony, nor was obliged to intromet with, or compt for more of the Rents; ſeing he debarred no other Creditor from Acceſs thereto.

The Lords found, That the Aſſigny was not liable to intromet beyond his Annualrent, nor comptable for more. For they diſtinguiſhed betwixt a voluntary Right in Security, and a legal Right by Diligence of Appriſing or the like.

July 26, 1709. *Dam* Janet Murray *Lady* Pitfirren, *againſt Mr.* Alexander Wood, *Chamberlain to the Earl of* Kinnoul.

IN the Suſpenſion of a Charge at the Inſtance of the Lady *Pitfirren*, againſt Mr. *Alexander Wood*, for Payment of One thouſand four hundred Pound contained in a Bond granted by him to the Charger, for the Behoof of the Lady *Cultmalundie* her Daughter, in Lieu of the Complement of a Gown for renouncing her Liferent Right in the Lands of *Cultmalundie*, purchaſed by the Earl of *Kinnoul* from *David Drummond* her Husband: The Lords found the Bond not compenſable by a Bond granted of the ſame Date for the like Sum by the Husband to *Alexander Wood* the Suſpender. In Reſpect the cuſtomary Gratification to a Wife for her Conſent to the Alienation of her Husband's Lands commonly called, *The Ladie's Gown*, falls under the *Paraphernalia*, and excludes the *Jus Mariti*: And it hardly conſiſted with *bona Fides* in the Suſpender, to take another Bond at the ſame Time from the Husband, to defeat the Security granted to the Lady.

July 28, 1709. *Sir* Archibald *and Mr.* John Stuarts *of* Blackhall, *againſt* James Stuart *of* Carſewell.

C*Arſewell* having in the Year 1688, purchaſed from Sir *Archibald Stuart* of *Blackhall* the Lands of *Langhouſe*, with two Pieces of Meadow and a Part of a Wood diſtinct from the Lands, he, ſeveral Months thereafter, to gratifie Sir *Archibald*, granted him at his Deſire an Obligement to paſs from the two Pieces of Meadow and Wood, if he and his then eldeſt Son ſhould thing fit to redeem the ſame from *Carſewell* within two or three Years at moſt, by Payment of Three hundred Merks which he paid for them. Neither Sir *Archibald* nor his eldeſt Son offered to redeem, for the Space of four Years that they lived together: But Sir *Archibald* after his Son's Death, aſſigned the

Obligement to Mr. *John Stuart* his ſecond Son now of *Blackhall*, who uſed an Order of Redemption, and purſued a Declarator.

Alledged for the Defender. His Obligement being only a Matter of Compliment and Civility, ſigned ſeveral Months after he had purchaſed the Ground, wherein he allowing Sir *Archibald* and his Son the Freedom to retract the Bargain within two or three Years at fartheſt; and none of them having ſignified any Inclination to do it for the Space of four Years while the young Laird lived: Sir *Archibald* or his Aſſigny cannot pretend any Benefit by the Clauſe of Reverſion, which was not conceived in Favours of him alone, but in Favours of him and his then eldeſt Son; Reverſions being *ſtrictiſſimi Juris*.

Anſwered for the Purſuer. Tho' Reverſions be ſtrictly interpreted as to the Tranſmiſſion, and go not to Aſſignies unleſs expreſſed; They are largely and favourably interpreted, as to the Time of Indurance; and Irritancies thereof are purgeable before Declarator: Becauſe the allowing a Reverſion implies that the Price was not adequate; and it appears from the Defender's Backbond, That there was not a competent Price given for the Subject craved to be redeemed. Nor is it of any Moment to object, That the Reverſion is only perſonal to Sir *Archibald* and his eldeſt Son: Seing Mr. *John Stuart* is now in his Brother's Place as his Heir, and the Father concurs in the Proceſs. Beſides, our Law eſteems no Right to be perſonal, without the excluſive Words *Allennerly* or *Only*.

The Lords found, That the Subject controverted is not redeemable: In Reſpect the Backbond was granted ſeveral Months after the Diſpoſition, and ſo was not *Pars Contractus*; Conſequently the Reverſion behoved to have been claimed in the ſpecifick Terms thereof.

November 4, 1709. John Murray *of* Arthurſtane, *againſt* James Wood *in* Kirriemuir.

John Murray Adjudger of the Eſtate of *Farquharſon* of *Balloch*, having purſued a Reduction and Improbation againſt *James Wood* another Adjudger, wherein all Diligence at his Inſtance, and Grounds thereof affecting the common Debtor's Eſtate were called for, and Terms taken by the Defender to produce; and having the 22 of *July* laſt obtained a Decreet of Certification for not Production, which was extracted the 8 of *Auguſt* thereafter: *James Wood* now repreſents by Bill, That his Writs were in Town, in Order to have been produced when the Certification was pronounced, but his Doers had not adverted to it, Buſineſs being hurried in the End of a Seſſion; and craved the Lords would recal the Decreet, and allow his Intereſt yet to be produced. In Regard, however tender they are in reponing againſt Certifications in Improbations that have ſtood long unquarrelled, yet ſuch may be got rectified if quarrelled *de recenti*, *Stair*, *Inſtit. Lib.* 4. *Tit.* 20. §. 11. *June* 26, 1673, *Murray* and *Crichtoun* againſt *Murray*. *February* 17, 1675, *Bannantine* againſt *Rome*. For no Forms, if recently complained of, ſhould be rigidly obſerved againſt Equity.

Anſwered for John Murray. Decreets of Certification in Improbations having been always conſidered as the beſt and ſtrongeſt Securities in our Law, ſo as they can hardly be overturned, tho' pronounced in Abſence: And the Certification in Queſtion being orderly extracted, after Compearance, and taking of Terms; it can never be brought back. The cited Deciſions relate to Caſes where the Production of Rights was hindred through Accidents that humane Power could not foreſee, or prevent: But the Lords never reponed againſt a Decreet of Certification upon no other Ground than that of a recent Application. Law muſt not be turned out of it's Channel and common Courſe, to meet a particular Caſe, tho' there may be Equity in it: It being a Maxim among the Doctors, That Equity ought to be the Rule in making Laws, but not in judging, when inconſiſtent with the Law made. So that one ſhould rather have the Benefit of the eſtabliſhed Form, than that another ſhould be relieved of an Inconveniency incurred through Neglect thereof; according to the Rule, *Jura ſubveniunt Vigilantibus*, &c. And therefore from the very Time Mr. *Murray* obtained his Decreet, it became a good and ſufficient Right to him, which cannot be made leſs ſuch, by the Defender's applying for Redreſs in a ſhort Time thereafter: Becauſe, when once the legal Time allowed for producing Rights is expired, Law makes no Difference as to Times of Application; which otherwiſe were neceſſarly to be determined, that Perſons might not be at the Trouble or Expence of extracting till the ſame are elapſed.

The Lords reponed *James Wood* againſt the Decreet of Certification, and allowed his Writs yet to be received; he paying *John Murray*'s Expences, according as he ſhall depone that he expended in procuring the ſaid Decreet.

November 9, 1709. Thomas Sandilands *Collector of the Fines impoſed by the Juſtices of Peace in the Diſtrict of* Mid-Calder, *againſt* John Purdie *of* Hartburnhead.

John Purdie fined by the ſaid Juſtices of Peace in One hundred Pound *Scots*, for Fornication with *Chriſtian Howiſon* his Servant, conform to the Act 38, *Parliament 1661*, he being the eldeſt Son of an Heretor, and ſo a Gentleman in the Conſtruction of Law; When charged for Payment by *Thomas Sandilands* Collector of theſe Fines: He ſuſpended upon this Ground, That the Fine was exorbitant; in ſo far as he was but a ſmall Heretor, and the Act of Parliament impoſeth the One hundred Pound upon Gentlemen Tranſgreſſors. And as all Heretors are not Gentlemen; ſo he denied that he had the leaſt Pretence to the Title of a Gentleman: And further, he had married the Woman he offended with, which leſſened the Scandal, and was a Ground to mitigate the Fine.

The Lords ſuſtained the Reaſon of Suſpenſion to reſtrict the Fine to Ten Pound *Scots*: Becauſe the Suſpender had not the Face or Air of a Gentleman. Albeit it was alledged for the Charger, That the Suſpender's Profligateneſs and Debauchery, the Place of the Country where he lives, and the Company haunted by him, had influenced his Meen.

November 11, 1709. *The Lord Juſtice Clerk and his Lady, againſt* John Hamilton *of* Bangour *and his Tutors.*

IN the Proceſs at the Inſtance of the Lady *Ormiſtoun* and the Lord Juſtice Clerk, her preſent Husband, againſt *John Hamilton* of *Bangour*, as Heir to the Lord *Whitelaw* the Lady's former Husband, for Payment of ſome Merchant Accompts due by the Defunct, and aſſigned to the Lady.

The Lords found the Accompts are not continued by Articles advanced to the Defunct's Relict, for his Funerals, Maintenance of the Family, and their Mournings, by the ſame Perſons to whom the former Accompts were due: In Reſpect the Lady did noways repreſent her laſt Husband. And therefore ſuſtained Preſcription of theſe Accompts *quoad Modum probandi*, not being purſued within three Years after the Husband's Deceaſe.

Albeit it was alledged for the Purſuer, That ſeing the Articles furniſhed after *Whitelaw*'s Death affect his Means, they ſhould be reckoned in the ſame

Claſs with what was furniſhed before, tho' not made by Order of the Heir or Executor: *Nam qui propter Funus aliquid impendit, cum Defuncto contrahere videtur, non cum Hærede. L. 1. ff. de Religioſis et Sumptibus Funerum.*

In Reſpect it was anſwered for the Defender, That any Accompts taken on after *Whitelaw*'s Deceaſe by the Relict, who was neither his Heir nor Executor, cannot be conjoined with the Accompts owing in his Lifetime, to ſtop Preſcription thereof. For it cannot be underſtood a current Accompt, but what is continued betwixt the ſame Perſons: Seing the Reaſon for computing the three Years Preſcription from the laſt Article of a Merchant's running Accompt is, partly, becauſe a Perſon who gets new Articles truſted to him before the former are paid, ought not to object the Merchant's Forbearance and Diſcretion, to his Prejudice; partly, becauſe the receiving of the laſt Article is a tacit paſſing from Preſcription of the former, which Reaſon can't take Place, where the laſt Articles are not taken on by the ſame Perſon to whom the firſt were given off, or by his Repreſentative. For any other indifferent *Negotiorum Geſtor* could not expreſly renounce the Defence of Preſcription competent to the Defunct's Heirs; and far leſs could he do it tacitly by Innuendo's. So tacit Relocation (of which the Currency of Accompts is a Kind) can never take Place, ſave betwixt the ſame Parties, or their Repreſentatives: And Three conſecutive Diſcharges do not import a Diſcharge of all Bygones, where the firſt or laſt of theſe Diſcharges is granted only by a Chamberlain.

November 15, 1709. George Livington *againſt* Moriſon *of* Preſtoungrange.

IN the Action at the Inſtance of *George Livington*, againſt *Preſtoungrange*: The Lords ſiſted Proceſs againſt the Defender, as being a Member of Parliament, albeit he was not yet attending the Parliament. In Reſpect the Parliament was ſitting, and he claimed his Privilege, and repreſented that he was under a Neceſſity to go and attend it.

November 16, 1709. John Crombie *Sheriff Clerk of* Roxburgh, *againſt* James Robertſon *Chirurgion in* Jedburgh.

IN a Reduction *ex Capite Inhibitionis*, at the Inſtance of *John Crombie*, againſt *James Robertſon*; the Defender alledged, That the Purſuer's Inhibition is null, in Reſpect the Execution doth not bear Delivery of a Copy to the Party inhibited; which is indiſpenſibly requiſite in the Executions of all Summons or Letters, *Stair Inſtit. Lib.* 4. *Tit* 38. §. 15. *Lib.* 3. *Tit.* 3. § 3. *Act* 75. *Parl.* 5. *Act.* 139. *Parl.* 12. *J.* 6. *July* 28, 1671, Sir *John Keith* contra Sir *George Johnſton*; and not ſuppliable by Intimation to the Party, *December* 4, 1628, *Potter* contra *Baillie*. The Reaſon why a Copy is neceſſary is, That the Parties, who are often ignorant of their own Buſineſs, may ſhew their Copies to their Lawyers, to anſwer for them, or adviſe them what to do.

Replyed for the Purſuer. The Execution quarrelled is moſt formal, altho' it bears not Delivery of a Copy: There being no Statute expreſly requiring ſuch a Solemnity. For the *Act.* 139. *Par.* 1592, Ordains only the Copy to be ſubſcribed by the Officer; and Formalities are not to be introduced by Inference. The *Act* 75, concerns only the Method of Execution at the Dwelling-houſe in Abſence of the Party, where a Copy is abſolutely neceſſary to be left for Intimation, as it is in the Caſe of Executions at the Market-croſs of *Edinburgh* againſt Perſons out of the Country: Whereas the Purſuer's Execution bears, That the Party was duly and lawfully inhibited, and perſonally apprehended. And as *perſonally apprehended* implies that the Party wa certiorated, which is all that the giving a Copy is deſigned for: So *lawfull inhibited* infers that a Copy, if neceſſary, has been delivered; *Nam præſumitur pro Solennitate Inſtrumenti.* The Deciſions founded on by the Purſuer do not meet; For that on the 4 *December* 1628, finds only Intimation to one perſonally, ſupplyes not a Charge, which indeed it cannot do: Seing a Charge requires to be by Execution. The Prattick betwixt Sir *John Keith* and Sir *George Johnſton*, beſides that it is but a ſingle Deciſion, hath this Speciality That the Execution bore not *lawfully inhibited*, as in this Caſe, but only *inhibited according to the Will of the Letters*: So that neither di that Execution bear, nor imply Delivery of a Copy. As to my Lord Stair's Opinion, that is only delivered in the Places cited, concerning the Executions of Hornings and Summonſes, which materially differ from Inhibitions. In ſo far as in Horning a Perſon being charged to pay under a ſevere Certification, the Execution ought to be very ſolemn and formal: And the Executions of both Hornings and Summonſes concern only the Party cited or charged Whereas the Execution of Inhibition doth chiefly concern the Liedges, to warn them not to contract or bargain with ſuch a one; And they are put ſufficiently *in mala Fide* to do it by the Copy affix'd at the Market-croſs.

Duplyed for the Defender. The Validity of the Execution againſt the Liedges, doth not ſupply the Defect of the invalid Execution againſt the Party For the whole muſt be valid, or the whole is null: as *Bonum eſt ex integra Cauſa, Malum ex ſingulis Defectibus.* It is not the Execution againſt the Liedges, that puts them *in mala Fide* to purchaſe from Perſons inhibited, o denounced, but the Regiſtration thereof: And when Purchaſers find in th Regiſter the Execution againſt the Party null, they regard not the Executio againſt the Liedges, as being null in Conſequence. 2. Where Law requires a ſpecial Solemnity, the Meſſenger's Execution muſt bear expreſly tha it was performed. And the Cuſtom of giving Copies is ſo prevalent, that w may ſay in the Words of the Law, *In tantum probatum eſt, ut non fuerit neceſſe Scripto id comprehendere.* 3. The fancied Diſparity betwixt a Hornin and Inhibition, is no more to the Purpoſe, than to ſay, Horning is not Inhibition. Are not all prohibitory Diligences reſtraining the Exerciſe of Propert and prejudicial to fair Purchaſers, odious as well as Horning? There is n material Difference betwixt the Deciſion 1671, and this Caſe: For nothin can be due and lawful, in the Execution, but what is according to the Command of the Letters; And it were dangerous to allow Meſſengers to be Judg of what is due and lawful.

The Lords repelled the Nullity objected againſt the Inhibition, That th Execution doth not bear a Copy.

Here it was obſerved by ſome of the Lords, That there was no Specialit betwixt the Deciſion 1671, and this Caſe: Becauſe the former bears, Tha the Meſſenger executed conform to the Command of the Letters, and the bore a Warrant to inhibit lawfully. Beſides, that to ſuſtain ſuch an Execution, would not only make a Meſſenger Judge of what is Law; but alſo woul prove a Temptation to Perjury, and unſecure Purchaſers who acquired b Advice of Lawyers, upon the Faith that an Execution not bearing Delivery o a Copy, was null.

November 30, 1709, Upon adviſing a reclaiming Bill and Anſwers, th Lords ordered the Regiſters to be ſearched, to know if conſtant and unifor Executions of Inhibitions do bear Delivery of a Copy to the Party tho' perſonally apprehended. And 30 *June* 1710, it being reported, That about th Time of executing the Purſuer's Inhibition, many Inhibitions are found t have been executed in the ſame Terms. The Lords adhered to their forme

Interlocuto

Interlocutor ſuſtaining the Inhibition, and decerned in the Reduction thereupon.

November 18, 1709. Alexander Grant, *againſt* Strachan *of* Thorntoun.

IN the Action at the Inſtance of *Alexander Grant* againſt *Thorntoun*: The Lords, upon Report of the Lord *Cullen*, found, That the Defender in a Summons of Conſtitution, in Order to adjudge and come in *pari Paſſu* with a former Adjudger, not compearing at the firſt Calling in the Outer-houſe, but compearing when the Cauſe came in by Courſe of the Regulation-roll, could not be allowed to ſee the Proceſs in common Form, but only in the Clerk's Hands.

Eodem Die.

UPon the Lord *Cullen*'s Report, the Lords found, That a Lord might grant a ſecond Diligence to a Perſon againſt whom the Term had been circumduced by another Ordinary, whether in Abſence or for not Reporting the firſt Diligence: Albeit *regulariter par in parem non habet Imperium*.

November 24, 1709.

UPon Report of the Lord *Cullen*, an Objection againſt *John Mitchel* Servant to my Lord *Elphingſtoun* his being a Witneſs, that he was not worth the Queen's Unlaw, being referred to his Oath, and he deponing that he could not tell, becauſe he had ſome Debts, albeit he had Effects to the Value of Ten Pound *Scots*; And it being ſuggeſted from the Bar, That he had Five Pound *Sterling* of Fee: The Lords deſired the Lord Ordinary to interrogate him, If he had a Fee or a Trade. For they were of Opinion, That if the Witneſs had a Fee or a Trade, tho he had not a Sixpence of real Effects, he might be ſuſtained. And if he had neither Fee nor Trade, the Lords deſired him to be interrogated, If he believed that he was worth Ten Pound; and if he ſhould ſay, That he did not believe it, the Lords were clear not to believe it neither: Becauſe Men commonly *ſperant plus eſſe in Bonis*. But the Objection muſt be inſtantly verified.

Eodem Die. James Monteith *of* Milnhall *againſt the Heretors within the Barony of* Abbotſcarſe.

IN the Action at the Inſtance of *Milnhall* againſt the Heretors of the Barony of *Abbotſcarſe*: The Lords repelled a Witneſs as being within the forbidden Degrees to the Adducer; albeit the other Party had before adduced him. In Reſpect, tho' when one Party produceth a Witneſs who is within the Degrees to the other, that other may, notwithſtanding his Propinquity, put Counter-interrogators to the Witneſs at the ſame Time that he is Examining by his Adverſary: He cannot crave him to be re-examined *ex Intervallo*, more than he could have produced him at firſt at his own Inſtance.

November 25, 1709. Margaret Turnbul *Spouſe to* Henry Elder *Writer in* Dumfermling, *againſt her Husband's Creditors.*

MArgaret Turnbul finding her Liferent Infeſtment in ſome Houſes in *Edinburgh*, provided to her by her firſt Husband, to be affected by the Creditors of *Henry Elder* her preſent Husband, as falling under the *Jus Mariti*: She raiſed Action of Aliment againſt him and them upon theſe Grounds, 1. The Purſuer's Jointure by a former Husband, being *ſua Natura Alimentary, ad ſuſtinenda Onera Matrimonii* (as all Tochers are given *eo Intuitu*) and the *Jus Mariti* but a limited *Dominium*, clogged with the Burden of the Wife's Aliment: His Creditors, who are in no better Caſe than he, cannot affect the Jointure in Prejudice thereof. 2. As where *Socius vergit ad Inopiam Separatio Bonorum* is never refuſed; *quia Nemo invitus tenetur manere in Communione*: So by the Canon Law and the Cuſtom of other Places in *Europe*, where a Husband's Affairs go wrong, *Separatio Bonorum in Communione* is allowed, *Perez. in Cod. Lib.* 5. *Tit.* 12, *N.* 4. *Treut. Vol.* 2. *Diſp.* 6. *Th.* 13. And albeit this is not agreeable to our Law, yet with us, the Wife in ſuch a Caſe ought at leaſt to have a ſuitable Aliment allowed to her out of her Jointure: *Hoc maxime attento*, that her Jointure is of that Nature, that it can't be totally affected at once by the Creditors, but only from Term to Term; as, if her Tocher were ſtill in her Father's Hand unpaid, he might exclude the Husband's Creditors from uplifting thereof, unleſs they found Caution for her Aliment. 3 A Wife's Right to aliment out of the Goods in Communion, *inharet Oſſibus*, is ſo peculiar to, and inſeparable from her Perſon, that it can no more be affected by the Husband's Creditors, than her Clothes and *Paraphernalia*, Stair *Inſtit. Lib.* 1. *Tit.* 4. *N.* 9. And an Aliment was lately found due to a Wife, in the Lady *Penkil*'s Caſe.

Alledged for the Creditors of the Husband. 1. When Wives marry, they take their Husbands for better, for worſe, and muſt ſhare with them in the Increaſe and Decreaſe of their Fortunes. 2. The *Jus Mariti* is ſo fix'd in the Husband by our Law, that he cannot renounce it; And the *Separatio Bonorum* is a Novelty, and would be of dangerous Conſequence in our Practice. For it would both prove a Snare to Creditors, and encourage Wives to ſpend profuſely their Husband's Fortune, with a View when it is gone, to crave a Separation of what they brought with them. 3. Tho' Liferents conſtituted formally by Way of Aliment, and declared not affectable by Creditors, are ſecure from Diligence at their Inſtance; Yet a Liferent Proviſion in common Form hath no ſuch Privilege. 4. The *Lady Penkil*'s *Caſe* doth not meet, in Reſpect ſhe had a plentiful Jointure, and he was Bankrupt before the Marriage.

Replyed for the Purſuer, 1. The Marriage-*formula of taking for better for worſe*, imports no more, but a Chriſtian Patience in comporting with the ordinary Infirmities of Husbands, and not any Obligation to ſtarve with them: For taken in a ſtrict Senſe, it would exclude all Divorces, and Aliments, upon whatſoever Account, which no doubt is contrary to Law. 2. The *Jus Mariti* is effectual in an abſolute Senſe only as to what is over the *Onera Matrimonii*: For anſwering whereof in the firſt Place, The Husband has the Adminiſtration of the Goods in Communion. As a good Woman will never miſpend her Husband's Subſtance; ſo a bad one may be reſtrained by the legal Remedies of Inhibition, &c. and the *Jus Mariti* being formally the ſame in a poor Man, as in a rich, the Lady *Penkil*'s Caſe comes home to the preſent Queſtion.

The Lords found the Wife could have no Aliment in Prejudice of her Husband's Creditors.

November 29, 1709. Jean Meaſſon *Relict of Mr.* William Thomſon *Writer to the Signet, againſt the Earl of* Aberdeen.

IN the Action at the Inſtance of *Jean Meaſſon*, as Executrix to Mr. *William Thomſon*, againſt the Earl of *Aberdeen*, for Payment of an Accompt for

Writings, expeding Charters, taking Infeſtments, and ſuch like Buſineſs done by the Defunct for the Earl.

Alledged for the Defender. The Accompt is preſcribed *quoad Modum probandi,* not being purſued within three Years of the Date of the laſt Article therein.

Replyed for the Purſuer. Preſcription cannot take Place: Becauſe the Writs relative to the Accompt were in Mr. *Thomſon*'s Cuſtody at his Deceaſe; And by Law he had *Jus Hypothecæ,* &c. therein, for Payment of his Accompt. For where a Creditor has Right to retain a Subject belonging to his Debtor, he cannot be thought negligent in delaying to ſue for Payment: Nor could he well ſeek Payment of his Accompt, till once the Writs were called for. So that the very having of the Writs doth interrupt any Preſcription that can be obtruded againſt the Articles, as to the Manner of Probation.

Duplyed for the Defender. Writers cannot plead any Hypotheck from the ſole having of an Imployer's Writs, unleſs they make appear that a Debt is reſting: Hypothecation being but an acceſſory Security. If the meer having of the Writs did interrupt the Preſcription, no Perſon that had been imployed as a Writer, could ever thereafter be ſafely uſed as Agent or otherways, in Buſineſs formerly expede by himſelf.

The Lords found, That Mr. *Thomſon*'s having the Earl's Papers in his Hand *Jure Hypothecæ,* doth not hinder Preſcription to run: And that therefore the Purſuer behoved to prove the Compt to be reſting owing by the Earl's Oath.

But thereafter *December* 13, 1709, the Purſuer pleaded, That the Currency of the Accompt was continued by an Article of a Diſcharge of a Backbond, granted by the Earl to Sir *James Elphinſton,* and drawn by Mr. *Thomſon* within three Years of commencing the Proceſs.

Alledged for the Defender. It is not a ſingle *Item* in three Years, that will make an Accompt current, but a cloſs Tract of Imployment. For when People have Occaſion but for a ſingle Paper once in a Year, it is uſually paid at Delivery: Seing the Matter will not furniſh out an Accompt; and it may be ſaid that a current Accompt, as Alluvion, requires continued Imployment and Currency, the inſenſible Gain whereof is underſtood to ſtop the Advancer's craving.

Anſwered for the Purſuer. There is no fixed Time known in our Law or Practice, for the connecting Articles in Accompts, which happen according as People have Occaſion to call for Things: And it is ſufficient for the Creditor in an Accompt, That he was ordinarily imployed by the Debtor when he had Buſineſs.

The Lords found, That the ſingle Article of the Diſcharge, being ſubſcribed by the Earl, is relevant to continue the Currency of the Accompt: And were clear that there is no Diſtinction to be made betwixt Merchant, and Writer Accompts.

November 30, 1709. *Miſtreſs* Sochan, *againſt* Walter Boſwell *of* Balbartoun.

John Sochan and *Balbartoun* having ſubmitted all Differences betwixt them in a Compt and Reckoning to two Arbiters, and Mr. *Sochan* having died before any Decreet was pronounced, but after giving in of Claims *hinc inde,* by Way of Charge and Diſcharge, formal Minutes of Debate upon the Articles, Interlocutors as to Relevancy, and the Defunct had deponed *Negative* as to ſome Articles referred to his Oath by *Balbartoun*: Miſtreſs *Sochan,* as repreſenting her Husband, brought the Matter by a Proceſs before the Seſſion;

In which it was objected for Mrs. *Sochan* againſt thoſe Articles in *Balbartoun's* Charge upon which her Huſband had deponed before the Arbiters, That they ought to be repelled, becauſe, *juratum eſt.*

Anſwered for Balbartoun. All Conceſſions of Parties, Minutes and Interlocutors before Arbiters are void and null, unleſs a Decreet Arbitral proceed thereon. Since the Deſign of a Submiſſion is, That final Deciſion be put to all Debates and Controverſies betwixt the Parties; In Proſpect whereof they are frequently induced to make large Conceſſions: Theſe neceſſarly fall in Conſequence of the Submiſſion's expiring without taking Effect by a deciſive Sentence, and Parties are *in Statu quo prius*; in the ſame Way, as Deeds or Gifts *Intuitu Matrimonii*, return *hinc inde*, if the Marriage go back. Submiſſions may expire after the Arbiters have determined the Claim of one of the Parties, or one Side of a Compt and Reckoning: And it were abſurd to ſuſtain ſuch a Conſtitution thereof, while the other Party is left to purſue his Right by a tedious Proceſs.

Replyed for Miſtreſs Sochan. Proceedings before Arbiters are ſuſtained before other Judicatures after falling of the Submiſſion, *L.* 5. §. 1 *&* 2. *C. de Recept. Arbitris.* And *Gothofred* upon that Text. Becauſe Judiciary Proceedings before one whoſe Juriſdiction is prorogated by Conſent of Parties, is of the ſame Authority *quoad* the Conſenter, as that which is done by the ordinary Magiſtrate: And an Oath of Party taken before Arbiters was found Probative, *January* 2, 1708, *Kinloch* contra *Lindſay.* 3. A falſe Oath emitted before Arbiters, would infer the Crime of Perjury. 4. *Balbartoun* hath homologated Mr. *Sochan's* Oath, by founding an Alledgeance thereon, and therefore cannot quarrel it, *Arg. L.* 4. *§. 6. C. de Recep. Arbitr.*

Duplyed for Balbartoun. An Oath materially conſidered, implying a written Acknowledgment or Declaration of Matters of Fact, is indeed always probative againſt the Deponent, which is all that was found in the Caſe betwixt *Kinloch* and *Lindſay:* But the preſent Queſtion is, If Mr. *Sochan's* Oath ſhould be ſuſtained to prove for him, which it cannot be, more than a Party having adduced before Arbiters Witneſſes for proving an Article of his Claim, who prove nothing, would, upon expiring of the Submiſſion, be hindred in a Proceſs before the Judge ordinary, to prove the ſame by new Witneſſes, or otherways? In Reſpect the *Litiſ-conteſtation* upon *Balbartoun's* referring ſuch Articles to his Oath (which only could ſupport it as probative in his Favours) is fallen to the Ground by the Submiſſion's not taking Effect. This is conſonant to the civil Law, *d. L.* 5. *Pr. C. de Recept. Arbitr.* where it is ſaid, That if a Decreet Arbitral be duly reclaimed againſt within Ten Days, (*multo magis*, if no Decreet be pronounced) neither Party has any Prejudice thereby, but are in the ſame Caſe as if they had not ſubmitted. And the §. 2 bears only, *Si quid atteſtatum ſit, i. e.* The concurring Teſtimonies of Witneſſes adduced before Arbiters are probative before the Judge ordinary; but not that *ſi quid Juratum ſit* ſhould be equally probative, and *Exceptio firmat Regulam in non Exceptis.* 2. An Oath taken *ex Officio*, or any extrajudicial Oath, as well as an Oath taken before Arbiters, would infer Perjury; But that is ſtill an Effect againſt the Deponent, and ſo *non probat Elenchum, viz.* That any ſuch Oath doth operate in his Favours. 3. *Balbartoun's* Charge being *articulatus Libellus*, wherein *quot Articuli, tot Libelli*, he may found upon Mr. *Sochan's* Oath as to any Article acknowledged by him, and repudiate the ſame as to other Articles.

The Lords found, That neither Interlocutors, Conceſſions, nor Minutes before the Arbiters, were probative or binding: But that Mr. *Sochan's* Oath doth prove *contra Deferentem*, as well as againſt the Deponent, becauſe of the Sacredneſs of an Oath.

Eodem Die. Alexander Dunbar *Taylor in the* Cannongate, *againſt* Robert Muirhead *Merchant in* Edinburgh.

ROBERT *Muirhead* being Cautioner in a Suſpenſion of a Decreet obtained by *Alexander Dunbar* before the Baillies of *Edinburgh*, againſt *Alexander Jack* one of the Gentlemen of the Horſe-guards for a Taylor Accompt; which was turned into a Libel, and a Day allowed to *Jack* to depone upon the Verity of the Accompt; And the Lords having not only found the Letters orderly proceeded for the Sums charged for, but alſo modified Sixty Pounds *Scots* of Expences upon his failing to Depone: *Alexander Dunbar* extracted the Decreet of Suſpenſion, and the Bond of Cautionry, and thereupon charged *Robert Muirhead* the Cautioner for the Sums contained in the Baillie's Decreet. He ſuſpended upon this Ground, That he being only bound for *Jack*, in Caſe the Letters were found orderly proceeded on the Baillie's Decreet; and that Decreet having been turned into a Libel, which was admitted to Probation: He the Cautioner was *ipſo Facto* ſufficiently liberated, and not bound to notice what might afterwards follow, perhaps through Colluſion betwixt the Charger and Suſpender.

Anſwered for the Charger. By the Stile of Bonds of Cautionry in Suſpenſions, the Cautioner is bound to pay, in Caſe it ſhall be found by the Lords, That the Principal ought ſo to do: Conſequently tho' the Ground of a Charge be turned into a Libel, the Cautioner is liable for the Sum in the Charge, if the Suſpender be decerned to pay the ſame.

The Lords repelled the Reaſon of Suſpenſion, and found the Letters orderly proceeded.

Thereafter, *December* 17, 1709, *Alexander Dunbar* having charged *Robert Muirhead*, for the Sum of 60 ℔. of Expences modified in the Decreet of Suſpenſion obtained againſt *Alexander Jack*, he ſuſpended upon this Ground, That the Charge was unwarrantable. In ſo far as he by his Bond of Cautionry was only bound to pay the Sum in the Baillie's Decreet, in Caſe it were found by the Lords that *Jack* ought to do the ſame: And therefore was not liable for the Expences modified at diſcuſſing the Suſpenſion; And Bonds of Cautionry being *ſtricti Juris*, can never be extended beyond what the natural Import of the Words will bear, L. 68. §. 1. ff. *de Fidejuſſ.* L. 99 ff. *de Verb. Signif.* Therefore the Lords by an Act of *Sederunt* in *November* 1613, (obſerved by *Spotſwood Tit. Suſpenſions*) ordained Cautioners in Suſpenſions, to enact themſelves not only for the Sum in the Charge, but alſo for refounding to the Charger ſuch Expences as ſhould be modified at diſcuſſing the Suſpenſion: Whence it's clear that they thought a Cautioner obliging himſelf only for the Sum charged for, not liable for any ſubſequent Modification of Expences.

Anſwered for the Charger. Seing *Acceſſorium ſequitur Naturam ſui Principalis*; The Damages ariſing to the Creditor by the Deed of the principal Debtor oblige the Cautioner, L. 58. §.2. ff. *de Fidejuſſ.* L. 24. §. 1. ff. *de Vſuris.* The Laws cited for the Suſpender concern only voluntary Stipulations betwixt the Creditor and Cautioner: And there is a great Difference betwixt a Cautioner in a conventional Obligation, and a Cautioner in a Suſpenſion, who doth not formally contract with the Creditor, but by Authority of the Lords enacts himſelf as Cautioner, and *ex Natura Negotii*, is underſtood to be bound for whatever ſhall be decerned againſt the principal Debtor. So that it is not arbitrary to the Clerks of the Bills, or to Cautioners to limit the Extent of ſuch Bonds, but they muſt be underſtood in the Terms of Law without Reſpect to the Stile: As Law and Cuſtom without Reſpect to meer Stile doth regulate the Import of Inhibitions, Interdictions and Gifts of Exchequer.

The Lords ſuſtained the Reaſon of Suſpenſion as to the Expences, and aſſoilzied the Suſpender from Payment thereof: In Reſpect he was not expreſly bound for the ſame by his Bond, and found the Charge unwarrantable. But recommended to the Committee of the Lords appointed for regulating Abuſes, to draw a *Formula* of a Bond of Cautionry in Suſpenſion, according to the Act of *Sederunt* 1613, to be the Rule in Time coming.

December 1, 1709. Elizabeth Dick *Lady* Penkill, *againſt* James Dunbar *her Huſband, and his Creditors.*

THe Lady *Penkill* having a yearly Annuity of 800 Merks provided to her out of the Lands of *Penkill*, with Conſent of Captain *Crichtoun* her former Huſband in theſe Terms, *viz.* That the ſame ſhould be only applicable for her Aliment, and that her Receipt and Diſcharge without his Conſent ſhould be ſufficient to the Debtor in the Annuity; After Captain *Crichtoun*'s Deceaſe, the Lady with the Concurrence of *James Dunbar* her preſent Huſband, purſued an Action of poinding the Ground againſt the Tenants of *Penkill*; and when it came the Length of a Decreet, diverted from him, becauſe of Maltreatment; There aroſe a Queſtion betwixt her, him, and his Creditors, In whoſe Name the Decreet ſhould go out.

The Lords found, That the Annuity being alimentary, did exclude Mr. *Dunbar*'s Diſpoſal thereof by his *Jus Mariti*, and could not be withdrawn by him or his Creditors, but muſt be imployed for alimenting her and him, and their Family; And that the Term's Annuity due preceeding their Marriage muſt be applyed for Payment and Satisfaction of the Lady's alimentary Debts preceeding the Marriage; And the Term's Annuity ſince the Marriage, for Satisfaction of alimentary Debts of the Family ſince the Marriage. And found that in Time coming the Annuity muſt be applyed for Maintenance of the Family; the Huſband alwiſe having the Adminiſtration and Application thereof, upon finding Caution to apply the ſame accordingly, and particularly to pay the Lady out of the firſt End of the ſaid Annuity yearly the Sum of 200 Merks for her Clothing; Providing the Debts contracted for obtaining Decreets, and making the Liferent Annuity effectual, be paid in the firſt Place off the whole Head of the bygone Annuities due preceeding and ſince the Marriage.

December 3, 1709. *Dam* Margaret Lauder *Lady* Pitmedden, *and Sir* Alexander Seaton *of* Pitmedden *her Huſband*, *againſt* Euphan Bathgate *Relict of* Robert Lauder *Clerk-depute of* Dundee, *and Sir* Alexander Wedderburn *of* Blackneſs.

SIr *Alexander Wedderburn* being Debtor in 861 Pound *Scots*, to *Euphan Bathgate* dwelling in *Dundee* in Liferent, and to the Lady *Pitmedden* in Fie, who, with the Conſent of her Huſband for his Intereſt, deſired to uplift the Mony: The Lords found that the Fiar had *Jus exigendi*, upon ſecuring *Euphan Bathgate*, by finding Surety within *Dundee*, to pay her the Annualrent there during her Lifetime; Albeit the Debtor was reſponſible, and the Liferentrix was againſt altering the Security.

Eodem Die. *Sir* John M'kenzie *of* Coul, *againſt the Magiſtrates of* Inverneſs.

IN the ſubſidiary Action at the Inſtance of Sir *John M'kenzie*, againſt the Town of *Inverneſs*, for Payment of 600 Merks due by *William* and *Duncan M'intoſhes* to Sir *John*; Upon this Ground, That the Magiſtrates, when required by a Meſſenger, refuſed to receive the Debtors into their Priſon by Virtue of a Caption at Sir *John*'s Inſtance againſt them.

Alledged for the Magiſtrates. That they could not warrantably incarcerate the ſaid Perſons, becauſe the Ground of the Debt whereupon the Caption was raiſed, ſtood ſuſpended.

Replyed for the Purſuer. When the Defenders were required to incarcerate his Debtors, there was no principal Suſpenſion produced to them, but only an atteſted Copy under the Hand of the Meſſenger who executed and intimated the ſame, which could not warrand them to diſobey the authentick Letters of Caption. For when the Sovereign's Will is intimated in the Form of Law to Magiſtrates (who are but Executors of the Law) they are obliged to obey till the Sovereign's Countermand be ſhewn in the Form of Law. Which is ſo far true, That Magiſtrates of a Burgh cannot diſmiſs a Priſoner after Incarceration, upon Inſtruction, That the Charge was ſatisfied and paid before, without a Warrant from the Lords of Seſſion.

Duplyed for the Defenders. They knowing that the Caption was countermanded by a Suſpenſion of the Debt, were not *in Tuto* to obey the Caption: For it is not the Intimation of the Suſpenſion to them, but the expeding of it at the Signet, that takes off the Effect of the Caption; And the Production of the atteſted Double was at leaſt a probable Ground for them to demur to put the Caption to Execution, and doth ſufficiently purge all Contempt of Authority.

The Lords found, That the ſeeing the Double of a Suſpenſion atteſted on the Back by the Meſſenger who intimated the ſame, was no ſufficient Excuſe for the Magiſtrates for not obeying the Letters of Caption: But in Reſpect the Action was ſubſidiary, remitted to the Lord Ordinary to hear the Magiſtrates upon any Reaſon of Suſpenſion againſt Payment of the Debt, that they could inſtantly verifie.

December 6, 1709.

Ordered by the Lords, That a Note of all Negative Oaths and clear Probation to be adviſed ſummarly, be given in to the Preſident's Servant, at leaſt the Night before Adviſing, to the End a Roll thereof may be affixt on the Wall.

Eodem Die. John Hamilton *of* Bangour, *againſt the Lady* Ormiſtoun, *Sir* John Inglis *and his Siſters.*

IN the Action at the Inſtance of *Bangour*, as Executor *dative ad Omiſſa qua* neareſt of Kin to Sir *William Hamilton* of *Whitelaw*, againſt the Lady *Ormiſtoun* and her Children of the firſt Marriage, as Debtors to the Defunct, whoſe Debts had been omitted in the principal Teſtament confirmed by the Lady *Houſhill*.

Alledged for the Defenders. The Decreet *dative* is null, and no Proceſs can be ſuſtained thereon, becauſe by the *Act* 26. *Par.* 1690, None can be confirmed Executors *dative* to a Defunct, but the Relict, Bairns, neareſt of

Kin,

Kin, or Creditors: And the Purſuer is neither Creditor, nor neareſt of Ki to him, *William Dunlop* his Nephew being nearer.

Replyed for the Purſuer. 1. The neareſt of Kin not having oppoſed th Purſuer's being decerned dative *ad Omiſſa*, it is *Jus Tertii* to the Defenders to found on the Right of the neareſt of Kin. 2. The Purſuer being Heir t the Defunct, and Creditor to the Executrix *qua* neareſt of Kin, for his Relie of moveable Debts, might, conform to the Act 41 Parliament 1695, obtai himſelf decerned Executor dative to the Defunct, as if he were Creditor t him: To the End he may have Acceſs to make effectual the Goods and Debt omitted by the principal Executrix.

Duplyed for the Defenders. 1. It is not *Jus Tertii* for them to object again the Purſuer's Title, in Reſpect the neareſt of Kin compears and concur 2. The Pretence that the Purſuer is Creditor for his Relief, is nothing to th Purpoſe, ſeing that Debt is not yet conſtituted: And Titles which oug to be made up by legal Diligence, are not to be made up by Reply at th Bar.

The Lords ſuſtained Proceſs: In Reſpect the Purſuer's Title of Executo could not be quarrelled ſummarly before their Lordſhips by the neareſt o Kin; but he behoved to apply firſt to the Commiſſars, for Reduction of th Decreet dative and Preference.

December 8, 1709. *Mr.* William Hamilton *Merchant in* London *and* Arthu Brown *Merchant in* Edinburgh, *againſt* Margaret Turnbul *Siſter to* Captai James Turnbul.

IN an Action at the Inſtance of *William Hamilton* and *Arthur Brown*, upo the paſſive Titles againſt *Margaret Turnbul*, for conſtituting againſt h Debts due to the Purſuers by the deceas'd Captain *James Turnbul*, in Orde to come in with former Adjudgers, there being no Compearance for th Defender when the Summons was firſt called: She was only allowed at th calling by the Regulation Roll, to ſee the Proceſs in the Clerks Hands, as ha been done 18 *November* laſt, in the Caſe of *Grant* againſt the Laird o *Thorntoun*. And the Lords reſolved to obſerve this Rule in all Time coming.

December 9, 1709. John Murray *of* Philiphaugh, *againſt* John Trotter Mortounhall.

HAry Trotter of *Mortounhall* having taken from *Margaret Scot* La *Cheſterhall*, a Tack of ſome Lands liferented by her, whereof he w Fiar, for the yearly Tack-duty of 2500 Merks; and the Lady having afte wards married *John Murray* of *Philiphaugh*, who got the Tack-duty aſſign to him in their Contract of Marriage: *John Murray* now of *Philiphaugh*, repreſenting the ſaid *John Murray* his Grand-father, purſued *John Trotter* *Mortounhall*, as repreſenting the ſaid *Hary Trotter* his Father, for Payment Tack-duties reſting before the Year 1675, when old *Philiphaugh* died.

Alledged for the Defender. By the 11 Act of the Parliament 1669, Mai and Duties of Tenants not purſued within Five Years after the Tenants r moving from the Lands preſcribe; unleſs proved to be reſting by the Defende Oath, or Writ. And it is more than Five Years ſince *Mortounhall*'s Ta was expired by the Liferenter's Death, and he commenced to poſſeſs as Pr prietar.

Reply

Replyed for the Purſuer. This being a correctory Law, ſtrictly to be interpreted, and neither extended *de Caſu in Caſum*, nor *de Perſona in Perſonam*, *March* 20, 1683, *Hamilton* contra *Herries*; it will not comprehend the preſent Caſe. For 1. It was made in Favours only of *nudi Coloni*, poor Tenants who labour the Ground by themſelves or their Subtenants, becauſe of their preſumed Ruſticity: Whereas here the Debate is with an Heretor and Fiar; who attained Poſſeſſion of Liferented Lands, while the Liferentrix lived, by a Tack from her of the whole Rent, and cannot in Propriety of Words be deſigned a Tenant in the Terms of the Act of Parliament. 2. Preſcription by the Act 1669 takes Place only from the Tenants Removal, to prevent the Hazard they were in of loſing their Diſcharges: But here the Heretor continues to this Day to poſſeſs his own Lands without removing at all. 3 The Act conſtitutes only a Preſcription of Mails and Duties and Rents of Lands not proved *Scripto:* Whereas the Purſuer proves his Claim by a written Tack; and it's reaſonable that Rents due by verbal Agreement only ſhould preſcribe ſooner, than ſuch as are conſtituted by Writ.

Duplyed for the Defender. 1. He pleads no Extenſion of the Act, but that his Caſe is in the preciſe Terms of it: For that Law is general, making no Diſtinction of Tenants, whether they poſſeſs by Tack, or verbal Set; or whether they be Rich, or Poor; or whether they be Tenants of the whole Rent, or but of a Part; and ſo long as the Liferent laſted, *Mortounhall* poſſeſſed *tanquam quilibet Colonus.* Nor could his being in the Fie, make any Alteration in the Caſe, ſeing he neither did nor could aſcribe his Poſſeſſion thereto. The Setter of the Tack was not concerned, whether the Tackſman laboured the Ground himſelf, or did ſubſet it: For there are many ſubſtantial Farmers who ſubſet their Rooms; and both *Colonus* and *Subcolonus* have the Privilege of the Act of Parliament. As to the cited Deciſion, it is no ways parallel: for it concerns not removing of Tenants, but the Extenſion of the Privilege of ſtipendiary Maintenances of the inferior Clergy, to Teind-duties payable to Biſhops as Titulars. 2. When the Act of Parliament requires Five Years after removing, that muſt be underſtood *civiliter & cum Effectu, viz.* That the Tenant ſo removed, as that he no longer poſſeſſed by the Tack, or by tacit Relocation; and the Lands were made void and rid to the Proprietar. Now 'tis certain, That a Tenant as effectually removes from the Lands, when he neceſſarly changes the Title of his Poſſeſſion, or ceaſes to poſſeſs as Tenant; as when he actually goes off the Ground. 3. The Purſuer cannot pretend, that his Claim is proved by the Tack, for that conſtitutes only the Tack-duty, and doth not prove what is reſting: As was decided betwixt Sir *John Home* and *John Doul.*

Triplyed for the Purſuer. A Tack is a good Inſtruction that the Tack-duty is reſting: As a Bond is that the Sums therein contained are unpaid, until the Debtor or Tackſman prove Payment. The Deciſion betwixt *Blackadder* and *John Doul*, doth not meet: For there was no Tack in that Caſe, and the Debate ran upon a mix'd Obligation granted, not by the Tenant himſelf, but by a Third Party; beſides, that ſingle Prattick was indeed ſingular.

The Lords found, That the Act of Parliament 1669 doth not extend to this Caſe of a Tackſman of the whole Liferent.

December 10, 1709. *Mr.* William Law *School-maſter, againſt Mr.* Duncan White.

MR. *Duncan White* having incarcerated Mr. *William Law* in the Tolbooth of *Edinburgh* by Virtue of a Caption for a civil Debt; And Mr. *William* being ſet at Liberty by the Magiſtrates, upon giving his Oath, in the

Terms of the late Act of Parliament, that he was not able to maintain himſelf, and Mr. *Duncan*'s declining to aliment him: Mr. *Duncan* did of new again ſummarly upon the ſame Caption apprehend and commit him to the *Canongate* Priſon. Which being complained of to the Lords: They found the ſecond Impriſonment was unwarrantable; and that Mr. *Law* could not, after he was once ſet at Liberty for Mr. *White*'s not alimenting, be incarcerated again by Virtue of the ſame Caption, but *Cauſa cognita* by Warrant of the Lords. For the Lords thought that the ſetting a Priſoner at Liberty as not able to maintain himſelf, was equivalent to a Suſpenſion and Relaxation.

Eodem Die. Alexander Waddel *of* Holhousburn, *againſt* William Douglaſs *of* Bads.

IN the Purſuit at the Inſtance of *Alexander Waddel*, as Aſſigny by *John Stevenſon* of *Herdmonſhiels*, againſt *William Douglaſs* of *Bads*, as repreſenting the deceaſt *William Douglaſs* his Father, for Payment of a Third of the Sum of 2565 Pound Principal, Annualrents and Penalty, contained in a Bond wherein the Cedent, the ſaid deceas'd *William Douglaſs*, and the deceas'd Mr. *William Archibald* Writer in *Edinburgh* were Co-principal Debtors; which Bond was paid by Mr. *David Mitchel* Doctor of Medicine, to *Alexander Veitch* the Creditor, in Name of *Herdmonſhiels*, whoſe Name and Mr. *William Archibald*'s was thereafter torn from it, upon a Diſcharge to *Herdmonſhiels* and all concerned in the Bond.

Anſwered for the Defender. His Father and Mr. *Archibald*, tho' bound as Co-principals with *Herdmonſhiels*, were in Effect but Cautioners, as is ſufficiently clear from the following Circumſtances. 1. Had not *Herdmonſhiels* conſidered himſelf as the only Debtor, he would not have torn his Name from the Bond, being ſufficiently ſecured by the indorſed Diſcharge: Far leſs would he have taken Mr. *Archibald*'s Name from it, the doing whereof doth plainly argue that he had no Pretence to Relief. 2. Had any Relief been competent to him, he would have taken a Diſcharge to himſelf, and an Aſſignation againſt the other two *Correi debendi*.

Replyed for the Purſuer. 1. The Bond having been a completed Right, any ſupervening Cancellation of the Debtors Names can only be extended in Favours of thoſe whoſe Names are taken away: For had it been deſigned to annul the Bond *in Totum*, *Bads*'s Name would have been alſo cancelled. Whatever might have been ſaid from the Identity of the Obligation, againſt the common Creditor, had the cancelling happened before he got Payment; yet after it was paid, two diſtinct Obligements of Relief againſt the Co-principals aroſe to the Payer, who might ſafely cancel the Name of him that ſatisfied for his Part, without vitiating the whole: As, had the Obligement been in different Papers, each might, upon Payment, have retired his own Bond. Beſides, as a Bond granted by different Perſons conjunctly and ſeverally, is not null for being ſubſcribed by one only: So a formal Bond ſubſcribed by ſeverals remains valid, ſo long as the Subſcription of any one of the Co-principals is intire. Cancellation cannot vitiate more than Falſhood: Now a Writ conſiſting *ex diverſis Capitulis vel Cauſis*, improved as falſe in one, may ſtand as to the reſt, *L.* 42. *C. de Tranſact.* Yea, Lawyers expreſly teach, That a partial cancelling of a Writ doth not vitiate the whole, *Everhard de Fide Inſtrumentorum*, *Pag.* 48. *N.* 46. *Alexander. Conſil.* 14. *N.* 10. *Voet. & Bruneman ad Tit. de His quæ in Teſtamento delentur.* And in the late Caſe of Mrs. *Margaret Menzies* contra *Livington*, a Writ was not found annulled by tearing from it the Side-ſcription. 2. Albeit the Diſcharge did wholly exclude the Creditor's Intereſt, ſo as he could not crave Payment from r uſe Diligence againſt *Bads*; yet the Obligement of Relief among the Debtors themſelves could not be taken away by the Creditor's Deed, but emained intire notwithſtanding his Diſcharge, which only extinguiſhed the ommon Debt, in ſo far as the Granter had Intereſt. Yea, the diſcharging he Co-principals, was ſo far from cutting off the Payer's Relief, that it was *de Facto* neceſſary to found it. And an Aſſignation from the common Credi-or was not neceſſary to entitle *Herdmonſhiels* to a proportionable Relief off the *Correi*, that being competent to him *ex Negotio geſto*, but only to furniſh im a more direct Ground of ſummary Charge.

Duplyed for the Defender. There is a great Diſparity betwixt a Bond ſubſcribed originally by one of more *Correi* therein mentioned, and a Bond rom which two of three ſubſcribing Debtors Names are taken away. And he Authorities out of the civil Law are wide from the Purpoſe. For one of he Articles tranſacted *ex falſo Inſtrumento* doth not annul the Tranſaction as to the reſt, becauſe theſe are *diverſa Negotia*, ſubſiſting ſeparately upon heir own Foot; whereas the Bond in Queſtion is an individual Obligement entred into by three. Again, the Teſtator's ſcoring the Name of one of the Perſons inſtituted Heirs by him, doth not hinder the Inſtitution to ſtand good as to the reſt; in Reſpect the Teſtament having its Force from the Teſtator's Subſcription remains intire: Whereas here the Subſcriptions which give Life o the Obligement are cancelled.

The Lords ſuſtained the Defence founded on the retired Bond, and Diſ-charge upon the Back thereof. Albeit one of the Lords ſaid, It was an ordi-nary Cuſtom to delete Perſons Names in a Decreet againſt Debtors, and hereupon to raiſe Diligence againſt the reſt: For the Lords thought ſuch a Practice unwarrantable. And it is commonly ſaid by my Lord Preſident, That he who tampers with a Writ, ſhould loſe either the Hand, or the Writ.

December 13, 1709. *Earl of* Lauderdale, *againſt the Lord* Yeſter.

IN the Action at the Inſtance of the Earl of *Lauderdale*, as Heir-male to the Duke of *Lauderdale* his Uncle, againſt *John* Lord *Yeſter* as charged to enter Heir to, or otherways repreſenting the deceaſt *Mary* Marchioneſs of *Tweddale* his Mother, to denude of an Appriſing led againſt the Eſtate of *Dumfermling* in the Year 1653, and conveyed to the Duke of *Lauderdale*, *Anno* 1668, upon this Ground; That the ſaid Marchioneſs had in *Anno* 1676 renounced all Right and Intereſt in the Eſtate of *Lauderdale* and others belonging to the Duke her Father in Favours of him and his Heirs-male; The Reaſons alledged for the Defender, why the Renunciation did carry no Right to the Appriſing in Queſtion being repelled *June* 22, 1709: He now contends, That no Proceſs can be ſuſtained againſt him, becauſe he is not charged to enter Heir to his Mother; nor was that paſſive Title libelled againſt him.

Replyed for the Purſuer. The Defender can't be allowed to recur now to a no Proceſs, after his proponing a peremptory Defence, which liberates the Purſuer from proving the paſſive Titles.

Duplyed for the Defender. The Defence proponed by him was not *peremptoria Cauſa*, ſuch as infers a Repreſentation, but only an Objection againſt the Purſuer's Title to the Appriſing, which is peremptory of the Inſtance, and may be proponed without acknowledging the paſſive Titles: Seing the Purſuer's Title muſt be inſtructed, before Proceſs can be ſuſtained at his Inſtance. 2. Tho' the Defence had been ſuch a peremptory as owned the paſſive Titles, it could not fix the Defender: Becauſe no paſſive Title is libelled, but that of charged to enter Heir; and no Charge is produced. For the proponing Peremptories do only free the Purſuer from the Trouble of proving the paſſive

Titles libelled: And the Libel can't be now amended in ſuch a Fundamental; tho' ſometimes an Amendment in Circumſtantials is allowed.

The Lords found no Proceſs againſt the Defender: In Regard there were no paſſive Titles libelled againſt him as repreſenting his Mother, but a charged to enter Heir, and no ſuch is produced. And they would not allow the Purſuer to amend his Libel.

Eodem Die. George Drummond *Accomptant General of Exciſe in* North-Britain, *againſt* James Campbell *of* Burnbank.

GEorge *Drummond* having purſued *Burnbank*, as repreſenting his Father, upon the paſſive Title of vitious Intromiſſion, for Payment of 4000 Merks contained in his Father's Bond; And the Defender having alledged, That he was Executor confirmed: The Purſuer, to take off that Alledgeance, offered to prove, 1. That the Defender both intrometted, and was cited at the Purſuer's Inſtance before Confirmation. 2. That he had Super-intromiſſion after the Confirmation, with Goods not confirmed.

Anſwered for the Defender. 1. He being confirmed Executor to his Father within Year and Day after his Death, that Confirmation doth purge the Vitioſity of all prior Intromiſſion, *Stair Inſtit. Tit. Vitious Intromiſſion*, §. 10. where Deciſions are cited to confirm this Aſſertion: Which ſeems reaſonable, ſince Confirmation cannot be expede immediately upon the Party's Death. And the Creditors are in no Danger; Becauſe, if any Subject intrometted with ſhould not be confirmed, it would be eſteemed a fraudulent Omiſſion, and make the Intrometter univerſally liable; or they may confirm *ad Omiſſa*. 2. Super-intromiſſion after Confirmation by the Executor confirmed, makes him liable only *in Valorem*. Becauſe, before the 20. *Act. Par.* 1696, it was always ſuſtained as a relevant Exception againſt vitious Intromiſſion, that there was an Executor confirmed; And that Law makes only this Alteration, That Confirmation of a third Party as Executor Creditor in a particular Subject, ſhould not purge the Vitioſity of Intrometters with any other Subject. Now the Defender being Executor Creditor himſelf, is not in the Caſe of that Statute 1696, but liable only *in Valorem*. Which is conſonant to the Analogy of Law, whereby any colourable Title as a general Diſpoſition excuſeth from ſuch a paſſive Title: And a Perſon decerned and confirmed Executor is *in Titulo* to intromet, at leaſt is as favourable as one clothed with a general Diſpoſition. For Super-intromiſſion after Confirmation, is not ſo unfavourable as anterior Super-intromiſſion, which argues both a fraudulent Omiſſion and Perjury; Inventories being given up upon Oath, and every Perſon ſuppoſed to know his own Deed. Again, by the civil Law, An Heir entring by Inventory, tho' guilty of Omiſſions therein, was not liable univerſally, *L.* 1. §. 10. *in Fin. C. de Jure deliberandi.*

Replyed for the Purſuer. Law to prevent Imbezilling of Mens Moveables after their Death, to the Prejudice of Creditors or others intereſſed, having introduced this paſſive Title of vitious Intromiſſion; and fixed the Method of Tranſmiſſion of by Confirmation and Caution: The not Obſervers thereof muſt be univerſally liable from the very Moment of their unwarrantable Intromiſſion. And Law having only *ex Gratia* allowed the unwarrantable Intrometters, to purge the Vitioſity by confirming before Citation at the Inſtance of any Creditor, that is not to be extended in Favours of a ſubſequent Confirmation. 2 Confirmation was never ſuſtained to protect a poſterior Super-intromiſſion by the Executor confirmed, but only Super-intromiſſion by a third Party, or by an Executor Creditor confirming partially who is not bound to Eik.

The Lords ſuſtained the Defence founded on Confirmation within Year and Day, to purge the Vitioſity of the Defender's Intromiſſion, notwithſtanding of a prior Citation given to him by the Purſuer before Confirmation: But ſuſtained the Super-intromiſſion with Goods not given up in the Inventary after the Purſuer's Citation, relevant to make the Defender univerſally liable.

December 14, 1709. *The Lord Juſtice Clerk and his Lady againſt* John Hamilton *of* Bangour.

IN the Compt and Reckoning at the Inſtance of the Lord Juſtice Clerk and his Lady, againſt *John Hamilton* of *Bangour*, the Purſuers having claimed Allowance of Articles extending to 5189 *Lib.* 9 *Shil. Scots*, as the Expence of the Lord *Whitelaw*'s Funerals: The Defender objected againſt ſeveral of theſe Articles, that they could not be allowed, becauſe extravagantly Sumptuous and Magnificent; *Actio funeraria* being only competent for ſuch funerary Charges as were neceſſary and decent, according to the Defunct's Quality and Eſtate. For 1. By the *Act.* 14. *Parl.* 1681, Funerals are to be gone about in ſober and decent Manner, and particularly the Uſe of mourning Clokes is reſtrained: Becauſe of the Prejudice ariſing from the ſuperfluous Expences of Burials, both to the publick, *Cujus Intereſt ne quis re ſua male utatur*; and to the private Fortune of Heirs; and to the Defunct's common Creditors, who are poſtponed to theſe who claim the funerary Expences. 2. Advances of funerary Expences are ſaid *Negotium gerere*, L. 14. §. 9. ff. *de Religioſis et Sumpt. Fun.* And by the Nature of *Actio Negotiorum geſtorum*, nothing can be repeted but what was *utiliter impenſum*, L. 10. §. 1. ff. *de Neg. Geſt. habita Ratione Facultatum ejus in quem factum eſt*, d. L. 14. §. 6. 3. In ſo far as the Expences exceeded the Condition of the Defunct's Fortune, they are ſuppoſed to be beſtowed *ex Pietate et Affectione*. 4. The Means of the Defunct are conſidered as the Rule of his Funeral Expences, albeit he ſhould order by his Will to exceed what was ſuitable, *d.* §. 6.

Replyed for the Purſuer. 1. The Rule to judge in this Caſe is the Quality of the Defunct, and the Condition of his Eſtate in his Lifetime, *L.* 12. §. 5. *ff. Eodem*, without Reſpect to what he left to his Heir: Eſpecially conſidering, that *Whitelaw* had no Children of his own Body, and was under no Obligation to leave his Fortune to a collateral Heir. 2. The Act 1681, is in Deſuetude; yea, never was obſerved, except in ſo far as it prohibites mourning Clokes; which were forborn, not ſo much upon the Account of the Act, as the Uneaſineſs of the Garb. True, it is not long ſince that Statute was made; But there being no fix'd Time to determine Deſuetude with us, it muſt be collected from the Generality of contrary Acts, *Arg.* L. 32. ff. *de Legibus*. Again, that Law was not made with any Regard to private Perſons or Families, or the Benefit of Heirs; but only to keep Mony in the Nation, which was too much ſent out for ſumptuous Apparel: Nor doth it annul any Bargains of Furniſhing, but only inflicts a Penalty or Fine upon the Contravener applicable to the Fisk. So that Merchants who are not obliged to know the Punctilioes of Decency, or what belonged to the Defunct's Character and Eſtate, furniſhing *bona Fide* to his Funerals, are ſufficiently entituled to Payment: And the Purſuer as Aſſigny conſtituted by the Merchant comes in his Place. It is not always true, That nothing can be repeted *ex Cauſa Negotii geſti*, ſave what is profitably expended, if we take *Profitably* in it's proper Senſe: For very few Things in Funerals can be ſaid to be *utiliter impenſa*, the greateſt part being *Diſpendia*. But that ought to be allowed which was *bona Fide expended*, according to the Cuſtom of the Country: As in all other Caſes *Actio*

Negotiorum is adapted to the Nature of the Thing, L. 14. §. 13. *ff. de Religioſ.* 3. Albeit the Rules of the *Roman* Law are much obſerved in determining private Rights; yet it's political Laws (and ſuch are the funerary Laws, as being part of the *Jus Sacrorum*) do not much influence our Conſtitution: But *Mos Regionis* doth every where regulate the Meaſure of funerary Expences; And other Places are more expenſive in their funeral Solemnities than here. Our Neighbours in *England* give Gifts to the Mourners; which Ceremony doth in *Holland* and *Germany* run high enough, where long mourning Clokes are alſo uſed. Nay further, it appears from L. 37. *ff. Eod.* And what *Voet* thereon obſerves in his Commentary, That even the *Romans* were very expenſive in their Burials: *Sumptus Funeris arbitrantur pro Facultatibus, vel Dignitate Defuncti*, L. 12. §. 5. ff. *Eodem*, Where the disjunctive Interjection *Vel* implyes, That a Perſon may be buried either according to his Means, or according to his Quality, if there be ſo much Gear as will defray the Charges. As to the particular Laws cited for the Defender, they import only, That the common Rule ſhould not be tranſgreſſed: And the Cuſtom of the Place muſt clear when that is done.

Duplyed for the Defender. Law regards the Circumſtances of Things, as they are at the Time when ſuppoſed to happen: Now the funerary Expences take Place only after the Parties Death, and the legal Reſtraint upon them, was made with Reſpect to Hurt and Prejudice that might follow, which can only be underſtood of the Heir's Prejudice, the Defunct being incapable of Hurt; And *pro Modo Facultatum*, i. e. according to the Extent of *Bona Defuncti*, which are underſtood *deductis Debitis*. Altho' the Defunct was under no Obligation to leave his Eſtate to a collateral Heir; Yet not having diſpoſed of it, it may not be exhauſted with ſuperfluous and vain Expences againſt Law: And if Merchants or Tradeſmen did advance to the Funeral, they did it upon their Hazard, as any other *Negotiorum Geſtor* or Furniſher. 2. The Pretence of the Act of Parliament's being in Deſuetude, is groundleſs: And the *Mos Regionis* is of no Authority, againſt a contrary poſitive Law. Yea, in theſe very Places where ſome ſuperfluous Expence in Burials is tolerated, that is done for Reaſons of State, to afford a Revenue to the Publick; and ought not to be copied after here, where no ſuch Duties are impoſed. 3. The Particle *Vel* is ſometimes taken for *Et*; And that in L. 12. §. 5. it is uſed in a conjunctive Senſe, is ſufficiently clear from L. 14. §. 6. *L.* 21. *ff. Eod.*

The Lords found, That *Actio funeraria* is only competent for Expences that were neceſſary and decent with Regard to the Defunct's Quality and free Eſtate, deſcending to his Heirs and Executors. For one of the Lords ſaid, That to ſpend upon a Perſon's funeral Solemnity according to his Quality, beyond what was ſuteable to the Fortune left to his Repreſentatives, was to bury his Eſtate with himſelf. Another Lord diſtinguiſhed betwixt the declatory and ſtatutory Parts of the Act 1681: Holding, That the funerary Rites therein preſcribed were Statutory; but that it was Declaratory in ſo far as concerned the burying in decent and ſober Manner, as to which it could not go in Deſuetude. But the Lords were all clear, That, if ſo much of free Eſtate did not deſcend to the Defunct's Repreſentatives, as was ſufficient to bury him; In that Caſe the Expences of the Burial, in ſo far as Decent and Neceſſary, would come off the Legacies.

December 26, 1709. Alexander Mackenzie *of* Frazerdale, *againſt* Lord Elibank *and his Siſters.*

Alexander *Mackenzie* of *Frazerdale*, as repreſenting *Mary Burnet* ſecond Daughter to *Alexander* late Arch-biſhop of St. *Andrews*, who was Executrix nominate to her Father; Purſued a Compt and Reckoning, and Exoneration, againſt the Lord *Elibank* and his Siſters, as repreſenting *Anna Burnet* the Biſhop's eldeſt Daughter their Mother; And in Order to diſcharge himſelf of an Article of 4866 ℔. 13 ſh. 4 d. *Scots*, ſtated in the Inventory as Mony lying by the Biſhop at his Death, offered to prove by Witneſſes, That 866 ℔. 13 ſh. 4 d. thereof in a ſeparate Bag was at the Deſire of the Defender's Mother equally divided betwixt her and her Siſter the Purſuer's Mother.

Alledged for the Defenders. Their Mother's Intromiſſion with Mony, is not probable by Witneſſes.

Replyed for the Purſuer. This Mony being a *Corpus* lying by the Defunct, expoſed to the Senſes of Witneſſes, intrometting with it is probable *prout de Jure, December* 13, 1671, *Moffat* contra *Finn, February* 4, 1671, *Wiſhart* contra *Arthur, December* 2, 1675, *Thomſon* contra *Moubray* and *Alexander*: Albeit Witneſſes by our Law cannot prove the borrowing of Mony, for that there is more in the Contract of *Mutuum*, than can be expoſed to the View of Witneſſes, *viz.* The Cauſe for which the Mony was delivered.

Duplyed for the Defender. Probation by Witneſſes is not receivable, where Writ uſeth to be exhibited: And the Deciſions adduced concern the Extinction of Rights of their own Nature extinguiſhable by Poſſeſſion, as Appriſings and other redeemable Rights; and do not quadrate with the preſent Caſe, where an Executor's Repreſentative pretends to take off the Effect of Inventory given up by her ſelf judicially upon Oath.

The Lords found the Diviſion of 866 ℔. 13 ſh. 4 d. lying Mony betwixt the Executrix and Lady *Elibank* before confirming of the Biſhop's Teſtament, is not relevant to be proved by Witneſſes, to exoner the Executrix from compting for the ſaid Sum confirmed.

December 21, 1709. *Miſtreſs* Lyon *againſt the Earl of* Aboyn, *and his Tutors.*

JOhn Lyon of *Mureſk*, having granted an Aſſignation in Favours of *John Riddoch* Writer in *Edinburgh*, narrating, *That Three thouſand five hundred Merks was reſting to* John Lyon *by Charles Earl of* Aboyn, *and that the Aſſigny had advanced to the Cedent a certain Sum of Mony in Lieu of the foreſaid Sum of Three thouſand five hundred Merks, therefore he did aſſign him to the ſaid Sum of Three thouſand Merks and Annualrents thereof, and obliged himſelf to warrand the ſaid Aſſignation of Three thouſand five hundred Merks againſt his Deeds done or to be done*: *John Riddoch* transferred the Right in Favours of the ſaid *John Lyon*'s Relict, who upon a regiſtred Extract of the Aſſignation, bearing *Three thouſand five hundred Merks* interlined in the diſpoſitive Clauſe, purſued *John* the preſent Earl of *Aboyn*, as repreſenting Earl *Charles* his Grandfather, for Payment of the ſaid Sum.

Alledged for the Defender. He muſt be aſſoilzied; Becauſe the Writ which is the Ground of the Purſuit, is vitiated by the Interlining, and conſequently null.

Replyed for the Purſuer. She cannot be prejudiced by the Interlining: Becauſe, the Aſſignation doth, without it, ſufficiently convey the whole Three thouſand five hundred Merks; ſeing the diſpoſitive Clauſe refers ſimply to the Narrative mentioning the whole Three thouſand five hundred Merks, and acknowledges the Receipt of the Value of that whole Sum, which is alſo mentioned in the Clauſe of Warrandice. So that it appears from the Narrative, *Onerous Cauſe*, and *Clauſe of Warrandice*, That the Five hundred Merks has only been forgotten thro' Overſight in the diſpoſitive Clauſe: And it were dangerous to find, That even the Vitiation of an Extract (which is more than Interlining)

ing) doth annul the principal Writ; ſeing Extracters may readily miſtake and amend Words. Nor doth Vitiation annul any Papers, unleſs it be in Subſtantials, or be ſuch, as the Words vitiated cannot be read or underſtood.

Duplyed for the Defender. As in Diſpoſitions and Charters of Alienation, however extenſive the Narrative and *Tenendas* be, nothing is underſtood conveyed, but what is in the diſpoſitive Clauſe: So the diſpoſitive Clauſe only in the Purſuer's Aſſignation can be noticed. And whatever Action, upon the Warrandice, might be competent againſt the Cedent's Repreſentatives, to Aſſign *de novo*, as to the Remainder; That could never found a Purſuit againſt the Earl of *Aboyn*, as to whom *Caſus omiſſus habetur pro Omiſſo*. So interlining or blotting Writs have always been ſuſtained to annul them, *November* 22, 1671, *Pitillo* contra *Forreſter*, *December* 14, 1627, *Hepburn* contra *Lyll*. Which is agreeable to the civil Law, *L.* 45. §. 8. *ff. De Jure Fiſci*, and to the Cuſtom of other Nations, *Tholoſan*, *Lib.* 36. *Cap.* 5. §. 5. *Guido Papa*, *Lib.* 22. *Boer. Deciſ.* 291. *Vulteius Tom.* 2. *Conſil.* 28. §. 17. and *Clarus Sentent. Lib.* 5.

The Lords found, That the Interlining is unwarrantable; and remitted to the Ordinary to inquire about the Author in Order to puniſh him: But found, That the Aſſignation without the interlined Words, did ſufficiently convey the whole Sum of Three thouſand five hundred Merks; and therefore repelled the Defender's Objection, and ſuſtained the Aſſignation.

December 22, 1709. John Henry *Cordiner in* Edinburgh, *againſt* John Glaſſels *and* George Coning *Merchants in* London.

T*Homas Glaſſels* Merchant in *Glaſgow*, having, in Security of bygone Debt due by him to *John Glaſſels* his Brother, and *George Coning*, aſſigned to *John Glaſſels* his Intereſt in the capital Stock of the *African* Company; By Virtue of which Aſſignation the Mony was uplifted from the Commiſſioners of the Equivalent: *John Henry* Creditor to *Thomas Glaſſels*, raiſed Reduction againſt *John Glaſſels* of the foreſaid Aſſignation, upon the Act of Parliament 1621, as being granted to a conjunct Perſon, after *Thomas Glaſſels* was at the Horn for the Debt due to the Purſuer. The Defender, for ſupporting the Aſſignation, produced a confirmed Teſtament, wherein he and *George Coning* are confirmed Executors *qua* Creditors to *Thomas Glaſſels* the common Debtor.

Alledged for the Purſuer. The Sum uplifted by the Defender by Virtue of the Aſſignation, could not be confirmed as *in Bonis Defuncti*; In Reſpect the Defunct was denuded by the Aſſignation.

Anſwered for the Defenders. Altho' they had taken Aſſignation from the Defunct; Yet, if they thought it lame or defective, they might paſs from it, or not make Uſe of it, and eſtabliſh a better Title by legal Diligence as they thought fit: And the Purſuer, who quarrels the Aſſignation, can never pretend that the Goods were not *in Bonis Defuncti*, becauſe he was denuded by it. For, How can that Deed turn to the Purſuer's Advantage, that he impugns, as done to his Prejudice? Can he both reduce it, and crave the Benefit of it at the ſame Time? This is inconceiveable: The moſt that he can pretend to, is, To have it taken out of the Way to afford him Acceſs to the Subject.

Replyed for the Purſuer. The Act 1621 doth not ſimply annul the Rights craved to be reduced, ſo as to make the Property of the Subject diſponed return to the Debtor; but only obligeth the Receiver of the voluntary Right, to make furthcoming what he recovered thereby, to the Creditor that uſed the firſt Diligence. Sir *George Mackenzie*, in his Treatiſe on that Statute, is of this Opinion; and alſo thinks, that a Diſpoſition made to a poſterior Creditor, accrews to him that had done anterior Diligence: Which is conſonant to the Current of Deciſions, *December* 18, 1673, Creditors of *Tarſappie* contra L. of *Kinfauns*, *July* 1673, *Street* and *Maſon* contra Lord *Torphichen*, *January* 18, 1678, *Kinloch* contra *Blair*, *June* 16, 1676, *Erskin* contra *Reynalds*. And the Defenders cannot repudiate the Aſſignation after their Acceptance of it, and recovering Payment by Virtue thereof.

Duplyed for the Defenders. The Intendment of the Act of Parliament is, That no partial Gratification in Favours of a Creditor, ſhall be prejudicial to a Co-creditor's more timely Diligence; and not that it ſhall accrew to him who quarrels it. The Effect of Repetition proceeds only upon Suppoſition that the Party favoured hath no other Title in his Perſon to defend againſt Repetition: Whereas the Defenders have a ſeparate Title, *viz.* A Confirmation *qua* Executors Creditors. Sir *George Mᶜkenzie* in his Treatiſe, argues only upon the nice Point of *vinco Vincentem*, for the Preference of a firſt to a ſecond Compriſer, betwixt whom a voluntary Right interveens: Whereas had the Competition been with the Perſon having that voluntary Right, the Preference could only have operated the taking that out of the Way; and not the making Uſe on't as an accrewing Right, to exclude the Aſſigny himſelf, clothed with another Right in his Perſon. The cited Deciſions do not meet the preſent Caſe: For there the Creditors quarrelling the Diſpoſitions had done no Diligence, and the Receivers of the Diſpoſitions had no other Right to compete upon; So that the making the Diſpoſitions accrew proportionably to the whole Creditors, did not hinder the Receivers of the Diſpoſitions to drop theſe, and take themſelves to other Titles.

The Lords found, That *John Glaſſels* and *Coning* might legally confirm as Executors-creditors to *Thomas Glaſſes*, and ſupport the Aſſignation by the Confirmation.

December 23, 1709. *The Feuars of* Dundaff, *againſt* David Madril *of* Muirmill.

IN the Declarator of Immunity from Thirlage at the Inſtance of the *Feuars* of *Dundaff*, againſt *David Madril*, The Lords 22 *July* laſt, having found that the Purſuers were aſtricted to the Defender's Mill: The Purſuers now alledge, That by the Aſtriction they are only bound for Inſucken Multure of ſuch of the *Grana creſcentia* as they either by Neceſſity or Choice happen to grind; And that they are at Liberty to export the Growth of their Ground; The Reaſon of thirling Corns imported, and freeing what is carried out, being becauſe, in theſe muirland Places they have more Profit by ſelling their Oats in Markets, than by making Meal of them.

Anſwered for the Defender. The Purſuers can grind at no other Mill any Corns belonging to them (Seed and Horſe-corn excepted) whether growing upon their own Lands, or brought within the ſame from other Places: For if they were permitted to ſell or diſpoſe upon the *Grana creſcentia*, and buy Meal and Malt elſe where for the Uſe of their Families, the Thirlage would be quite eluded.

Replyed for the Purſuer. Thirlage is odious, and Clauſes of Immunity are to be favourably interpreted: And the prejudicial Conſequence to the Defender's Mill, by allowing the Purſuers a Faculty to grind, or not grind there at their Pleaſure, is of no Weight to overturn the expreſs Words of their Charters. So the Lords in *February* 1682, betwixt the Earl of *Caſſils* and the Tenants of *Maybole*, and in the late Caſe of *Rathillet* againſt *Mordecarny*;

carny, did not regard the fancied Inconveniencies to a Thirl-mill, by favourably interpreting the aſtricted Perſons Rights.

The Lords found, That the Thirlage imports that all grindable Corns growing upon the Purſuer's Lands, in ſo far as neceſſary to the Conſumption of their Families within the Thirl, are aſtricted to be grinded at the Defender's Mill: But that the Purſuers may freely export the Superplus of the Growth of their Ground; And that, if the *Grana creſcentia* are not ſufficient for their own Conſumption, what is imported for that End pays Outſucken-multure.

Eodem Die. *Captain* Henry Bruce, *Brother to the Laird of* Clackmannan, *againſt Mr.* William Dalrymple *of* Glenmure *and* Alexander Inglis *of* Murdiſtoun.

IN the Purſuit at the Inſtance of Captain *Bruce*, againſt Mr. *William Dalrymple* and *Alexander Inglis*, for implementing a Decreet-arbitral pronounced by Sir *Hugh Dalrymple* Preſident of the Seſſion, by diſponing to the Purſuer the Houſe and Yards of *Clackmannan*, who claimed an Orchard ſeparated from the Houſe by ſome arable Ground interjected, as falling under the general of *Yards*.

Anſwered for the Defenders. By Houſe and Yards joined together *uno Spiritu*, are only meant Yards contiguous to the Houſe, for the Uſe and Service thereof: Whereas the Orchard acclaimed is both diſcontiguous, and differs from a Yard, as is clear from all Charters wherein Yards and Orchards are expreſs'd by different Words, viz. *cum Hortis et Pomariis.*

Replyed for the Purſuer. The general Term Yards or *Horti* (ſo called *quod ibi Arbores et Olera oriuntur*) comprehends Gardens and Orchards: And we are not to think *Pomarium*, an Orchard to be of a diſtinct Species from *Hortus*, becauſe mentioned together in Charters; ſeing ſynonimous Words are frequently added in Charters.

The Lords found the Captain had Right to the Orchard libelled, as comprehended under the general Word *Yards* in the Decreet-arbitral.

Eodem die. *The Creditors of the Deceaſt* George Marſhal *Merchant in* Edinburgh, *againſt his Children of the firſt and ſecond Marriage.*

IN a Competition betwixt the Creditors of *George Marſhal* and his Children, thoſe of the firſt Marriage having adjudged upon Bonds of Proviſion granted to them by their Father, and the Child of the ſecond Marriag having adjudged for the Proviſion in her Mother's Contract: both craved t be ranked *pari Paſſu* with the Creditors.

Alledged for the Creditors. The Children cannot be brought *in* equall with them: Becauſe, Contracts of Marriage and Bonds of Proviſion are bu the Father's Deſtinations in Favours of their Children, whereupon no Diligence could be uſed againſt the Father in his Lifetime, as was decided, *February* 10, 1688, in the Caſe of the *Creditors and Children of* William Robertſon. And ſeing Children can have only a Share of their Parents Means, the can pretend to nothing till his Debts be ſatisfied: that only being ours, *quo deductis Debitis eſt noſtrum.*

Anſwered for the Children. 1. Thoſe of the firſt Marriage contended, Tha they were not only Creditors to their Father *Jure Naturæ*, whereby Parent are obliged to provide for their Children; but alſo were onerous Creditor to him, in Reſpect of a great Tocher he got with their Mother, and thei

Bond

Bonds were prior to the contracting of the Creditor's Debts, and therefore they ought to be preferred, *December* 11, 1679, *Creditors* contra *Children of* Mouſwell. 2. The Child of the ſecond Marriage pleaded, That her Proviſion was conceived in her Mother's Contract of Marriage before the Date of the Creditor's Bonds, which was an onerous, and no latent Deed: And the Lord *Preſtoun*'s Children of the ſecond Marriage were brought in with his Creditors according to their Diligence.

Replyed for the Creditors. The Proviſions muſt be conſidered only with Reſpect to the Father's Condition at his Death, at which Time being inſolvent and bankrupt, he could do no Deed in Prejudice of his juſt and lawful Creditors; as is clear from the Prattick betwixt the *Creditors and Children of* Robertſon, and that of *Inglis* contra *Boſuell*, *November* 14, 1676, obſerved by *Dirletoun*. Nor is the Child of the ſecond Marriage in any better Caſe than the other Children; becauſe, a Contract of Marriage doth not take the Fie from the Father, or hinder him to contract Debt, *November* 21, 1682, *The Creditors and Children of Mr.* Andrew Marjoribanks; but it is only deſigned to regulate the Succeſſion of the Children of the Marriage, with Relation to themſelves or to Children of other Marriages.

The Lords preferred onerous Creditors to the Children, in Reſpect the Father was Fiar; notwithſtanding the Bonds of Proviſion and Contract of Marriage.

Eodem Die. *The Creditors of the deceaſt* George Marſhal, *againſt* James Hamilton *of* Pancaitland.

IN the Competition of the adjudging Creditors of *George Marſhal*, it was alledged that *Pancaitland* could not come *in pari Paſſu* with the reſt; becauſe, his Adjudication was not within Year and Day of the firſt effectual Adjudication, obtained at the Inſtance of *James Scott* before the Sheriffs of *Edinburgh*, upon a *Cognitionis Cauſa* againſt the apparent Heir renouncing.

Anſwered for Pancaitland. He ought to come in equally, becauſe his Adjudication is within Year and Day of the firſt Adjudication before the Lords: And no Reſpect could be had to that before the Sheriffs, becauſe it was pronounced *a non ſuo Judice.* In ſo far as the Lords are only proper Judges in Adjudications, now ſince the Twenty fourth Article of the Regulations, ordaining all Abbreviates of Adjudications to be ſigned by the Lord Ordinary: Eſpecially conſidering, That the Rolls and the Minute-book do properly publiſh and certiorate the Liedges when there is a Courſe of Diligence againſt a Debtor; And Men are not bound to know, nor can know what is done before inferiour Judges. 2. *Eſto*, ſuch a Decreet of Adjudication before an inferior Judge were ſuſtained, it cannot be the Rule of Preference before the Lords, where the Form of Proceſs requires longer Diets, and more Days: As in Competitions betwixt Arreſters, the Obtainer of a Decreet of Furthcoming in the Seſſion, if he hath not been *in Mora*, will be preferred, conform to the Date of his Arreſtment, to a poſterior Arreſter obtaining the firſt Decreet before an inferior Court. And if it were otherwiſe, all Adjudications would be led before inferiour Courts, for fear of coming too late by the more tedious Form of the Seſſion.

Replyed for the other Creditors. The Act of Parliament 1661, bringing in Adjudgers within Year and Day *pari Paſſu*, muſt, as being a correctory Law, be ſtrictly interpreted. The Act of Regulation, concerns only Decreets of Adjudication before the Lords: For thoſe before Sheriffs, and their Abbreviates, can only be ſubſcribed by the Sheriff Pronouncer thereof, as was done in this Caſe. 2. Whatever may be pretended in the Caſe of Furthcomings, Conſtitutions, and the like, before the Lords requiring Delay by the Courſe of the Rolls; That cannot be alledged for ſecond or poſterior Adjudgers, whoſe Adjudications paſs ſummarly without going to Rolls.

The Lords found, That *Pancaitland*'s Adjudication, not being within Year and Day of the firſt Adjudication before the Sheriff, cannot come in *pari Paſſu* with the reſt. For the Lords thought that the ſigning of Abbreviates by a Lord conform to the Regulation, concerned only Adjudications before the Seſſion: Since the ſigning of Abbreviates came in Place of Allowances; and Adjudications on a *Cognitionis Cauſa* before the Sheriffs, were not in Uſe to be allowed, and conſequently required no Abbreviate to be ſigned.

Eodem Die. George Lockhart *of* Carnwath, *againſt* John Baillie *of* Walſtoun.

AT a Treaty of Agreement betwixt *John Baillie* of *Walſtoun*, and *John Hamilton* Writer to the Signet, about the Sale of *Walſtoun*'s Eſtate to *George Lockhart* of *Carnwath*, a Minute of Sale being drawn up, ſigned by *Walſtoun*, and given to *John Hamilton*, upon his Obligement to procure ſome Preſtations from *Carnwath*, and to cauſe him ſubſcribe the Minute under the Pain of Five hundred Pound *Sterling*; And *Carnwath* having ſigned and got up the Minute from Mr. *Hamilton*, he thereupon charged *Walſtoun* to implement the ſame; who ſuſpended and repeted a Reduction, upon this Ground, That he reſiled from the Bargain, and there was *Locus Pœnitentiæ*, in ſo far as 1. The Minute charged on is no delivered Evident, the Charger not having received it from *Walſtoun*, but only from *John Hamilton*, who had no Warrant to give it up to him, but only to procure his Subſcription to it. And it were unreaſonable, that *Walſtoun* ſhould be bound to *Carnwath* by that Copy of the Minute now in his Hand, before he were equally bound to *Walſtoun* by delivering another ſigned Double to him: Till which Time the Bargain was incomplete, and might be reſiled from by *Walſtoun*; as *Carnwath* might have ſhaken himſelf looſe of it, by throwing the ſigned Minute in the Fire, or cancelling his Subſcription. For to ſuſtain ſuch an unwarrantable Delivery by a Mandatar, *qui exceſſit Fines Mandati*, would open a Door to all Manner of Fraud At which Rate it ſhould be in the Power of any mercenary Agent, to ſurrende his Clients Bonds to his Debtors. 2. The Price of the Lands was not clearl determined by the Minute, which bears only *Twenty one Years Purchaſe of th free Mony and Victual Rent payable out of the Lands, conform as the ſame ſhall b proven to have paid at the Suſpender's Father's Deceaſe, or his own Entry, comptin the Chalder of Victual at   the Chalder*; Which Blank in the Minut could not be filled up without Conſent of both Parties: And Contracts of Sal are never underſtood to be perfected, while the Price is left uncertain; which i then only certain, when *certa Quantitas exprimitur, vel de quo conſtat pe Relationem ad Rem certam*. 3. The Preſtations on *Carnwath*'s Part contained i Mr. *Hamilton*'s Obligement to *Walſtoun*, are *Pacta ex incontinenti adjecta*, th Obligement being of the ſame Date with the Minute, and expreſly relativ thereto: And while theſe Things are unperformed by *Carnwath*, the Bargai is ſtill open, unconcluded.

Anſwered for the Charger. 1. When a ſubſcribed Writ is once out of th Granter's Hands, and in the Hands of a Third Party, who delivers it to hi in whoſe Favours it is conceived; Law preſumes that he had a Mandate o Commiſſion for delivering of it, unleſs the contrary be proved by Writ o Oath of the Receiver. The pretended Inconvenience to *Walſtoun*, by *Carnwath*'s being ſole Maſter of the Minute, did not hinder the Bargain to b completed; yea, the Minute in his Hand was a common Evident for both

Upon which *Carnwath* could not ſue, without performing his Part; And for Recovery thereof or an Extract, Action was competent to *Walſtoun*; and had *arnwath* deſtroyed it, the Tenor might have been made up againſt him by is Oath, and other habile Methods of proving Tenors. 'Tis no Paradox in Law, that a Debtor becomes free upon getting up his Bond from the Creditor's Truſtee, who had counteracted his Truſt: For no Man gives Truſt without unning Hazard by the Truſtee's proving unfaithful. 2. The Reaſon founded n the Blank in the Minute, and Uncertainty of the Price, is of no Weight: For the Price was determined, before *Walſtoun* ſigned the Minute, to Twenty one Times the Value of the yearly Product of the Subject ſold. And the taking n Obligement from *Hamilton* the Truſtee under a Penalty to procure *Carnvath*'s Subſcription to the Minute, did as fully impower him to fill up the Blank, and liquidate the Value of Nine or Ten Chalders of Victual, the reſt of the Rent being paid in Mony; as the having of the Minute impowered him o deliver it: And *ita eſt*, that the Blank was filled up before the Minute was lelivered to *Carnwath*; ſo that the Principle of the common Law, that *Emptio on eſt perfecta* before adjuſting of the Price, is miſapplied, the Price here being ully determined before Delivery of the Minute. 3. The Preſtations that Mr. *Hamilton* ingag'd *Carnwath* ſhould perform, cannot be reckoned *Pacta ex ncontinenti adjecta* to the Sale: Becauſe not undertaken by *Carnwath* the Purhaſer, but only by Mr. *Hamilton*, as taking Burden for him. Nor doth *arnwath*'s not performing theſe Conditions (ſuppoſe he were liable for them) nnul the Bargain, but only afford Action to *Walſtoun* againſt him to perform. Beſides, *Carnwath* is ready to perform his Part of the Minute; upon *Walſtoun*'s erforming what is incumbent upon him, which is to ſatisfy the Deſire of he Charge by granting a valid Diſpoſition in the Terms of the Minute.

The Lords found, That the Minute of Agreement charged on, being ſigned y both Parties, and in *Carnwath*'s Hands, was a complete Minute and Bargain; nd there was no *Locus Pœnitentiæ*: And therefore repelled the whole Reaſons of Suſpenſion and Reduction.

December 24, 1709. *Mr.* Thomas Linning *Miniſter of* Walſtoun, *againſt* John Baillie *of* Walſtoun.

MR. *Thomas Linning* having repreſented to the Presbytery of *Biggar*, that his Glebe was both inſufficient and inconvenient; in ſo far as, it is very barren Ground, and lay at a great Diſtance from the Church and Manſe: They ordered a new Deſignation of a ſufficient Glebe in the Terms of the 161 *Act*, *Parl.* 1593; purſuant to which Four Acres of arable Ground neareſt to the Church were meaſured out and deſigned. The Miniſter having charged the Poſſeſſor, who was *Walſtoun*'s Tenant, to remove, *Walſtoun* ſuſpended the Act of Presbytery. At the diſcuſſing of which Suſpenſion, the Lords found, That the Act of Parliament doth only warrand the Deſignation of a Glebe to a Miniſter who has no Glebe; or to make up the legal Quantity to one whoſe Glebe extends not to Four Acres of Land: But doth not impower the Presbytery to change and alter Glebes, or to deſign a new Glebe to a Miniſter who is already in Poſſeſſion of a competent Glebe, albeit it doth not ly moſt eweſt to the Church.

Eodem Die. Patrick Gellie *and Mr.* Alexander Thomſon *Executors to* Thomas Burnet *Merchant in* Aberdeen, *againſt* Robert Panton *Merchant in* Campvere, *and* Gilbert Stuart *Merchant in* Edinburgh.

THomas Burnet having named *Patrick Gellie* and Mr. *Alexander Thomſon* his Executors, and left to *Andrew Burnet* his Nephew 6000 Merks *Scots*, to *John Burnet Andrew*'s Brother 3000 Merks, to *Elſpeth* and *Beſſie Burne* his Siſters 4000 Merks, and all theſe Sums to be liferented by *John Bur* elder, Father to the Legatars: With Power to the Executors, without Conſent of *John Burnet* elder, to pay the 6000 Merks to *Andrew*, or ſo muc thereof, and at ſuch Times, as they ſhould think fit, they always paying th Superplus of what they keep off him to his Brother and Siſters, by ſuch Proportions as they, with Conſent of *John Burnet* elder, ſhall think expedient.

The Lords found, That the Executors could not, after old *John Burnet*' Death, exerce their Power to evacuate the Legacy left to *Andrew Burnet*, b ordaining the whole to be paid to his Brother and Siſters, in Prejudice of *Robe Panton Andrew*'s lawful Creditor. And found the ſaid Legacy ſubject to th Payment of a Bill of Exchange for 1231 Gilders drawn by *Andrew* upon th Executors, payable to *Robert Panton*. Albeit it was alledged for the Executors, that ſince a Legacy might be effectually left *in Arbitrio Tertii*, *L.* 4 §. 2. *ff. de Legat.* 1. And even might be made payable by the Heir to this o that Perſon he pleaſed, *L.* 16. *ff. de Legat.* 2. or the proportioning thereo among the Legatars might be committed to his Diſcretion, *L.* 3. §. 2. *ff. de annuis Legatis*: It is clearly in the Power of the Executors, who are *Hærede in mobilibus* to pay the whole Legacy in Queſtion to *Andrew Burnet*'s Brother and Siſters, paſſing by himſelf. In Reſpect it was anſwered for *Robert Panton* That the Laws cited for the Executors, concern the Caſe of a Legacy tranſferred by the Teſtator, *de Perſona in Perſonam*; or left by him with thi Quality, *If the Heir pleaſe*; or a Legacy whereof the Terms of Payment ar referr'd to the Heir's Arbitrement: Neither of which is the preſent Caſe where the Executors pretend to evacuate *Andrew*'s Legacy in Prejudice of hi juſt and lawful Creditor, which they cannot do. Seing the Teſtator havin left 6000 Merks to *Andrew*, and only 7000 to the other Three, is preſume to have had moſt Affection for him, and not to have deſigned that the Executors ſhould put him in a worſe Caſe than the reſt. The Faculty given to th Executors to pay the Whole, or a Part to *Andrew*, without his Father's Conſent, was in *Andrew*'s Favours, and could only be exerced in the Father' Lifetime, who had Intereſt in the Diſpoſal of the *Superplus* more than was pai to *Andrew*. For had the Teſtator deſigned, That the Executors ſhould hav Power ſo to reſtrict and diſpoſe of *Andrew*'s Legacy, after the Father's Death theſe Words, *Without his* (*i.e.* The Father's) *Conſent*, would not hav been adjected, as needleſs at a Time when his Intereſt by the Liferent cea ed.

Eodem Die. Alexander Anderſon *of* Auchinreath, *againſt* James Cock *To Clerk of* Bamff.

J*Anet Anderſon*, with Conſent of *James Cock* Portioner of *Carnock*, grante an Aſſignation of 1590 Merks in Favours of *Alexander Anderſon*, bearin the Parties to have ſigned upon the 24 *Auguſt* 1704 at *Carnock*, before Fou Witneſſes, inſert and deſigned: Two Notaries ſubſcribed for *Janet Anderſo* Two of the Witneſſes ſign in common Form, a Third adjects to his Subſcription, *Witneſs to both Notars Subſcriptions*, and the Fourth ſigns with theſ additional Words, *Witneſs to the Co-notars Subſcription. Alexander Anderſo* purſued *James Cock* Town Clerk of *Bamff*, as repreſenting the ſaid *James Cock* for Payment of the Sum aſſigned.

Alledged for the Defender. The Aſſignation is null, for that both the Notaries do not ſubſcribe before Four Witneſſes: In ſo far as the Adjection to th Subſcription of one of the Witneſſes bears, *That he was only Witneſs to th Co-notar's Subſcription.*

Replye

Replyed for the Purſuer. The Docquet of the Aſſignation bearing it to be ſigned at one Place and Time, and before four Witneſſes, this eſſential Part of the Writ, cannot be redargued by any ſuperfluous Adjection to the Witneſſes Subſcription, but only by Improbation. 2. No Faith can be had to this officious Adjection to the Witneſſes Subſcription; Becauſe, *non conſtat* when it was writ, or who writ it, and it bears not to be holograph: Conſequently it is null by the Act of Parliament 1681. For it might have been added ſince the ſigning of the Writ: And can be of no greater Import, than if ſuch a Witneſs had granted a ſeparate Declaration, wanting Writer's Name, that he had been preſent only at the ſubſcribing of one of the Notaries, which would certainly have been null. *June* 27, 1704, *Lady Kinfauns* contra *Earl of Northesk*, the Lords would not ſuſtain this as a Nullity of a Bond, granted by *Pittarrow* and the *Lord Lower*, that two of the Witneſſes did adject to their Subſcription, *At* Lower *ſuch a Day Witneſs to my Lord* Lower's *Subſcription*; Whereas the Docket of the Body of the Bond bore it to have been ſubſcribed the Day preceeding at *Pittarrow*. 3. Writs ſubſcribed by ſeveral Parties, uſe to be ſuſtained, tho' wanting Witneſſes, from the preſumed Verity of the Writ: Which equally holds in this Caſe, where the Husband ſubſcribes as Conſenter, and ſo muſt be ſuſtained as a Witneſs.

Duplyed for the Defender. The Adjection to the fourth Witneſs's Subſcription, is not inconſiſtent with the Docket of the Writ, which bears only in general, Before ſuch Witneſſes (without ſaying Witneſſes to both the Notaries) but only qualifies that Generality. Whereas in the Caſe of the cited Deciſion, the Adjection to the Subſcriptions of the two Witneſſes, did downright contradict the Docket of the Body of the Writ. 2. It's of no Import to ſay, That this Adjection is no more probative than a ſeparate Declaration. For as it appears to be genuine *ex Facie Scripturæ*: So the Uſer of the Writ muſt take it as it ſtands; unleſs he offer to prove, That ſuch Words were *Viis et Modis* added to the Witneſs's Subſcription, after the Delivery of the Writ to him. 3. If the Wife's Deed be null, the Husband's Conſent and authorizing her *ad integrandam Perſonam* (as Lawyers phraſe it) falls in Conſequence: As a Curator's Conſent could not ſupport the Minor's Deed, that is null for Want of Witneſſes. Becauſe, by a Husband or Curator's ſo interpoſing, *id ſolum agitur*, to hinder the Deed to be quarrelled, for Want of Authority in the Diſponer, and not to ſupply other Nullities.

The Lords ſuſtained the Nullity, and found it not ſupplyed by the Husband's Subſcription: In Reſpect he doth only ſign as Conſenter, and not as a Diſponer.

Eodem Die, *Miſtreſs* Elizabeth Scot *Relict of* John Lockhart *of* Lee, *againſt* James Lockhart *of* Lee.

THe deceas'd *Cromwel Lockart* of *Lee*, diſponed his Eſtate in the Form of Intail, to *Richard Lockhart* his immediate younger Brother, and his other Heirs ſubſtitute; with ſeveral Clauſes irritant, and Proviſions: Particularly, That it ſhould not be in the Power of any of the ſaid Heirs to provide their Ladies in Jointures, exceeding a Third of the free Rent of the Eſtate for the Time, and that in full Satisfaction of all Right of Terce. Upon the Foot of this Tailzie, *John Lockhart*, who ſucceeded to *Richard*, provided his Lady in a yearly Annuity of 2000 Merks: who after his Deceaſe purſued *James Lockhart* of *Lee* her Husband's Heir of Tailzie, for Payment of the ſaid Proviſion, and an interim Aliment.

Alledged for the Defender. The Rent of his Eſtate was exhauſted by Annualrents of Debts and Ladies Liferents, prior to the Purſuer's, particularly with 5500 Merks of Annuity in Favours of *Martha Lockhart*, Relict of the ſaid *Cromwel Lockhart*, now Lady *Stevenſon*.

Replyed for the Purſuer. The Lady *Stevenſon* had reſtricted her Annuity to 4000 Merks for the Well and Standing of the Family of *Lee*, which muſt be profitable to the Purſuer, who is a Lady and Mother in the Family.

Duplyed for the Defender. The Reſtriction was made with ſeveral ſtrict Clauſes irritant, which have been incurred: So that the Eſtate is liable to the Burden of the Lady *Stevenſon*'s full Liferent, when ſhe pleaſes to take her ſelf to it.

Triplyed for the Purſuer. Altho' the Lady *Stevenſon* might recur to her full Liferent, yet ſhe has not done it; and ſo long as ſhe does not exerce that Faculty competent to her, the Eaſe of her Jointure continues a Subject affectable for the Purſuer's Proviſion and Aliment.

Quadruplyed for the Defender. 'Tis all a matter in this Caſe, whether the Lady *Stevenſon* be actually inſiſting for the whole 5500 Merks or not: Seing ſhe may do it, and *Illud eſt Debitum, quod Exceptione perpetua ſummoveri non poteſt.*

The Lords found, That the Lady *Stevenſon*'s Jointure is only to be reckoned at 4000 Merks yearly, ay and while ſhe recur to the Irritancies in that Reſtriction.

December 27, 1709. Archibaled Smith *Writer in* Edinburgh, *againſt* John Vint *Shoomaker in* Caltoun.

THe deceas'd *John Vint* Cordiner in the *Caltoun* granted Bond to *William Smith* one of the Keepers of the Parliament Houſe, for the Sum of 336 *Lib.* 18 *Shil. Scots*, and for his further Security and more ſure Payment thereof, aſſigned him to ſeveral Debts due to *Vint*, partly by Ticket, partly by Accompt: with this Proviſion, That *William Smith* being once paid of his Debt, and neceſſary diſburſed Expences, the Aſſignation ſhould be void, and he ſhould hold Compt for what more he received, than paid him; Of the which aſſigned Debts he ſigned an Inventory, and granted Receipt of the Aſſignation thereto. About Twenty two Years thereafter *Archibald Smith*, as Aſſigny by *William Smith*, purſued *John Vint*, as repreſenting the ſaid *John Vint* his Father, for Payment of the Debt in his Father's Bond.

Alledged for the Defender. The Debts aſſigned being preſcribed, the Purſuer muſt either impute them in Payment, or ſhew that he has done Diligence for recovering thereof in due Time; ſince he did not retroceſs the Cedent, that he might have been in a Capacity to ſue for Payment. For the Aſſignation and Receipt thereof imply'd a Mandat *utriuſque Gratia*, which obliged the Aſſigny to Diligence required in a Mandatar. Yea, his Obligement to Diligence is expreſſed by the aſſigning not only in further Security, but alſo for more ſure Payment.

Replyed for the Purſuer. An Aſſigny in Security is not liable, unleſs expreſly obliged, to do Diligence: Becauſe, ſuch an Aſſignation doth not looſe the Cedent's Bond, eſpecially when he never required the Aſſigny to do Diligence, or to denude. Nor was he bound to have retroceſſed the Cedent, tho' required, without an Offer of Payment: For no Law obligeth a Creditor to quit his Pledge, unleſs the Cauſe for which it was given be firſt ſatisfied; far leſs to expend certain Mony for recovering doubtful Debts. 2. The Aſſignation is not properly a Mandat, but *Pactum adjectum mutuo*, or rather a *Pignus*;

nus, which obligeth the Aſſigny to take Care of the *ipſa Corpora* of the Writs impignorated, that they periſh not through his Neglect. He was under no greater Tie to purſue for Payment (albeit he might have done it) than an Arreſter is to proſecute a Furthcoming, or an Adjudger to purſue for Mails and Duties: For any Inconvenience thro' the Debts periſhing *medio Tempore*, may be obviated by the Debtor's redeeming the Subject aſſigned or arreſted, by Payment of the principal Debt; And if he ſuſtain any Loſs thro' his failing to do it, *ſibi imputet*.

The Lords found, That the Purſuer was not obliged to do Diligence for recovering the Debts to which he was aſſigned in Security: And that theſe Debts, tho' now preſcribed, are not imputable in Payment of the Debt due by the Cedent to the Aſſigny.

Eodem Die. Alexander Cuningham *of* Craigends, *againſt* Alexander *Earl of* Eglintoun.

ALexander Cuningham *of* Craigends having in *Anno* 1704, procured, by a Grant from Her Majeſty, his Village of *Kilbarchan* to be erected in a Burgh of Barony; with Power to him to hold Fairs, and exact all the Profits and Duties thereof: He purſued a Declarator againſt the Earl of *Eglintoun* heretable Sheriff of *Renfrew* (where *Kilbarchan* lies) for declaring, That the Purſuer has the ſole Right to hold Fairs in the ſaid Burgh, and exact the Duties thereof.

Alledged for the Defender. He and his Predeceſſors, as heretable Sheriffs of *Renfrew*, by themſelves and Deputs had preſcribed a poſitive Right to ſet up Weights at the Fair of *Kilbarchan*, and to exact a particular Duty for weighing ſuch Goods as were ſold there, by immemorial Poſſeſſion; conform to a Charter of the Sheriffſhip, bearing *Cum omnibus Feodis, Divoriis et Caſualitatibus ſeu ſpectan. aut quæ ad Dictum Jus et Officium pertinere dignoſcentur*; Which Right could not be inverted by the Purſuer's Charter, which was granted *Periculo Petentis, et ſalvo Jure cujuſlibet.*

Replyed for the Purſuer. The Privilege of holding Fairs, and exacting the Duties thereof, being ranked *inter Regalia* by *Sixtinus*, and other Writers on the Subject, it could never be poſſeſſed as Part and Pertinent: And the Sheriff being the Queen's Lieutenant, was in *peſſima Fide* to make or connive at any Exaction upon the Subject, without expreſs Allowance; Nor has the Power of exacting Cuſtoms at Fairs, any Connection with the Office of Sheriff. 2. Again, the Defender's Poſſeſſion as Sheriff, was but as the Queen's Servant, and ſo can never prejudice Her Majeſty or Her Donatar: A Servant's Poſſeſſion *qua talis*, being the Maſter's Poſſeſſion. 3. *Eſto* the Defender as Sheriff had a poſitive Right to the Duties of ſuch a Fair, the Sovereign might diſſolve that Caſuality from the Sheriffſhip, and beſtow it otherways; it being ordinary to diminiſh the Profits and Juriſdictions of Sheriffs, by erecting new Juriſdictions of Juſtices, Barons, *&c.* within theirs. Nor doth it alter the Caſe, That the Defender is heretable Sheriff: Seing the making a Right hereditary, doth only impower to tranſmit it to Succeſſors, without any further Power than what the Predeceſſor had.

Duplyed for the Defender. That the *qua* Sheriff could preſcribe a Right to the Privilege in Queſtion, is clear from Deciſions, *July* 18, 1676, Earl *Kingborn contra* Town of *Forfar*, *December* 9, 1679, Lord *Hattoun contra* Town of *Dundee*, And, which meets the preſent Caſe *in Terminis*, *December* 13, 1677, Earl *Murray* contra *Feuars* of the Fiſhing upon the Water of *Neſs*. The Privilege of ſetting up Weights, and taking a Duty for weighing, is not properly an Exaction of Cuſtom; and ſo not *inter Regalia*: Becauſe, the Sheriff is bound *ex Officio* to ſee that no falſe Weights be uſed, and to regulate Weights conform to Law. 2. The Defender did not poſſeſs in Name of the Sovereign, but in his own Name by the Sovereign's Conceſſion. 3. He ſhall not here diſpute Her Majeſties Power of taking away any of his Caſualities, as heretable Sheriff: But poſitively contends, That no ſuch thing is done, or deſigned by the Grant in Favours of the Purſuer.

Triplyed for the Purſuer. The Deciſions cited for the Defender, are not parallel. For there was no poſitive Grant in Competition with the Earl of *Kinghorn*'s Right of Conſtabulary: Beſides, there is ſome Diſparity betwixt a Sheriff, and a Conſtable. And the Earl pretended to preſcribe no more than was the known and common Right of all the Conſtables in *Scotland*; Whereas the Right of Fairs cannot be called the common Right of Sheriffs. The Prattick betwixt the Earl of *Murray*, and the Fiſhers of *Neſs*, is but a ſingle Deciſion: Beſides, Salmond Fiſhing being *inter Regalia*, a Servitude thereupon might be more eaſily conſtituted in Favours of the Sovereign's heretable Lieutenant in the Place, than the Liberty of coming to any Weights, which is *meræ Facultatis* to every Subject, can be loſt *non utendo*. 2. Our Lawgivers have had a particular Care to ſecure the Liedges from the Exactions of Sheriffs at Fairs, *Act.* 59. *Par.* 13. *J.* 2. *Act* 33. *Par.* 5. *J.* 3. 'Tis true, the Grant of an Office in general, *cum Feodis, Divoriis et Caſualitatibus*, doth imply ſuch Fees and Profits, as ariſe from the Nature of the Office, and are a Conſequence of the Juriſdiction: As the Seaſin-Ox is a Perquiſite of Sheriffs, for that they, as the Queen's Officers, give Seaſin of Lands holden of Her by Precepts out of the Chancery, and compt in Exchequer. But ſuch a general Clauſe, cannot extend to exotick Profits of a different Kind, having no Contingency with the Office.

Quadruplyed for the Defender. Tho' the Grant of an Office in general, *cum Feodis*, &c. implies only the Profits and Fees naturally ariſing, according to the common Rule, *Mandata Juriſdictione, ea omnia mandari cenſentur, ſine quibus Exerceri non poteſt*; Yet a Perſon infeſt heretably in an Office may by long Poſſeſſion preſcribe a Right to ſome Privilege, that doth not always follow the Nature of the Office. And it's ſtrange to reckon the Privilege of ſetting up Weights, and exacting a ſmall Duty from ſuch as weigh their Goods there, for defraying the Charges, an exotick Profit of a Sheriff, who, *Ratione Officii*, is to inſpect and regulate Weights.

The Lords found, That the Earl's Right of heretable Sheriffſhip of *Renfrew*, *cum Feodis*, *Divoriis*, *Caſualitatibus*, &c. is ſufficient to found a Preſcription to ſet up Weights and uplift the Duties thereof at the Town of *Kilbarchan*.

Eodem Die. ACT *of* SEDERUNT *anent the Outer-houſe Rolls.*

AT *Edinburgh* the Twenty ſeventh Day of *December*, One thouſand ſeven hundred and nine Years, The Lords of Council and Seſſion conſidering, That by the 16 *Act* 3*d*. *Seſſ.* 2*d*. *Par.* of K. *Cha.* 2*d*. Intituled, *Act concerning Regulation of the Judicatures*, and that Part thereof which concerns the Seſſion; The Manner of taking up Cauſes to be Inrolled each *Saturday*, and inſerting the ſame in the Books of Inrollment to be kept for that Effect; And ſpecifying what is to be paid for every Cauſe ſo to be inſert; and appointing the Weekly Rolls of Cauſes to be diſcuſſed in the Outer-houſe, to be taken from the Books of Inrollment, according as they ſtand inſert therein, are particularly ſet down, and enacted: Nevertheleſs, ſeveral Abuſes have crept in, tending to diſappoint the good Deſign of the foreſaid Act. For Remedy whereof, the ſaid Lords Appoint and Ordain, That in Time coming, the Keeper of the Books of Inrollment, do prefix the Arithmetical Numbers of 1, 2, 3, *&c*, to each Cauſe, as they ſtand inſert in the ſaid Books of Inrollment; and that the ſaid Keeper, at the firſt coming out of each Weeks Ordinary upon *Tueſday* Morning, preſent, and lay before him the ſaid Books of Inrollment, with an Docquet thereupon, ſubjoined cloſs to the Cauſe taken up upon the *Saturday* immediately preceeding, in theſe words, *The total Number of the Actions and Cauſes inrolled upon* Saturday *laſt, being ſuch a Day of the Month, extend to ſuch a Number, which Docquet the Lord Ordinar is to ſign under his Hand*; And the ſaid Lords Ordain the Book-keeper, to preſent the ſaid Books of Inrollment every *Tueſday* Morning, ſo docqueted, and and expreſſing the Day of the Month, and Number of the Cauſes in Words, and not in Arithmetical Figures, under the Pain of Thirty Pounds *Scots toties quoties*, in Caſe of Failzie, and Impriſonment until Payment thereof be made to the Poors Box without Mitigation; And it is hereby recommended to the weekly Ordinar for the Outer-houſe, That upon every *Wedneſday* Morning, he Report to the haill Lords, whether the ſaid Books of Inrollment had been preſented and ſubſcribed upon the *Tueſday* preceeding, in Manner foreſaid, or not; And further, the Lords diſcharge the Keepers of the ſaid Books, to exact above Four Shilling *Scots* for Inrolling each Cauſe, under the above Penalty *toties quoties*: And ordain theſe Preſents to be intimated in the Outer-houſe, and Printed.

Eodem Die. ACT *of* SEDERUNT, *anent Cautioners in Suſpenſions, and Atteſting of Cautioners.*

AT *Edinburgh* the Twenty ſeventh Day of *December*, One thouſand ſeven hundred and nine Years, The Lords of Council and Seſſion conſidering, That of late ſome Bonds of Cautionry in Suſpenſions, have been taken only to pay the Sums contained in the Charge, down right contrary to the Act of *Sederunt*, dated Twenty third of *November*, One thouſand ſix hundred and thirteen, expreſly ordaining that Caution ſhall be taken, not only for Obedience of the Charge, but likewiſe for what Expences of Plea ſhall be decerned, for preventing which Inconveniency in Time coming, they revive the ſaid Act, and ordain Bonds of Caution to be taken in Time coming, for the whole Sums that ſhall be decerned by the Lords; with Certification, if any be taken otherways, the Clerk of the Bills ſhall be liable to the Parties for their Damages. The Lords having likeways obſerved, That the Atteſters of Cautioners, are only taken obliged for their Reſponſality and Sufficiency at Time of their Atteſtation, which puts the Liedges to a long and tedious Probation of the Cautioners Condition at the Time; and finding it an unreaſonable Practice, therefore, they ordain the Clerks of the Bills to take the Atteſters bound as Cautioners for the Cautioner, and liable ſubſidiarly in their Order, as fully as the Cautioners themſelves, under the ſame Certification againſt the Clerks to the Bills, if they do otherways. And further, the Lords having obſerved, That where Decreets either of the Lords themſelves, or inferiour Courts are ſuſpended, the Cautioner claims to be freed, if the Decreet charged on be turned to a Libel, which the Lords think unreaſonable; And ſeing Chargers do oft give Way to the paſſing of Suſpenſions in Reſpect of the Solvency of the Cautioner offered; Therefore, to aſcertain the Liedges in Time coming, they declare, they'll find the Cautioner ſimply liable in his Order for all that ſhall be decerned by the Lords, whether the Decreet be turned into a libel or not. And that thir Preſents may come to the Knowledge of the whole Liedges, they ordain this Act to be Printed, and Copies thereof to be affixed in the Outer houſe, in the uſual Form; As alſo, the ſame to be inſert and recorded in the Books of *Sederunt*.

December 28, 1709. *Sir* George Hamilton *and his Aſſigny, againſt Sir* James Calder *of* Muirtoun.

IN the Action at the Inſtance of Sir *George Hamilton* and his Aſſigny, againſt Sir *James Calder*, as Cautioner for the deceas'd *John Murray*, who had been Caſh-keeper to the Tackſmen of the Cuſtoms, the Lords *July* 18, 1706, having found that Sir *George* behoved to proceed againſt the Defender by diſcuſſing and adducing Probation as in a Libel, notwithſtanding of an extracted Decreet againſt the Repreſentatives of *John Murray*; And upon a reclaiming Bill given in by Sir *George*, the Decreet being ſuſtained againſt the Cautioner as to the Points of Relevancy and Probation therein determined, reſerving to him to be heard on all competent Defences, albeit omitted to be proponed by the Defenders in the ſaid Decreet: Sir *James* reclaimed upon this Ground, That, notwithſtanding the ſaid Decreet werein he was not called, he ought to be heard upon the Relevancy and Probation; Seing it cannot have the Effect of *Res judicata* againſt him.

Anſwered for Sir George Hamilton. The Decreet againſt the Repreſentatives of the Principal, is juſtly ſuſtained againſt the Cautioner; not as the Effect of *Res judicata*, but as the Conſequence of an acceſſory Obligement, which hath the ſame Relevancy and Probation as the Principal. For as a Cautioner follows the Faith of the Principal: So his Oath doth militate againſt the Cautioner. And the Cautioner of an Executor was not ſuffered to propone exhauſted, after the Principal had made that Defence, and failed in proving, *March* 4, 1623, *Wood* contra : Albeit the Cautioner was neither called nor compearing in the Decreet againſt the Executor. Again, a Decreet of Liquidation againſt the principal Debtor upon Probation by Witneſſes, was ſuſtained againſt the Cautioner, who was not called therein, *June* 24, 1665, *Irving* contra *Strachan*. And it's clear from *Voet. Tit. de Fidejuſſoribus* §. 8. That Accompts cleared and determined againſt the Heirs of the principal Debtor, conclude the Cautioner.

Replyed for Sir James Calder. 'Tis true that Cautioners in Suſpenſion of Decreets, or Cautioners *judicatum ſolvi*, are effectually bound by Decreets againſt the Principals, tho' they compear not at pronouncing: Becauſe, ſuch Cautioners do in Effect ſubject themſelves to the Performance of th Decreets to be pronounced. But the Defender is in a Different Caſe from theſe, and cannot be concluded by *Res judicata* againſt the Principal, *Voet ad Tit. de Re judicata*, §. 32. *Huber ad eundem Tit.* §. 51, 52.

The Lords found, That the Decreet againſt the Repreſentatives of th principal Debtor, is not *Res judicata* either as to Relevancy or Probatio in ſo far as concerns the Cautioner; but that any Thing done in the ſai Decreet is only to be conſidered as Pratticks or Interlocutors, which th Purſuer may found on, and repete here, without Prejudice to the *Defende* to object, both againſt the Relevancy and Import of the Probation.

December 29, 1709. William Duff *of* Bracco *Supplicant.*

B*Racco* having purſued a Sale and Ranking of the Eſtate of *Edinglaſſie*, againſt the Heretor and his other Creditors; and carried the Proceſ ſo far on, without applying for Expences, till the Decreet of Ranking wa ready to be extracted, and the Sale ready to be Adviſed: The Lords, upo a Petition offered by *Bracco*, remitted to the Ordinary in the Ranking, t modifie a Sum for ſatisfying the Expences already beſtowed, and to be expended for perfecting the Sale and Ranking; and to grant Warrant to the Factor of the Eſtate for Payment thereof.

December 30, 1709. *Sir* John Johnſtoun *of* Caskiben, *againſt* John Pedder *Commiſſar-clerk-depute of* Aberdeen.

SIr *John Johnſtoun* having obtained a Precept of Poinding againſt ſeveral Debtors purſued by him before the Commiſſar of *Aberdeen*; And thereupon charged *Iſobel Drum* Relict of *Alexander Burnet* Merchant there, for the Sum of 111 ℔. 9 ſh. contained in the Precept as due by her: She ſuſpended, and Sir *John* required from *John Pedder*, who ſigned the Precept, n Extract of his Decreet, in Reſpect the Charge could not be diſcuſſed upon the Precept. Which Extract *John Pedder* refuſed to give out, becauſe there was no Decreet againſt *Iſobel Drum*; but his Servant had raſhly extended the Precept upon the Decreet againſt the whole Debtors in the Libel, without noticing preciſely the Perſons decerned againſt; and he following the Servant's Faith had by Inadvertency ſigned it. Sir *John* having nothing left to inſtruct his Debt, but the Decreet which was refuſed, by *Iſobel Drum*'s dying in the mean Time, he purſued *John Pedder* for Payment of the 111 ℔. 9 *ſh.* and for Damages.

The Lords ſuſtained the Defender's giving out the Precept without having a Decreet for his Warrant, relevant to make him liable for the 111 ℔. ſh. mentioned therein to be due by *Iſobel Drum* to Sir *John Johnſtoun*. Albeit it was alledged for the Defender, That his Eſcape was innocent and pardonable, and ſuch as might have fallen out in the Hands of the moſt exact Man.

December 31, 1709. Alexander Wedderburn *Town-clerk of* Dundee, *againſt* Robert Nicolſon *Merchant there, and other Creditors of* Henry Crawford.

IN the Action of Sale of the Lands of *Halcartoun* pertaining to *Henry Crawford*, carried on at the Inſtance of *Alexander Wedderburn* and others, Compearance was made for *Robert Nicolſon* and others, who alledged, That no Proceſs could be ſuſtained: in Reſpect the Summons was paſt without a Bill and Deliverance of the Lords; Whereas all Summons of Sale ought to paſs by Bill, ſpecially narrating the Act in Virtue whereof the Sale is Raiſed. Becauſe, 1. Summons of Adjudication, that hath neither ſo ſummar nor univerſal an Effect as Sales, require a Bill. 2. By the Act 17, Parliament 1681, Intimations, which are but Conſequences of the Proceſs of Sale, ſhould paſs *ex Deliberatione Dominorum Concilii*; and much more is a Bill requiſite to found the Summons it ſelf.

Anſwered for the Purſuer. No Law appoints Summons of Sale to paſs upon Bill: Yea, theſe paſs of Courſe, becauſe founded upon Statute, the only Deſign of a Bill, when uſed, being in Order to get an Extract of the Summons in Caſe it ſhould be loſt during a long Dependence of the Proceſs. No Parallel is to be drawn from a Summons of Adjudication, to that of Sale: Becauſe, Adjudications by uniform and univerſal Cuſtom paſs by Bill, perhaps for clearing the Secretarie's Dues; Whereas Summons of Sale go otherwiſe, being founded only upon the common Debtor's Circumſtances, and the Purſuer's Title as a real Creditor. Nor can any Argument be fetched from Letters of Intimation: Which need no Bill; becauſe the Act and Commiſſion is their

Warrant, and they paſs *per Actum Dominorum*, and are not ſubſcribed by Writers to the Signet, but by Clerks of Seſſion.

The Lords ſuſtained Proceſs in the preſent Caſe: In Reſpect of the former Cuſtom, and the Inconveniency that would otherwiſe ariſe to many who have *bona Fide* purchaſed upon Sales, wherein the Formality of a Bill was not obſerved. But the Lords reſolved to make an Act of *Sederunt*, That no Summons of Sale ſhould hereafter paſs without a Bill.

January 4, 1710. Thomas Logie *Merchant in* Edinburgh, *againſt* Patrick Ferguſon *Merchant there.*

IN the Proceſs at the Inſtance of *Thomas Logie*, againſt *Patrick Ferguſon*, as repreſenting *John Ferguſon* Cordiner in *Edinburgh* his Father, founded on an Obligement, ſubſcribed by him before Witneſſes, and bearing the Writer's Name without any Deſignation: The Lords found the ſaid Writ, which was granted ſince the Act of Parliament 1681, null for Want of the Writer's Deſignation. Albeit the Purſuer offered to prove by the Defender's Oath, That the Obligement was truly ſubſcribed by his Father, and ſtill unſatisfied; And alledged that the Statute 1681, prohibiteth ſupplying by Condeſcendance only, without Prejudice to ſupply by other Methods.

January 5, 1710. Patrick Mortimer *in* Cowper, *againſt* James Archibald *and others.*

IN the Cauſe at the Inſtance of *Patrick Mortimer*, as Executor confirmed to *Agnes Wilkie* Relict of   *Fotheringham* in *Kennoway*, againſt *James Archibald* and others, for Repetition of Goods and Mony belonging to the Defunct, and abſtracted by them; the Libel being referred to the Defenders Oaths: They deponed, That *Agnes Wilkie*, ſome Weeks before her Death, gifted and delivered to them certain Particulars in Goods and Mony; partly, to ſee her honeſtly buried; partly, in Requital of their Attendance on her during her Sickneſs.

The Lords found the Quality of being gifted, intrinſick to the Oath, and a ſufficient Ground to Aſſoilzie the Deponents. Albeit it was alledged for *Patrick Mortimer*, That Qualities *ſuper Facto alieno are never reckoned Intrinſick, November* 6, 1667, *Fiſe* contra *Daw* obſerved by *Dirletoun*; and that the Things were gifted is the Fact of another Perſon which ſhould be proved; and *Donatio nunquam præſumitur.* In Reſpect it was anſwered, That Intromiſſion with Moveables being referred to a Partie's Oath, He might qualifie the Cauſe of his Intromiſſion, *February* 3, 1672, *Scot* contra *Elliot.*

January 6, 1710. Elizabeth Blair *Lady* Kirktoun, *againſt* Henry Hunter of Kirktoun *her Husband.*

HEnry Hunter, to oblige his Wife to return to his Family, which ſhe had deſerted through his Severity and maltreating of her, granted a Bond to pay to her yearly 400 Merks, in Caſe they ſhould divert and live ſeparately; A total Breach hapning after this Reconcilement, ſo as there was no Likelyhood of their longer Correſpondence as Man and Wife: The Lords, upon her Application modified to her a yearly Aliment of 300 Merks in Mony and Victual, for which ſhe extracted a Decreet. But in Reſpect the ſame was leſs than the Proviſion in the Bond, ſhe thought fit to Charge her Husband to Implement his Bond, who ſuſpended upon the Reaſons following. 1. The Charge at the Inſtance of a Wife, againſt her Husband, without the Authority of a Judge, is intrinſically null. 2. The Bond is null, as being granted *contra bonos Mores*, in the View of a Separation to happen, the LORD knows when; and more odious than *Pacta de Hæreditate Viventis*, which are reprobated in Law. 3. Such a Bond granted to the Wife for Sums payable *ſtante Matrimonio*, both recurred to the Husband himſelf *Jure Mariti*; and is revocable as a Donation.

Anſwered for the Charger. Bonds for Aliment, either in Caſe of Deceaſe, or Separation, *ne Maritus in Uxorem ſeviret*, are onerous, and not like gratuitous Deeds which are revocable, *ne Conjuges mutuo Amore ſe ſpolient.* And where the Ground of Separation is found juſt by Sentence of a Judge (as in this Caſe) the Marriage is effectually diſſolved as to all the legal Conſequences during the Separation; For no Debt contracted by her in the ſeparate State can affect him, nor would the Adminiſtration or Profits of any Eſtate falling to her by Succeſſion, come under the *Jus Mariti.* So that the Bond of Aliment granted in the View of a Separation which hath happened, can no more be now revoked, than if the Husband were actually dead.

Replyed for the Suſpender. What is neceſſary for the Charger's Aliment, is already cognoſced and determined according to the Suſpender's Fortune; And the Exceſs charged for being *ſine Cauſa*, recurs to him, and is revocable.

The Lords ſuſpended the Letters *ſimpliciter*.

Eodem Die. Robert Glendinning *of* Partoun, *againſt* John Irvine *of* Drumcoltran.

IN a Reduction and Improbation purſued by *Robert Glendinning*, againſt *John Irvine*, for reducing a Decreet of Appriſing of the Lands of *Barwhillanty* from *John Maxwel*, obtained by *Thomas Lidderdale* of *Gerran* (alias *St. Mary Iſle*) and a Charter of Appriſing granted to him by the deceas'd *Robert Glendinning* of *Partoun* the Superior, bearing, *For certain onerous Cauſes, and Warrandice from his proper Fact and Deed*: To which Appriſing and Charter *John Irvine* acquir'd Right in the Year 1690.

Alledged for the Purſuer. The Decreet of Appriſing was pronounced againſt *John Maxwel* who never had Right to the Lands: And the Charter of Appriſing, not an original Right, but given only in Obedience to the Decreet, did communicate no further Right than ſtood in the Debtor's Perſon, againſt whom the Appriſing was led; Seing it contains no Clauſe of *Novodamus.*

Anſwered for the Defender. Tho' common Charters of Appriſing, underſtood to be granted in Obedience and *ex Neceſſitate Juris*, do not prejudice the Superior of his Right to the Lands appriſed: Yet here the Superior having freely gone beyond the Terms of an ordinary Charter of Appriſing, by not mentioning a previous Charge to have been given, by expreſſing that he granted it for onerous Cauſes, and obliging himſelf and his Succeſſors to warrand the ſame from their Fact and Deed, which he was under no Neceſſity by Law to do; Theſe Clauſes muſt operate as effectually againſt him as a *Novodamus.* Eſpecially conſidering, That the Defender, a ſingular Succeſſor by Appriſing, cannot be ſuppoſed to have the original Writs, which *de Facto* are abſtracted and kept out of the Way by the Debtor, who colludes with the Purſuer.

Replyed for the Purſuer. All Charters of Appriſing do juſtly bear the like Narrative for *onerous Cauſes*, whereby is meant, only the Years Rent due to the Superior for granting the Charter. Albeit the Defender's Charter mention not the giving of a previous Charge, it narrates the Appriſing, and the Lords Allowance, whereby the Superior was ***nominatim*** decerned to grant a Charter in Favours of the Appriſer: So that his granting thereof can never be underſtood a voluntary Act, but a receiving the Appriſer in Obedience, to give him Preference in a Competition with others, *ſalvo Jure Cujuſlibet & Superioris, Stair, Inſtit. Lib.* 2. *Tit.* 4. §. 12. *Lib.* 3. *Tit.* 2 §. 25. The Clauſe of Warrandice from Fact and Deed, imports no more, than that the Superior neither has, nor ſhall by any Deed of his prefer another Creditor to the Appriſer; which is the leaſt of all Warrandice, and implied in all Caſes, whether expreſt or not. Again, Warrandice from Fact and Deed being regulated by the Nature of the Writ to which it is adjected: It imports only in this Caſe, That the Charter is good in its Kind, *viz.* a ſufficient Charter of Obedience, and that the Superior has done no Deed to incapacitate him to grant the ſame, and ſhall do nothing in Prejudice thereof, ſuch as it is.

The Lords found, That the Charter granted by the deceaſt *Robert Glendinning* of *Partoun*, to *Thomas Lidderdale* Appriſer of the Lands of *Barwhillanty*, cannot be conſidered as given in Obedience; And that the Purſuer cannot quarrel the Property, in Reſpect of the Obligement of Warrandice.

January 10, 1710. Henry Bothwel *of* Glencorſe, *againſt* John Trotter *of* Mortounhall.

IN the Action at the Inſtance of *Glencorſe*, againſt *Mortounhall*, for Payment of Seven Pound Eleven Shillings *Sterling*, contained in a Precept drawn by *Alexander Trotter* upon the Defender his Brother, payable to *Alexander Bothwel* Merchant in *Edinburgh* the Purſuer's Brother, dated *September* 7, 1688: The Lords found, That the Purſuer being decerned Executor to his Brother, and having confirmed his Teſtament, needed not a Licence to purſue before the Commiſſars, for Payment of another Debt not confirmed.

January 11, 1710. *Sir* Philip Anſtruther *of* Anſterfield, *againſt Mr.* Robert Gordon *Writer in* Edinburgh.

SIR *Philip Anſtruther* having purſued Mr. *Robert Gordon* before the Baillie of *Holy-rood-houſe*, the Defender procured the Cauſe to be advocated, upon this Reaſon, That he was a Member of the College of Juſtice, as being one of the Clerks of Chancery: Albeit he had retired to, and was dwelling in the Abbey, as a Sanctuary to ſhun the Diligence of his Creditors.

January 17, 1710. *The Town of* Montroſe *againſt Mr.* Robert Strachan.

THE Magiſtrates and Town Council of *Montroſe*, having in *Auguſt* 1704, elected Mr. *Robert Strachan* to be Maſter of their *Grammar* School; and lately by an arbitrary Act of their Council, deprived him of his Office, and declared the School vacant: He ſuſpended upon this Ground, That the Town could not *ad Libitum* turn him out, without qualifying and proving Malverſations againſt him.

Alledged for the Chargers. Seing the Suſpender's Act of Admiſſion doth not appoint him to be School-maſter expreſly during his Lifetime, it is underſtood to be during Pleaſure: And therefore, the Chargers, who are Patrons of the

School, put in the Maſter, and pay his Salary, may by their inherent Power turn him out as an ordinary Servant, without rendring a Reaſon for ſo doing.

Anſwered for the Suſpender. Whether he be the Town's Servant or not, he is not in the Caſe of an ordinary hired Servant, that may be put away at Pleaſure. And his Commiſſion, not bearing the Clauſe *durante Beneplacito*, gives him Right to the Office *quamdiu ſe bene geſſerit*: As was decided in the Caſe of the Town of *Edinburgh* againſt Mr. *Andrew Maſſy*. And it would be ruinous to the Inſtruction of Youth, to allow of an arbitrary chopping and changing of School-maſters.

The Lords found, That the Chargers could not arbitrarily remove the Suſpender from his Office, but for reaſonable Cauſes; And found, That either Ignorance or Inſufficiency was a ſufficient reaſonable Cauſe to deprive him, without Neceſſity to condeſcend upon Malverſations.

January 19, 1710. Robert Straiton *in* Grange, *againſt* Aliſon Robertſon *Daughter to Mr.* Duncan Robertſon *Writer.*

IN a Competition betwixt *Robert Straiton* and *Aliſon Robertſon*, for an Acre of Temple-lands in *Swanſtoun*, ſhe, *January* 18, 1704, having produced and founded Preference on a Diſpoſition granted to her by *Barbara Reid*, ſigned by two Notaries for the Granter who could not write, and ſubſcribed by three Witneſſes only, albeit four were inſert: The Lords found, That the ſaid Diſpoſition, tho' now ſubſcribed by the fourth Witneſs, is null. For that the Writ being once judicially produced with ſuch a Defect, that could not *ex Intervallo*, ſo long after ſubſcribing by the Notaries, be ſupplied.

Eodem Die. *Mr.* John Dickſon, *Clerk to the Juſtices of Peace of* Berwick-Shire *againſt Mr.* John Hume *Advocate.*

THE Juſtices of Peace of *Berwick-Shire*, having ſet a Fine of Fifty Pound *Sterl.* upon Mr. *John Hume*, for which he was put to give Bond to Mr. *John Dickſon* their Clerk: Mr. *Hume*, when charged upon the Bond, ſuſpended, and raiſed Reduction of the Sentence. At diſcuſſing the Suſpenſion, the Lords reſtricted the Fine as exorbitant, to Thirty Pound *Sterling*, and found the Letters orderly proceeded for the reſtricted Sum.

January 21, 1710. Alexander Forbes *of* Ballogie, *againſt* James Catanach *Merchant in* Aberdeen.

IN a Competition of the Creditors of *Alexander Forbes* of *Craigie*, *James Catanach* having, upon a Decreet of the Magiſtrates of *Aberdeen* againſt *Craigie*, obtained a ſummar Precept from the Sheriff, for arreſting in the Hands of *Craigie*'s Debtors within the Shire, and accordingly arreſted: The Lords found the Arreſtment null. In Reſpect it was unwarrantable in the Sheriff to interpoſe his Authority ſummarly to the Baillie's Decreet, by giving a Precept of Arreſtment thereon, without citing the Party decerned.

January 25, 1710. Idem *againſt* John Allardice *Manager for the late Woollen Manufactory of* Aberdeen.

IN a Furthcoming purſued by the Creditors of *Alexander Forbes* of *Craigie*, *Alexander Forbes* of *Ballogie*, who arreſted the common Debtor's Effects upon regiſtred Bonds, pleaded Preference to *John Allardice*: In Reſpect t Ground of his Arreſtment is a printed Bond granted to the late Woollen M nufactory of *Aberdeen*, wherein the Eſſentials, *viz.* the Debtor and Credit Names, the Sums, Principal, Penalty, and Courſe of Annualrents, D Witneſſes Names, and Deſignations, are filled up in Writ, without menti ing the Name and Deſignation of the Upfiller; And conſequently is null the Act of Parliament 1681.

Alledged for Allardice. His Bond being granted *in Re mercatoria*, to Company's Manager, for the Price of Cloth delivered to the Debtor, who a Partner in the Manufactory, is valid without the ordinary Solemnities required by Law in other Writs: As is clear fom the Inſtances of Subſcriptions in Compt Books, Bills of Exchange, Notes betwixt Merchants, Diſcharges betwixt Maſter and Tenant, Bonds given to the *African* Company by Subſcribers, that Company's Receipts to them, and all the printed Notes given into, or iſſuing from the Commiſſioners of the Cuſtoms or Exciſe which are valid by Cuſtom, tho' wanting theſe ordinary Solemnities; and the Notes of any trading Company, and the Indorſation of Bills, are expreſly excepted in the Act annulling blank Writs.

Replyed for Ballogie. Eſto, that Bills, Indorſations, and Merchants Notes, which are ſhort Writings, are privileged for Diſpatch ſake; yet there is no Exception of printed Bonds, and Privileges are not to be extended *de Caſu in Caſum.* And albeit the *African* Company had not obſerved the due Formalities in their printed Bonds, that can be no Precedent for others: Seing that Company was impowered by Act of Parliament, to make ſuch Orders and Methods of Management of their own Affairs, as they thought fit. And to ſay that the Officers of Cuſtoms and Exciſe uſe unformal Writs, is no Argument at all unleſs it were alledged that ſuch, when quarrelled, had been judicially approved.

The Lords found, That albeit for the greater Diſpatch of Buſineſs, Incorporations and publick Offices are allowed to print their Bonds with Blanks fo the Subſtantials; yet the Filler up of theſe Blanks muſt be deſigned: *An* therefore ſuſtained the Nullity objected againſt *Allardice*'s Bond, *That* th Filler up of the Blanks therein is not named and deſigned; unleſs it be offered t be proved, that the written Part of the Bond is Holograph, *i. e.* all writte with the Debtor's own Hand.

Eodem Die. Philip Savage *Chancellor of the Court of Exchequer in* Ireland *and Sir* Patrick Dun *of the City of* Dublin *Knight, againſt Mr.* Jame Craig *Advocate.*

MR. *Robert Craig* of *Riccartoun*, with Mr. *James* his Brother, havin borrowed Eight hundred Pound *Sterling* from *Philip Savage*, and S *Patrick Dun*, and granted Bond for the Double of the Sum after the *Iriſh* Forn with the uſual Conditions and Reſtrictions upon Payment at the Terms therei mentioned: The Creditors purſued Mr. *James Craig* upon the Bond before th Seſſion.

Alledged for the Defender. The Bond ought to be reſtricted to the Sum trul received, and Annualrent thereof due by the Law of *Scotland*. For the Creditors having chuſed to purſue here, their Pretenſions muſt be regulated by th Law of the Place: And who claim the Benefit thereof, muſt acquieſce therein without grudging at the Inconveniencies attending it. 2. The Creditors mu upon Payment (in the Terms of the Law of *Scotland*, where they find it thei Intereſt to purſue) give an abſolute Diſcharge, without any Reſervation.

Replye

Replyed for the Purſuer. The Bond being drawn and ſigned in *Ireland,* con-orm to the Law there, is good to the full Extent againſt the Granters all the World over, where they can be reached. At leaſt, 2. What the Purſuers can-ot recover by the Law of *Scotland,* ought to be reſerved to them, to purſue for againſt the Debtors Perſons and Eſtates in *Ireland,* conform to the Law of hat Kingdom.

The Lords found, That the Defender is liable only for the Eight hundred Pound, and Annualrents thereof according to the Law of *Scotland*: And that pon Payment thereof, the Purſuers are obliged to diſcharge the Bond, and ll that has followed thereon, without any Reſervation.

Eodem Die. *Mr.* John Paterſon *Collector of Exciſe within the Shire of* Perth, *againſt Sir* James Ramſay *of* Bamff, *and others.*

SIR *James Ramſay, David Campbell* of *Keithock,* and *James Ogilvie,* having granted Bond for Seventy Pound *Sterling,* contained in two Decreets btained by Mr. *John Paterſon* againſt Mr. *John Ogilvie* Brewer in *Cowper* of *Angus,* before the Juſtices of Peace in *Perth-Shire*; One for Fifty Pound, for his keeping a concealed Store-houſe, and the other for Twenty Pound, for re-uſing Acceſs to a Gager to ſearch his Cellars and Store-houſe: The Granters of the Bond raiſed a Suſpenſion and Reduction thereof, and of the ſaid Decreets, upon Nullities and Informalities. The Lords, conſidering that the Sentences of Juſtices of Peace in Matters of Exciſe are by Statute Final, and not ſubject to the Review of any other Judicature, declined to judge whether the Decreets were Formal or not. But found the Letters orderly Proceeded, except as to the Penalty, which they ſuſpended; And further, ſuperſeded extracting of their own Decreet for a certain Time, that the Suſpenders might apply to the next Quarter Seſſions of the ſaid Juſtices of Peace for Redreſs.

January 26, 1710. Suſanna Simpſon, *and Mr.* Duncan White *of* Cruick *her Husband, and others, againſt* Robert Rollo *of* Powhouſe.

IN the Competition betwixt *Robert Rollo* and *Suſanna Simpſon* and her Huſband, for the Mails and Duties of the Lands of *Stonehouſe*; *Suſanna Simpſon* having produced a principal heretable Bond of Two thouſand ſix hundred Merks, with an Infeſtment thereupon in the Lands, granted by the deceaſt *Alexander Simpſon* of *Stonehouſe* to his Brother *William Simpſon,* with an Aſſignation thereto from *William* to *Suſanna,* and to *Patrick* and *Alexander Simpſons* their Brethren: The Lords found it relevant to extinguiſh the Bond and Aſſignation, that both were in *Alexander* the Debtor's Cuſtody after *William* the Creditor's Deceaſe; And *Inſtrumenta apud Debitorem reperta* are preſumed extinct. And found, That the Seaſin following upon the Bond did not alter the Caſe: Seing the Debtor could as eaſily have taken his Name from it, as if it had been a perſonal Bond; Whereby the Seaſin had been null as wanting a Warrant. Nor doth the Aſſignation make any further Difference than to change the Creditor; And its being put with the Bond in the Debtor's Hand before Delivery to the Aſſignies, was equivalent to Cancelling.

January 27, 1710. Daniel Hamilton *Clerk to the high Court of Admirality, againſt* Charles Gordon *Writer in* Aberdeen.

THERE being a Warrant and Commiſſion granted by the high Court of Admirality, for rouping at *Aberdeen* the ſixteenth Part of a Ship belonging to *Alexander Forbes* of *Craigie*; And it being an Article of the Roup, That the higheſt Offerer ſhould be preferred, he giving furthwith Bond and Caution to pay the Price offered to *Daniel Hamilton* Clerk of the high Court of Admirality, within Twenty Days after the Roup, under the Penalty of Two hundred Pound; and in Caſe of his failing ſo to do, the immediate preceeding Offerer to be preferred, he always under the like Penalty, granting Bond and Caution as above: *Charles Gordon* who was preferred as higheſt Offerer at the Roup, ſhifting to give Bond and Caution in the Terms of the Article; *Daniel Hamilton*, in whoſe Hands the Price was appointed to be conſigned, purſued Mr. *Gordon* for Payment thereof, and of the Two hundred Pound of Penalty; And offered to prove by his Oath, That he was preferred as the higheſt Bidder.

Alledged for the Defender. Since he did not ſign the Offer, which is neceſſary to be done in all Venditions of Ships, there was *Locus Pænitentia*, and he did reſile.

Replyed for the Purſuer. 1. There can be no *Locus Pænitentiæ*, becauſe, 1 Ships being *inter Mobilia*, are often tranſmitted by verbal Sale, and naked Induction into Poſſeſſion, without Writ; And even when the Articles of Roup are thought fit to be ſigned, that is ordinarly done when the Roup is over, and the higheſt Bidder takes Inſtruments upon his being preferred. 2. It was the Defender's own Fault that he did not obtemper the Article by giving Bond and Caution in the Terms thereof: And it's abſurd to let him go free from paying the Price, when by interpoſing his Offer, he debarred others who might have ſtood to the Bargain; eſpecially conſidering, That ſuch an Indulgence would render all Roups eluſory. 3. The Article of Roup obliging the Perſon preferred to give Bond and Caution for the Price under the Pain of 200 ℔, being read immediately before the Roup, the Defender by his offering became bound in the Terms of the Article, *ex quaſi Contractu.* 2. *Et ſeparatim*, albeit there were Place for the Defender to reſile, he muſt be liable for the 200 ℔. of Penalty: For in the civil Law *Stipulatio inutilis* is effectual *quoad Pænam*, tho' not for Performance of the Obligation; and the Lords have ſo decided, *July* 15, 1637, *Skeen* contra   obſerved by *Durie*.

Duplyed for the Defender. The Loſs of the Benefit of the higheſt Offer is all the Penalty adjected by the above Article of Roup to the not abiding by the Offer; whereas he only who adheres to it, grants Bond for the Price, and fails to make punctual Payment, is liable for the Penalty of 200 ℔. And if thoſe concerned in the Roup ſuffer any Prejudice, thro' the Defender's uſing the Privilege of reſiling competent to him by Law, the Blame muſt ly upon the Clerk of Roup, who might have prevented it by taking Hold of the immediate preceeding Offer. Again, if the higheſt Offerer ſhould incur the Penalty for reſiling, the next immediate Offerer reſiling is alſo liable for the ſame Penalty, and ſo on to the reſt; whereby perhaps a Dozen of Penalties might be recovered, and the Price of the Ship alſo from the Thirteenth Offerer: Or if none adhered, all ſhould pay Penalties, and the Ship continue with the Owner to be rouped over again. Yea, deſigning Men might, at this Rate, procure great Sums by Way of Penalty for not adhering to Offers for a Ship, as belonging to a Perſon who perhaps had no Right to it.

Triplyed for the Purſuer. It's a Miſtake to alledge that many Penalties would fall due in ſuch a Caſe. For when the higheſt Bidder is put either to hold to his Offer or pay the Penalty, all the other Offerers are *ipſo Facto* free: And in publick Roups ſeveral Perſons cannot be *ejuſdem Rei Emptores in ſolidum.* And no Perſon ſhould offer at a Roup, till he is ſatisfied as to the Sufficiency of his Right, in whoſe Name the Goods are to be expoſed to Sale.

The Lords found, That the Defender might reſile, and ſo be free from ying the Price. But found it relevant for the Purſuer to prove by the efender's Oath, That he was the higheſt Offerer at the Roup, to make him ble for the Penalty, or ſo much thereof as the Ordinary ſhould modifie.

bruary 1, 1710. William Ranking *alias* Little *of* Libbertoun, *againſt* Lewis Johnſton *of* Cariffen *and* James Henderſon *Son to the deceas'd* Alexander Henderſon *Writer to the Signet.*

W*Illiam Ranking* having ſucceeded to the Eſtate of *Libbertoun*, and ſome Houſes and Shops in *Edinburgh*, as Heir of Tailzie to *William Little* *Libbertoun* his Uncle by the Mother, burdened with Clauſes irritant and ſolutive *de non alienando, nec contrahendo Debitum*: The deceaſt *Walter* *anking* of *Orchardhead William*'s Father did, by his Teſtament in *December* 690, name *Lewis Johnſton* and *Alexander Henderſon* to be Tutors to him, with e expreſs Condition, That they ſhould not be liable for Omiſſions, but only r their actual Intromiſſions; who accepted and acted as Tutors, and, after xpiring of *William*'s Pupillarity, were choſen by him to be alſo his Curators, ith the ſame Quality, That they ſhould only be liable for actual Intromiſ- ions.

This *William Ranking (alias Little)* after his Majority purſued *Lewis* *ohnſton*, and *James Henderſon* as repreſenting *Alexander Henderſon* the other Tutor and Curator, to compt for the Rents of his Eſtate in his Minority.

Alledged for the Defenders. The Purſuer's Claim could only be ſuſtained gainſt them for actual Intromiſſions, conform to the Quality in the Father's Nomination, and the Act of Curatory.

Replyed for the Purſuer. Tutors, by the very Nature of their Office, are iable both for Omiſſions and Commiſſions, and as a Wife left by her Husband Tutor to his Children would fall from the Office by her marrying again; tho' ſhe was named with this Proviſion, That her Tutory ſhould continue, notwithſtanding of her taking a ſecond Husband, *Spotſwood*, *Pratt. Pag.* 346: So a Father could not, before the Act 8, Parliament 1696, name Tutors to his Children, with the Quality of not being anſwerable for Omiſſions. And even that Statute doth only allow ſuch a qualified Nomination by a Father in *Liege Pouſtie*, when ſuppoſed to be free of indirect Influence, for the Adminiſtration of any Eſtate deſcending from himſelf to his Children; for that one may adject what Quality he pleaſeth to his own Gift: Whereas not only doth the Purſuer's Eſtate flow from his Uncle; but his Father's Nomination of Tutors was in Teſtament, which could not oblige the Father's Heir to repair any Damage ariſing thereby to the Pupil; and it were hard to think, That Parents had a greater Power before that Law, than ſince. 2. The Defenders could not be elected Curators with ſuch a Quality by the Minor, who might have been impoſed upon to do it to his enorm Leſion.

Duplyed for the Defenders. Tho' our Law has not extended the Power of Fathers ſo high, as it is by the *Roman* Law and in other Nations; it repoſeth great Truſt and Confidence in Tutors named by them, who are exempted from making Faith *de Fideli*, and from finding Caution *Rem Pupilli ſalvam fore*: Now by Parity of Reaſon, a Father is impowered to name Tutors with a Quality, that they ſhould not be liable for Omiſſions; which is of no greater Import to the Pupil, than diſpenſing with the making Faith, and finding Caution. It doth not alter the Caſe, that the Purſuer's Eſtate was not derived from his Father: Seing the Father had the only Power of naming Tutors to his Son, and *Tutor datur Perſonæ, non Rei*; the Management of the Pupil's Eſtate being only a Conſequence of the Office of Tutor. Again, as the Act

1696

1696 limits the Father's Power of naming Tutors to Deeds *in Liege Pouſtie*, and the Eſtate flowing from him, it extends it beyond what former Law and Cuſtom allowed, by authorizing Fathers to name Curators to their Children with ſuch a Quality, and further that they ſhall not be liable *in ſolidum* for others, but only for their reſpective Intromiſſions. This Statute doth not innovate our old Law or Cuſtom, whereby Fathers could name Tutors by Teſtament, with Condition that they ſhould be comptable only for actual Intromiſſions: Which had it's Riſe from the civil Law, that allows a Father to name Tutors to his Children either purely and ſimply, or to a Day, or *ſub Conditione*. And it's a Pupil's Intereſt, That he and his Eſtate fall under the Care and Adminiſtration of Perſons whoſe Fidelity and Diligence is known to his Father: Eſpecially conſidering, That when a Tutor's Condition alters, either as to his Honeſty or Fortune, there is a ſufficient legal Remedy, to remove him as ſuſpected, or oblige him to find Caution. The Prattick obſerved by *Spotſwood* is not the Purpoſe: For the Father's naming his Wife to continue Tutrix to his Children in the Event of her falling under the Curatory and Government of another Husband, was choking both to Law and Senſe.

The Lords were much divided in their Opinions about this Point. And thoſe who pleaded againſt the paternal Faculty of naming Tutors with a Privilege of not being ſubject to anſwer for Omiſſions, yielded, That a Father might by granting a Bond oblige his Son and Heir not to quarrel the Tutor named, upon the Account of Omiſſions; and ſo do that *per Ambages*, he could not directly do. However it was found by the Plurality, That the Defenders *qua* Tutors were liable only, in the Terms of the Purſuer's Father's Nomination, for their actual Intromiſſions, and not for Omiſſions: But in Regard they were alſo Curators, not by Nomination of the Father, but by the Minor's Election, they were liable *qua* Curators for Omiſſions, as well as Intromiſſions.

February 2, 1710. John Sharp *of* Hoddam *and* Charles Maxwell *of* Cowhill *and his Lady, againſt the Earl of* Nithſdale.

HOddam having, as Executor Creditor to *Dougal Maxwell* of *Cowhill*, with the Concourſe of his apparent Heir, purſued the preſent Earl of *Nithſdale*, for Payment of 2000 Merks contained in a Bond granted by the deceaſ *John* Earl of *Nithſdale* to *Dougal Maxwell* in *Anno* 1669: The Defender alledged the Bond was null for Want of both the Writer's Name and Deſignation.

Replyed for the Purſuers. They offered to ſupply the Nullity, by condeſcending on the Writer and his Deſignation, which they might do, the Bond being granted before the Act of Parliament 1681. And for clearing that ſuch a Nullity in Writs anterior to that Statute was thus ſuppliable by our *Cuſtom* they cited the Authority of Preſident *Spotſwood*, *Pratt. Pag.* 359. Sir *George Mackenzie Obſer. on the Act* 1593, and ſeveral Deciſions, as *December* 5, 1665, *Cuningham* contra Duke of *Hamilton*, and *February* 22, 1676, Laird of *Innes* contra *Gordon*, and *July* 10, 1676, obſerved by *Dirleton*, and *November* 30, 1683, obſerved by my Lord *Newtoun*.

Duplyed for the Defender. Tho' in the Caſe of Writs anterior to the Act of Parliament 1681, a ſupplying the Deſignation of the Writer might have been admitted; both Name and Deſignation was never allowed to be ſupplied. And *December* 5, 1707, *Campbell* contra *Bell*, an Aſſignation before the Act 1681 was found irremediably null; for that there was but one Witneſs inſert, tho' two ſubſcribed: Now it was more favourable to indulge the making up the Deſignation of a ſubſcribing Witneſs, than to ſupply both Writer's Name and Deſignation, which is the making up a Man.

Triplyed for the Purſuer. The Deciſion betwixt *Campbell* and *Bell* comes not home to the Caſe in Hand: For the ſupplying a Witneſs's Name and Deſignation, differs much from ſupplying the Name and Deſignation of the Writer; ſeing the Writ might have been ſign'd without Witneſſes, but not without a Writer.

The Lords found the Defect of the Bond ſuppliable by the Purſuer's condeſcending upon, and proving the Writer's Name and Deſignation.

Eodem Die. *Earl of* Lauderdale, *againſt my Lord* Yeſter, *and* George Seton *of* Barns.

THE Earl of *Lauderdale* having raiſed a Summons againſt the Lord *Yeſter* and *Seton* of *Barns*, concluding againſt my Lord *Yeſter* as Heir of Line to the Duke of *Lauderdale*, that the Purſuer, as Heir-male to the Duke his Uncle, has good and undoubted Right to an Appriſing led againſt the Eſtate of *Dumfermling*, and alſo that the Appriſing is affectable for his Relief of the Duke's Debts: And concluding againſt *Barns*, as repreſenting *Charles* Earl of *Dumfermling*, that he ought to be perſonally liable for the Sums contained in the Appriſing.

Alledged for my Lord Yeſter. The Purſuer may conſtitute his Relief as accords againſt the Heir of Line, and adjudge in common Form: But to declare the Appriſing affectable for his Relief, is to go out of the common Road of Diligence. 2. Such a Concluſion cannot be indulged, unleſs the Grounds of Debt had been libelled and produced; ſeing a Right cannot be declared affectable with a *Nonens*: And the Purſuer might as well carry on an Adjudication, or purſue a Forthcoming, without producing his Debt.

Alledged for Barns. The Proceſs as to him is ſleeping, not having been inſiſted in for a whole Year after it was called by Courſe of the Roll; and therefore muſt be waken'd.

Replyed for the Purſuer. 1. There is no Neceſſity to libel or produce the Debts in this Proceſs, which concludes not Payment, but only that the Appriſing belonging to the Duke ſhould be declared affectable by his Debts. 2. The Proceſs was kept waking againſt *Barns*, by the continued Proſecution againſt the Lord *Yeſter*, upon the ſame active Title, Libel and Grounds of Debt; againſt whom it was neceſſary for the Purſuer to inſiſt *primo Loco*, to remove all prejudicial Exceptions againſt his Title: As in an Action againſt Heirs of Line and Tailzie, the latter could not pretend that the Proceſs *quoad* him could ſleep, during the Time of inſiſting againſt the Heir of Line, who muſt be firſt diſcuſs'd.

Duplyed for Barns. Perinde eſt whether different Parties be called in one, or in ſeparate Summonſes, where the Concluſions are different. The Reaſon why a Proceſs doth not ſleep againſt an Heir of Proviſion, while the Creditor is diſcuſſing the lineal Heir, is, becauſe the Action reſolves in a Competition betwixt theſe, which of them ſhould be liable to the Debt: Whereas there is no ſuch Thing in this Caſe, and therefore the Parallel doth not hold.

The Lords declared the Appriſing affectable for the Purſuer's Relief of the Duke of *Lauderdale's* Debts: And found, That the Proceſs is ſleeping as to *Barns*.

February 3, 1710. *Laird and Lady* Airth, *againſt* Hamilton *of* Grange.

JOhn *Hamilton* of *Grange* and Miſtreſs *Jean Bruce* Daughter to Mr. *Alexander Bruce* of *Airth*, with Conſent of her Father and Miſtreſs *Ann Van Eik* her Mother, having, *September* 22, 1659, at *Teyll* in the Province of *Gelderland*, entred into a Contract of Marriage, bearing, *That the Bride brings with her to the Marriage, likeas her Father and Mother do give with her, Obligations amounting to the Sum of* 18600 *Gilders with the following Conditions and Stipulations; In Caſe the Bridegroom die before the Bride, leaving Children of the Marriage, ſhe ſhould poſſeſs the Houſe of* Grange, *and enjoy yearly during her Lifetime* 4000 *Merks out of the Bridegroom's readieſt Effects. All which the Parties Contracters promiſe to perform to each other upon Faith and Honour, and farther under Obligation, Submiſſion and Renunciation according to Juſtice, &c.* Which Contract is not ſigned by the Laird of *Airth*, but only by his Wife, the Bridegroom and Bride, and the Friends accompanying them at the Marriage. *Grange* having died before the Lady leaving Children of the Marriage, ſhe married *Richard Elphinſton* of *Calderhall*, who got the Eſtate of *Airth* diſponed to him and his Heirs. *Elizabeth Elphinſton* now Lady *Airth*, as repreſenting *Calderhall* her Father, with the Concourſe of *William Dundas* her Husband, purſued *Hamilton* of *Grange*, as repreſenting the firſt Husband of Miſtreſs *Jean Bruce* the Purſuer's Mother, for Payment of 32000 Merks of bygone Jointure due to *Calderhall* her ſecond Husband, *Jure Mariti.*

Alledged for the Defender. No Proceſs can be ſuſtained for the Jointure, till it be inſtructed, That the 18600 Gilders of Portion ſtipulated by the Contract as the Cauſe thereof is paid.

Anſwered for the Purſuer. No Tocher is due by the Contract: For it doth not bind the Bride for it, ſince it bears only a Narrative that ſhe brings ſo much with her; Nor was her Father bound, who did not ſign the Contract.

Replyed for the Defender. The Bride was bound for the Tocher, not only by her ſigning the Contract, but alſo as Heir to her Father who was bound. 2. The Purſuer, as deriving Right from her Father, cannot claim the bygone Liferent Annuities, without paying the Tocher the mutual Cauſe thereof, *February* 9, 1673, *Dick* contra *Murdoch*, *June* 15, 1670, *Raith* and *Wauchop* contra *Wolmet* and *Biggar*.

Replyed for the Purſuer. The Implement of a Wife's Proviſion doth not depend upon Payment of the Tocher, *July* 1665, *Mackie* contra *Stuart* *July* 11, 1670, *Hunter* contra Creditors of *Peter*. *Stair*, *Inſtit. Tit. conjuga* *Obligat.* §. 22. Becauſe, tho' a Tocher be an ordinary Motive and Concomitan of Marriage, the completing the Marriage is the true Cauſe that makes th Proviſions effectual. So that Arguments drawn from other mutual Contracts do not meet the preſent Caſe: And in none of the Deciſions cited by th Defender, was there a Purſuit for Jointure, at the Inſtance of a Wife, or an repreſenting her.

Duplyed for the Defender. Tho' Marriage is favourable, yet *Pacta nuptiali eatenus tantum procedunt, quatenus reſpondent Legibus:* And Law hath pre ſcribed general Rules to all mutual Contracts without Exception. 'Tis tru *Grange* might have effectually ſecured his Lady in a Jointure without gettin any Tocher: As Marriage is often ſolemnized without Thoughts of a Jointure to the Wife; and Tochers have been given where the Husband had n Equivalent to give in Jointure; and are frequently due, when the Jointur takes no Place by the Husband's ſurviving his Wife. But ſince the Jointur here was provided in Contemplation of a ſuitable Tocher ſtipulated; Toche and Jointure are *Correlata, quæ mutuo ſe ponunt, et tollunt*, the latter canno

b

be claimed, unleſs the former be paid; and far leſs, when the Father, who ſhould have paid it, did not ſign the Contract and might reſile, whereby there was alſo *Locus Pœnitentiæ* as to the Jointure.

The Lords found, That the Purſuer, as Heir to her Father, is under no Obligation to pay the Tocher; in Reſpect her Grand-father did not ſubſcribe the Contract, and there was no ſeparate Obligation for the Tocher. But found, That, albeit the Contract is not null for not being ſubſcribed by the Bride's Father, mentioned therein as a Contracter for the Tocher: Yet the Purſuer cannot inſiſt againſt the Defender for Payment of the Jointure, without paying the Tocher, except in ſo far as the Jointure exceeds the Tocher.

February 7, 1710. John Bryſſon *and* Claud Henderſon *Merchants in* Glaſgow, *againſt the Duke of* Athol.

IN the Action of Forthcoming at the Inſtance of *John Bryſſon* and *Claud Henderſon*, againſt the Duke of *Athol*, as Debtor to *Jean Hardie* Relict of *Hugh Hardie* Merchant in *Perth*, *James Hardie* her Brother, and *John Hardie* Merchant in *Edinburgh*.

The Lords found, That Peers are bound to depone in common Form, in Caſes where the Libel is referred to their Oath, as the only Mean of Probation.

February 8, 1710. Barbara Fea *Spouſe to* Patrick Trail *younger of* Elneſs, *againſt* John Trail *of* Elneſs *her Husband's Father.*

IN the Action of Aliment at the Inſtance of *Barbara Fea*, againſt *John Trail* her Father in Law, wherein *Patrick Trail* the Purſuer's Husband, who had deſerted her and gone abroad, was alſo called.

Alledged for the Defender. Albeit he might be liable *Jure Naturæ* to aliment his Son, no Law obligeth a Father to aliment his Son's Wife ſeparately from her Husband, but ſhe ought to follow, and reſide with him.

Anſwered for the Purſuer. Law obligeth Parents to aliment their Children, and Grand-children, and much more a Son's Wife; who is *una & eadem Perſona* with her Husband, and upon that Score was ſubjected by the civil Law to the Power of the Husband's Father, and reckoned a Member of his Family. 2. As there is a legal Tie upon the Defender to maintain his Son and his Family, he is *ſubſidiarie* liable, in Abſence of his Son, to aliment his Wife, which is a leſs Charge. Eſpecially conſidering, That it was thro' the Defender's Inſtigation that the Purſuer's Husband unjuſtly deſerted her, without any Fault on her Part; as appeared from a Letter written by the Defender to his Son at *London*, wherein he threatned to diſown him, if he came in her Company, or any ways owned her as his Wife.

The Lords found, That, albeit a Father is not bound to aliment his Son's Wife ſeparately from her Husband, yet it is relevant to make *John Trail* liable, by Way of Damage, to aliment the Purſuer, that in a Letter to his Son he threatned to diſown him, if he owned her.

Eodem Die. John M'laren *of* Craigfield *and* James Din, *againſt the Executors and Creditors of Major* Chieſly.

MAjor *Chieſly* having been in uſe to borrow Mony out of the Bank, by drawing Bills upon his Debtors in the ordinary Stile of Bank Bills, payable to *Robert Currie* his domeſtick Servant, whoſe Name was only borrowed *ad hunc Effectum*, that *Currie* might indorſe them to the Treaſurer of the Bank, for Value given to the Major: One of theſe Bills drawn upon Sir *Alexander Brand* (which in Reſpect of his Refuſal to accept, could not be tranſacted in the Bank, where no unaccepted Bills are negotiated) being neglected by the Major as an uſeleſs Paper in the Hands of *Currie*, who died ſhortly thereafter, his Repreſentatives got hold of it, and bruſhed it up as a true Debt upon the Major's Repreſentatives, in a Multiple-poinding at their Inſtance, againſt the Major's Creditors.

Alledged for the Major's Repreſentatives. No Reſpect can be had to the Bill. Becauſe, *Currie* was the Major's Servant at the Date of it, and in conſtant Uſe to upliſt his Mony; and never indorſed the Bill to any Perſon in his Lifetime, but on the contrary, when he made a Diſpoſition to his Father of all his Effects, made no Mention of ſuch a Bill, tho' the Particulars ſpecified were of far leſs Value. Beſides, it is ordinary in negotiating Bills in the Bank, That the Perſon to whom the Mony is payable in the Bank, has no Manner of Intereſt in the Bill, nor Concern in the Bank.

Anſwered. *Currie* being Creditor in the Bill, albeit he was the Drawer's Servant, a Truſt in his Perſon can only be proved *Scripto vel Juramento*, conform to the Act of Parliament 1696.

The Lords ſuſtained the Objection againſt the Bill, and found, That it muſt be underſtood to have been drawn for the Major's own Behoof; and that this Caſe doth not fall under the Act of Parliament 1696, anent Truſts; and that *Currie*'s Repreſentatives had no more Right to the Bill, than they could have had to ſo much of the Major's Mony that had been found in *Currie*'s Hand.

February 10, 1710. *The Earl of* Leven *and other Creditors of* Frendraught *againſt* Theodore Moriſon *of* Bognie.

THe Lands of *Bognie* being Wadſet in the proper Form by the deceaſt Viſcount of *Frendraught* in *Anno* 1635, for 10000 Merks to *Moriſon* o *Bognie*, who got Infeftment and Poſſeſſion; in the Year 1647, *David Gregory* of *Kinnardie* appriſed the whole Eſtate of *Frendraught* comprehending *Bognie* and in the 1673, diſponed his Appriſing then expired, containing the Reverſion of *Bognie*, in Favours of the deceaſt *George Moriſon* of *Bognie*, who wa infeſt upon a Charter under the great Seal, and in *May* 1674, granted a Back-bond, bearing, *That moſt part of the Price given to* Gregory *for the Appriſin was the Viſcounteſs of* Frendraught's *Mony, and therefore obliging him as Truſtee to denude of the ſaid Appriſing in Favours of the Viſcount and Viſcounteſs in Liferent, and the Heirs of the Marriage in Fie, which failing, t the Heirs and Aſſignies of the Viſcount; excepting and reſerving always as muc of the ſaid Lands as would pay the Sums of Mony that he had advanced, o ſhould advance for redeeming the Eſtate of* Frendraught, *or whatever othe Debt ſhall be due to him by the Viſcount before the Date of the Diſpoſition t be granted by him in Manner foreſaid.* In *Anno* 1680, *Robert Dunbar* o *Burgie* Adjudged the Eſtate of *Frendraught*, and alſo *Bognie*'s Back-bond, an in *March* 1683, offered Security to him for the Annualrents of the principa Sum in his Wadſet, and craved that he might cede the Poſſeſſion of the Wadſet Lands, or be comptable for the *ſuperplus* Rent conform to the Act of Parliament 1661. Whereupon he raiſed a Declarator and Compt and Reckoning now carried on by the Earl of *Leven*, as having Right to *Burgie*'s Adjudication, and transferred *paſſive* againſt *Theodore Moriſon* now of *Bognie*, as repreſenting his Father.

Alledge

Alledged for the Defender. No Reſpect can be had to the Offer of Security. Becauſe the Reverſion of the Defender's Wadſet, was carried away from the Viſcount's Repreſentatives or Creditors, by *Gregorie*'s expired Appriſing, before the leading of *Burgie*'s Adjudication, and veſted in the Perſon of the Defender by *Gregorie*'s Diſpoſition.

Replyed for the Purſuer. Burgie by adjudging the Back-bond (which is *Pactum de Retro vendendo*) had Right to the Reverſion ; and had the ſame Intereſt to make the Offer in the Terms of the Act 1661, as the Viſcount himſelf.

Duplyed for the Defender. Albeit the Appriſing in his Father's Perſon was redeemable by the Back-bond, it remains with him and his Heir to all Effects, until the Sums reſting to him be fully paid : As an Appriſing within the Legal carries effectually, till redeemed, all Right of Reverſion competent to the Debtor. So that *Burgie*, by his Adjudication, had only Right to the Reverſion of *Bognie*'s Appriſing, competent by the Back-bond, whereof the Terms muſt be obſerved. For the Back-bond did not convey the Reverſion of *Bognie*'s Wadſet, but only declared, how *Gregorie*'s Appriſing, that conveyed it to the Defender, ſhould be redeemed.

Triplyed for the Purſuers. Altho' they cannot redeem till they pay the whole Debt due to the Defender, they have Right to the Reverſion, to make him comptable, after the Offer of Security, for the Annualrents, *June* 19, 1669, *Scot* contra *Langtoun*.

The Lords found, That *Burgie* had ſufficient Title and Intereſt to make Offer to *Bognie* of Security for Payment of the Annualrent of the Sum contained in his Wadſet, in the Terms of the Act of Parliament 1661 ; to the Effect to make *Bognie* comptable for the *ſuperplus* Rent of the Wadſet Lands, over and above the Annualrent of the Sum due to him by the Wadſet : But that the Defender's Super-intromiſſions ſhall not be imputed for extinguiſhing the Wadſet, but other Sums due to him in the firſt Place. But 22 *February* Inſtant, the Lords allowed the Defender to be heard upon any Objections he had againſt the Legality of *Burgie*'s Offer, and Adjudication.

Eodem Die. Alexander Miln *Merchant in* Montroſe, *againſt* Alexander Erskin *Merchant there.*

A*Lexander Miln* having charged *Alexander Erskin*, for Payment of a 29 *Lib. Sterling* Bill, drawn by him upon *Hary Scot* Merchant in *London*, payable to the Charger, and proteſted for not Acceptance: He ſuſpended upon this Reaſon, That the Charger could have no Recourſe againſt him as Drawer of the Bill ; in Regard the ſame had not been duly negotiated by the Charger's intimating to him with the firſt Poſt, That the Bill was not honoured by Acceptance ; which is a neceſſary Step of Diligence in the Poſſeſſor of a Bill, as Mr. *Forbes* obſerves *Pag.* 97. That the Drawer may have Opportunity to draw his Effects out of the deſigned Accepter's Hands, and beware of truſting him with more. For it is not to be imagined, That a Merchant who finds himſelf not in a Condition to anſwer his Correſpondent's Bills, to the Value of the Effects in his Hand, will be the firſt that will acquaint him of it. And the Charger has been ſo unaccountably negligent, that he did not advertiſe the Suſpender, concerning the Fate of his Bill till 5 or 6 Months after its Date.

Anſwered for the Charger. Suppoſe ſuch timeous Advice were neceſſary to be given by the Cuſtom of other Places ; the 20 Act of Parliament 1681, requires no more in the Poſſeſſor of a Bill, to entitle him to the Benefit of ſummar Diligence, than that it be proteſted, and the Proteſt regiſtred within Six Months. Beſides, 2. The Suſpender ſuffered no Prejudice thro' the Want of

Advertiſement, that his Bill was proteſted; ſeing Mr. *Scot* did ſuddenly break after the proteſting; And where a Perſon claims Damage thro' another's Negligence, he muſt inſtruct and clear his Damage.

Replyed for the Suſpender. The Act of Parliament 1681, being only intended to favour, with ſummary Diligence, Bills that are duly proteſted and regiſtred within Six Months; It is groſly abſurd to infer from thence, That the ſaid Statute doth diſpenſe with any Piece of Diligence formerly incumbent on the Poſſeſſor of a Bill, to afford him Recourſe againſt the Drawer. For at that Rate of arguing, the Poſſeſſor of a Bill might ſufficiently exoner himſelf, by preſenting it to the Perſon drawn upon, any Time within Six Months, tho' he might have done it within Six Days. 2. Albeit Mr. *Scot* became Bankrupt ſoon after the Bill was drawn, yet ſeveral of his Creditors thereafter recovered Payment by a Courſe of Diligence; and the Suſpender might have been as forward, had he been timeouſly advertiſed of the Fate of his Bill.

The Lords found, That the Charger not having adviſed the Drawer, that his Bill was refuſed to be accepted, for the Space of 5 or 6 Months after proteſting for not Acceptance: He cannot recur againſt the Drawer; And therefore ſuſpended the Letters *ſimpliciter*.

Thereafter upon a reclaiming Bill offered by the Charger 21 *February* Inſtant, the Lords adhered. Albeit it was alledged, That the Noiſe of *Scot's* breaking came to the Suſpender's Ears in a few Days after proteſting the Bill: In Reſpect he, not being acquainted by the Charger that his Bill was proteſted, had Ground to believe it was paid. And 28 Inſtant, the Lords again adhered. Albeit the Charger offered to prove, That within Six Weeks after the Bill was proteſted, he acquainted the Suſpender thereof: For the concealing from him the Fate of his Bill during the Space of Six Weeks, was thought as culpable, as if the Advice had been delayed Six Months. Eſpecially conſidering, that Mr. *Scot* did ſuddenly break, about the Time the Bill was preſented.

Eodem Die. Hugh Wallace *of* Ingliſtoun, *againſt the Creditors of* Spot.

IN the Ranking of *Spot*'s Creditors contained in Lord *Alexander Hay*'s Back-bond to the Exchequer, upon his getting the Gift of the common Debtor's Eſcheat, *Ingliſtoun* craved Preference for the Debt in the Horning upon which the Eſcheat fell, in the Terms of the Act of Parliament.

Alledged for the other Creditors. No Reſpect can be had to *Ingliſtoun*'s Horning, becauſe the Rebel was duly relaxed before the Caſuality fell; and therefore the Gift of Eſcheat muſt be underſtood to have proceeded upon Denunciation at the Inſtance of other Creditors.

Anſwered for Ingliſtoun. The Relaxation is null by the *Act* 75. *Parl.* 6. *J.* 6. being executed at the Croſs of *Edinburgh*; Albeit the Rebel was denunced at *Haddingtoun*, where his Lands lay. *Ingliſtoun*'s Conſent to Relaxation imports only, that *per eum non ſtetit*, if *Spot* was not lawfully relaxed: Which not being done, the Relaxation and Conſent fall of Courſe.

The Lords found *Ingliſtoun*'s Conſent to the Relaxation relevant to exclude him *perſonali Objectione* from quarrelling upon the Account of any Nullity or Informality: Whatever a third Party might do.

Eodem Die. *Mr.* George Leſlie *of* Kincraigie Advocate, *againſt the real Creditors of* Riccartoun-Craig.

IN a Competition of the Creditors of *Riccartoun*, Mr. *George Leſlie*, who had procured from the Queen a Gift of ſingle and Liferent Eſcheat of the

common

mmon Debtor denounced Rebel *March* 1, 1698, pleaded Preference to e real Creditors by heretable Bonds and baſe Infeſtments, poſterior to the nual Rebellion; albeit prior to, and confirmed under the great Seal be- re the Gift and Declarator thereon. Becauſe, *id non agebatur* by the ſimple onfirmation without a *Novo-damus*, to debar the Superior or his Donatar om a Caſuality already fallen; but only to ſtate the Creditor confirmed, aſſal for thereafter *ſalvo Jure ſuo et cujaſlibet, Stair Inſtit. Lib.* 3. *Tit.* 3. 26. *January* 14, 1676, *Aitoun* contra *Duncan*. Eſpecially conſidering, hat Confirmations paſs of Courſe in Exchequer; and the Sovereign cannot prejudiced by the Negligence of Her Officers.

Alledged for the Creditors. The Donatar can be in no better Caſe than e Superior, who could not be heard to purſue ſuch a Caſualty againſt a ngular Succeſſor for onerous Cauſes, received ſimply in Place of the former aſſal, without Mention of any reſerved Right, *February* 26, 1623, *Sibbald* ontra L. of *Lethenty*. For even a ſimple Conſenter to a Right, cannot allowed to quarrel it. And Confirmation by the Queen, who is always vourable to Her Vaſſals, muſt be as effectual if not more, than an ordinary uperior's Confirmation. Beſides, in all Charters whether of Reſignation Confirmation, the Fie is diſponed *tanquam Optimum Maximum*, which cludes all leſſer Rights, and conſequently the Caſualty of Eſcheat, at leaſt ſo r as to ſalve the Right confirmed: As Confirmation excludes Recognition curred before, or after. 2. If Confirmation did not purge all prior fallen aſualties, the Superior might claim two Liferent Eſcheats out of the ſame ubjects, in Caſe the Vaſſal confirmed ſhould happen to be Year and Day t the Horn, which is abſurd. 3. The receiving one Vaſſal in Place of nother is indeed an Effect of Confirmation, but not the ſole Effect: For t alſo eſtabliſheth the Fie in the Vaſſal's Perſon, as freely as the Superior would give it; And a *Novo-damus* hath this farther Effect, That it remits the ygone Caſualties of feu and blench Duties, which are ſpecially reſerved in Charter of Confirmation. 4. My Lord *Stair* in the Place cited, ſpeaks only f baſe Infeſtments granted after Rebellion, and not confirmed. And the ecision betwixt *Aitoun* and *Duncan*, is ſingle and ſingular, contrary to the former Prattick in the Year 1623.

Anſwered for the Donatar. Albeit Confirmation doth hinder Recognition by the Deed confirmed; in Reſpect that feudal Delinquency is only incurred for Want of the Superior's Conſent to the Vaſſal's Deed, and purged by his conſenting at any Time: Yet Confirmation doth not ſecure even the Right confirmed, againſt Recognition incurred by anterior Deeds; conſequently Confirmation of the Vaſſal's Deed after his Year and Day Rebellion, doth not exclude the Eſcheat fallen to the Superior before. The Prattick betwixt *Sibbald* and *Lethenty*, is quite miſapplyed: For there the Lords only found, That *Lethenty*'s Liferent Eſcheat did accrew to *Clunie* the immediate Superior his Liferent Eſcheat, fallen into the Hands of the Biſhop *Clunie*'s Superior, and not to *Sibbald*, the Donatar of *Clunie*'s ſingle Eſcheat. 2. *Eſto*, any of *Riccartoun*'s confirmed Creditors were Year and Day at the Horn, the Superior would not have Right to two Liferent Eſcheats; but only he would have two Strings in his Bow, ſo as he might chuſe to take the Benefit of either the principal Debtor's, or his Creditor's Eſcheat.

The Lords preferred the Donatar.

February 14, 1710. *The Lord* Gray, *againſt Sir* William Hope *of* Balcomy.

IN the Action at the Inſtance of the Lord *Gray* as Creditor to Mr. *George Campbell*, againſt Sir *William Hope*, for reducing a Diſpoſition of a Lodging

ing in the *Canongate*, granted to Sir *William* by Mr. *George*, *ex Capite Inhibitionis.*

Alledged for the Defender. The Purſuer's Inhibition is null, in ſo far as it was not executed or publiſhed at the Market-croſs of the *Canongate*, Head Burgh of the Regality of *Burghtoun*, within which the Lodging diſponed lies; but only at the Diſponer's Dwelling-houſe in *Leith*, and at the Market-croſs of *Edinburgh*, Head-burgh of the Shire where he lives, and his Lands lie.

Replyed for the Purſuer. His Inhibition wants no Formality required by Law, or Statute, and more was needleſs.

Duplyed for the Defender. Moſt of the Solemnities of Executions are introduced by Cuſtom, without any poſitive Statute. And it hath been the conſtant Cuſtom to execute Inhibitions at the Market-croſs of the Head-burgh of the Regality where the Lands lie: Which Solemnity *Craig Lib.* 1. *Page* 83. *Hope Maj. Prat. Tit. Inhibitions*, and *Dirletoun* in his *Doubts Tit. Inhibition*, ſuppoſe to be neceſſary; And their Opinion is confirmed by a conſtant Tenor of *Deciſions*, particularly in the Caſe betwixt *Cleland* and *David Falconer* in *November* 1691, and that betwixt *Baird* of *Sauchtounhal* and *Watſon* of *Sauchtoun*. 2. The Manner of executing Inhibitions is not regulated by any Act of Parliament. For the Statute 119. *Par.* 7. *J.* 6. *Anno* 1581, relates only to Regiſtration; and it's requiring, That, where the Perſon inhibited hath Lands in another Shire than where he dwells, the Inhibition be produced, duly executed and indorſed to the Clerk of that other Shire, imports and ſuppoſeth a Neceſſity of executing there, as well as in th Shire where the Party dwells; Since Regiſtration and Publication go ſti Hand in Hand. And the *Act* 264 *Par.* 15. *J. 6.* appoints Inhibitions to b executed at the Market-croſs of the Head-burgh of the Stewartry or Regalit where the inhibited Party lives, and to be regiſtred in the Books of tha Juriſdiction: Becauſe they are only recorded, where they are publiſhed. 3. N where can Inhibitions be more effectually publiſhed, than at the Head-burg of the Shire where the inhibited perſon dwells, and of the Juriſdictio where his Lands lie. And being real Diligences affecting Lands, they ſhoul be publiſhed where theſe lie: As Warnings and Denunciations of Lands to b appriſed, are executed upon the Ground of the Lands, and thereafter at th Head-burgh of the Juriſdiction where they lie.

Triplyed for the Purſuer. It is denyed, there is any uniform Cuſtom of executing Inhibitions at the Head-burgh of each Juriſdiction where the inhibite Party hath Lands; Tho' ſome may have done it *ob majorem Cautelam*. Suppoſe the Cuſtom ſo to do were univerſal, it cannot bind ſuch as have not obſerved it: Becauſe not founded in, nor agreeable to Law, *L.* 2. *C. Quæ ſ longa Conſuetudo*; *nam non Exemplis ſed Legibus eſt judicandum.* So, albeit b general Cuſtom Fifteen Perſons are adhibited upon Inqueſts in Appriſings, y an Appriſing was ſuſtained where the Inqueſt conſiſted only of Thirteen: I Reſpect Law requires no greater Number. And are not four Witneſſes moſtly ſubſcribing to every Seaſin? Yet the Lords have ſuſtained Seaſins wherei there were but two or three Witneſſes, becauſe two Witneſſes are ſufficient i Law to any Inſtrument of one Notar. The Reaſon for three Oyeſſes, is no founded ſimply upon Cuſtom, but upon the Law requiring Publication at th Market-croſs, which long Cuſtom hath determined only as to the Manner, b publick reading of the Letters after three Oyeſſes. The Opinion of the learne Lawyers cited for the Purſuer, is not of that Weight, as to be a Ground t decide contrary to the written Law. Beſides, *Hope* and *Dirletoun* ſpeak only of the Head-burgh of the Shire; and *Provincia* or *Vice-comitatus* are uſed by *Craig* as ſynonimous Words for Shire. But this Point is fully cleared, by th later Authority of the Viſcount of *Stair*, and Sir *George Mackenzie*, who hold

it

ſufficient, That Inhibitions be executed at the head Burgh of the Juriſdiction here the inhibited Perſon dwells, and recorded either in the particular Regi- er where the Lands ly, or in the general Regiſter. And in any Deciſions that em to favour the Defender, the Point hath not been ſeriouſly or fully debat- l. For that betwixt *Cleland* and *Falconer*, was made after the Parties had anſacted, and perhaps not without a particular View. And the *Ratio deci- ndi* in the Prattick *Watſon* contra *Baird* was, for that the Inhibition was not xecuted at the head Burgh of the Regality where the Party inhibited dwelt, nd ſo doth not meet the preſent Caſe. 2. It being clear in the Act 1581, That e ſecond Production of the Inhibition to the Clerk of the Shire where the ands ly, implies only, That it ſhould be produced to him in Order to Regi- ration, duly executed as it was produced to the firſt Clerk; Seing there is o Mention of any new Publication or Execution: And therefore the Conſe- uence drawn from the Defender's conſtrained and unnatural Gloſs falls to the round. That we are not to argue from Regiſtration to Publication is clear; ing Inhibitions are often regiſtred in the publick Regiſter at *Edinburgh*, hen the inhibited Party lives in a remote Juriſdiction: But it cannot be ad- anced, That in ſuch a Caſe Publication at the Market Croſs of *Edinburgh* neceſſary. 3. There is a great Difference betwixt Inhibition and Appriſing, e firſt being only a Diligence to hinder Parties to ſell their Heretage in Preju- ice of the Inhibiter, without giving him any real Right thereto; Whereas ppriſing conveys the Right of the Heretage appriſed; And therefore the enunciation ſhould be upon the Ground thereof, and publiſhed at the head urgh where it lies. So that it is juſtly ſufficient to execute Inhibitions at e Market Croſs of the head Burgh of the Juriſdiction where the inhibited erſon dwells, without Neceſſity to publiſh them alſo in all other Diſtricts here he hath Lands: As Denunciation upon a Horning at the head Burgh f the Juriſdiction where the Perſon denunced dwells, will make his Liferent ſcheat fall, and carry Right to his Lands during his Lifetime, where-ever hey ly.

The Lords found, That an Inhibition needs not to be executed at the head Burgh of the Regality where the inhibited Perſon's Lands ly, but that it is ufficient, after executing againſt him perſonally, or at his Dwelling-place, o execute at the Market Croſs of the head Burgh of the Shire where he dwells, and regiſter the ſame either in the particular Regiſter of the Juriſdiction where his Lands ly, or in the general Regiſter.

Eodem Die. *The Lord* Roſs *and others againſt* George Houſtoun *Son to the deceaſt* Patrick Houſtoun *Merchant in* Glaſgow.

IN the Cauſe at the Inſtance of the Lord *Roſs* againſt *George Houſtoun*, as repreſenting his Father, for Payment of his Proportion of Fraughts, and Profits of a Ship and Cargo, intrometted with and diſpoſed of by him while imployed as Supercargo by the Purſuer and others; contained in a Decreet in Abſence, obtained by them againſt him before the Court of Admirality, for not finding Caution *Judicio ſiſti & judicatum ſolvi*; The Lords *July* 15, 1708, having reponed the Defender against the Decreet, becauſe the Warrant thereof was not ſubſcribed by the Judge: He thereafter craved to be aſſoilzied from the Proceſs, in Reſpect the Purſuers did not inſiſt.

Alledged for the Purſuers. Before they inſiſt, the Defender ought to find Caution *Judicio ſiſti & judicatum ſolvi*; as if the Proceſs were depending before the Admiral Court.

Replyed for the Defender. There is no Shadow of Pretence for his finding Caution *Judicio ſiſti & judicatum ſolvi* as the Proceſs ſtands. Seing albeit ſuch

Caution is introduced by Cuſtom before the Admirality, for that Matter there tabled do moſtly concern Strangers and Seafaring Men, whoſe Reſidenc is uncertain: Yet where the Admiral's Decreet and Procedure is overturned and the Libel *de novo* inſiſted in before the Lords, not againſt *Patrick Houſtou* himſelf as Supercargo, but againſt his Heir, upon the paſſive Titles, who i not a Stranger, or Perſon of uncertain Fortune or Reſidence; There is no Law nor Precedent for obliging him to find Caution. And ſuppoſe Caution had been found before the Admiral, it would have fallen after his Decreet was turned into a Libel.

Duplyed for the Purſuers. The Son againſt whom the original Proceſs againſt the Father is continued, ought to be liable to the ſame Things that might have been required from his Father. Turning the Decreet into a Libel alters not the Caſe: Seing the Purſuer is allowed to proceed upon the Libel as firſt raiſed before the Admirality, and therefore may do it with the Admiral-Privilege. And it is a Miſtake to think, That by an Admiral's Decreet being turned into a Libel, the Cautioner therein *Judicio ſiſti & judicatum ſolvi* would be aſſoilzied: For he's not like the Cautioner in a Suſpenſion of a Decreet, who is only bound in Caſe the Letters be found orderly proceeded, but is liable even to the Event of a Reduction of Suſpenſion before the Lords; being obliged for whatever ſhall be decerned upon ſuch a Libel. Again, it's all a Matter, whether the Parties be Strangers or not, where the Cauſe is maritime: Seing th *Act 16. Parl. 1681*, obligeth all Parties without Diſtinction before the Admirality, to enact themſelves and find Caution, both for Compearance and Performance. And if the Defender ſhould be exempted from finding Caution in this Cauſe, he who is purſued in any maritime Cauſe before the Admiralit has no more to do, but ſuffer a Decreet in Abſence to paſs againſt him for no finding Caution, and then to get himſelf reponed to his Defences by a Suſpenſion and Reduction: whereby the Privileges allowed by the Act 1681 to th Judge of Admirality for obliging Defenders in Cauſes before him, to find Caution, would be altogether evacuated, and rendered eluſory.

Triplyed for the Defender. 'Tis true indeed that Parties are often unde Neceſſity to let Admiral Decreets paſs againſt them, and betake themſelves to the legal Remedy of Suſpenſion and Reduction: There being nothing mor ordinary before the Admiral Court, than for Purſuers to libel Extravagan Sums deſignedly to incapacitate the Defender to find Caution, and ſo to overtake him by a Decreet in Abſence for not finding Caution, which paſſeth o Courſe.

The Lords found, That the Defender is not bound to find Caution *Judici ſiſti & judicatum ſolvi* in the Proceſs as now ſtated before the Lords.

February 16, 1710. Gilbert More *Writer in* Edinburgh, *againſt Sir* Samue Forbes *of* Foveran.

SIR *Samuel Forbes*, to ſtop Diligence at the Inſtance of *Gilbert Mor* againſt *Robert Keith* of *Fedderate*, alias *Lentuſh*, and Mr. *Alexande Johnſton* Merchant in *Edinburgh*, for 600 Merks contained in their Bond having, by his Letter, *Auguſt* 5, 1697 to Mr. *More*, obliged himſelf to procure Security to him, or to pay the Debt betwixt and *Martinmas* then next It was alledged for Sir *Samuel*, when purſued for Payment, That he bein only a Cautioner by his Letter, was free; in Reſpect no Diligence was don thereon within ſeven Years of the Date, in the Terms of the Act of Parliamen 1695. And he muſt be underſtood a Cautioner, in ſo far as the Letter wa acceſſory and relative to, and corroborative of an antecedent principal Obligation, and implyed that he was to be relieved by the Granters thereof.

Anſwered for the Purſuer. The Letter can never import a Cautionry, Sir *Samuel* being therein obliged as *Correus debendi*, without any expreſs Quality of Relief: And the Granter of a ſimple Bond of Corroboration, is not a Cautioner in the Terms of the cited Act of Parliament, but truly a Co-principal.

The Lords found, That Sir *Samuel Forbes* was not a Cautioner in the Terms of the Act of Parliament 1695; and therefore could not plead Preſcription.

February 17, 1710. *Captain* Henry Bruce *againſt Mr.* William Dalrymple *of* Glenmure, *and* Alexander Inglis.

IN the Action at the Inſtance of Captain *Bruce* againſt Mr. *William Dalrymple* and *Alexander Inglis*, mentioned *ſupra December* 23, 1709: The Lords allowed Mr. *William* to claim his Privilege of a Member of Parliament, to ſtop Proceſs; Albeit he had ſiſted himſelf *in Initio Litis*, and proponed Defences *in Cauſa*, without founding on his Privilege; which the Purſuer contended was a tacit Renunciation of the Privilege, ſince *primus Actus Judicii, eſt Judicis approbatorius*. For the Lords ſeem'd to be of Opinion, That this was not of the Nature of an ordinary Declinature, or like the Privilege of Exemption from anſwering before inferior Courts, that is competent to Members of the College of Juſtice, that may be renounced expreſly or tacitly.

Eodem Die. Suſanna Marſhal *only Child of the deceaſt* George Marſhal *Merchant in* Edinburgh *his ſecond Marriage, againſt* George *and* Helen Marſhals *Children of the firſt Marriage, and Mr.* Alexander Farquharſon *Writer to the Signet* Helen's *Husband for his Intereſt.*

IN a Competition betwixt *Suſanna Marſhal* who had adjudged for the Proviſion in her Mother's Contract of Marriage dated *January* 3, 1690, and *George* and *Helen Marſhals* who had adjudged upon Bonds of Proviſion granted to them in *April* 1703, by their Father who made no Contract of Marriage with their Mother: The Children of the firſt Marriage claimed to be preferred, at leaſt to come in *pari Paſſu* with *Suſanna Marſhal*. Becauſe, they were Creditors by the Bond of Proviſion, and her Intereſt was but a naked Deſtination in her Mother's Contract, whereby ſhe was Heir of Proviſion to the Father, and liable to fulfil his Deeds and pay his Debts *ſubſidiarie*, after diſcuſſing the Heir of Line. At leaſt the Children of the firſt Marriage were equally Creditors by their Bonds, as *Suſanna* by the Contract: Both being granted in Conſequence of the natural Tie upon Parents to provide for their Children.

Anſwered for Suſanna Marſhal. The Father could not evacuate the Proviſion in her Mother's Contract of Marriage, by granting *ex poſt Facto* gratuitous Bonds to the Children of the firſt Marriage, which he was under no civil Obligation to grant by Contract with their Mother: And the Heir of a Marriage may quarrel ſuch gratuitous Deeds; *Stair, Inſtit. Lib.* 3. *Tit.* 3. §. 19.

Replyed for George and Helen Marſhals. Tho' a Father cannot, in Prejudice of a Proviſion in his Contract of Marriage, do fraudulent or meerly gratuitous Deeds: He being Fiar, is not tied up from rational Deeds for juſt and neceſſary Cauſes. Which is clear from the Author of *Les Loix Civiles* in the Preface to that Part of his Treatiſe concerning Succeſſion, *N.* 10, the

Deciſion betwixt *Anderſon* and *Bruce*, *December* 1 and 21, 1680, and ſeems to be alſo my Lord *Stair*'s Opinion in the Place cited. Now a Bond of Proviſion by a Father to a Child, cannot be conſidered as a fraudulent gratuitous Deed: Since the Law of Nature obligeth Men to provide their Children.

The Lords admitted the Children of both Marriages to come in *pari Paſſu pro Rata*, according to their reſpective Proviſions in the Bonds and Contract.

February 23, 1710. Alexander Moncrieff *of* Mornipea, *againſt* James Maxwell *of* Leckiebank.

L*Eckiebank* having, by a Gift of Tutory from the Exchequer, found Caution and acted as Tutor dative to Mr. *John Bonnar* of *Greigſtoun*, ſince the Year 1702, when he was legally cognoſced to be fatuous and *incompos Mentis*: *Mornipea* (who was Minor at expeding of the Gift in Favours of *Leckiebank*) now took a Brieve out of the Chancery for ſerving himſelf Tutor or Curator as neareſt of Kin to Mr. *John*, conform to the *Act* 18, *Parl.* 10. *Ja.* 6.

Alledged for Leckiebank. 1. He being already conſtituted Tutor dative, there is no Place for a Tutor of Law: In Reſpect *Tutorem habenti Tutor dari non poteſt*. 2. The Act of Parliament requires that a fatuous Perſon's neareſt Agnat according to the Diſpoſition of the common Law (*i. e. Qui per virilis Sexus Cognationem junctus eſt*, §. 1. *Inſt. de Legit. Agnat. Succeſſ.*) be his Tutor of Law. Whereas *Mornipea* is not Agnat to the fatuous Perſon; the former's Grand-mother being only the latter's Father's Siſter. 3. *Leckiebank*, being the fatuous Perſon's Siſter's Son, is a Degree nearer to him than *Mornipea*, who is but the Father's Siſter's Grand-child.

Anſwered for Mornipea. 1. The Meaning of the Brocard, *Tutorem habenti Tutor non datur*, is, That it is not conſiſtent with the Office of a Tutor to have another joined to him as *Tutor dativus*: But it doth not hinder a Tutor Teſtamentary, or a Tutor of Law, to be preferred to a Tutor dative already in Office; who is properly conſidered only as an *interim* Curator appointed to manage till the Tutor of Law ſhould ſerve, *February* 22, 1628, *Colquhoun* contra *Wardrop*. *January* 21, 1663, *Stuart* contra *Spreul*. And much rather ought *Leckiebank*, to cede to *Mornipea* who was Minor, and incapable to act, when the other obtained his Gift of Tutory. 2. It was never intended by the Act of Parliament, That the Tutory of Idiots ſhould in all Points be regulated conform to the civil Law: But only that the neareſt Agnats and Kinſmen to fatuous Perſons on the Father's Side, in the Senſe of our Law, ſhould be ſerved and preferred to be Tutors and Curators to them; as by the civil Law the neareſt Agnats according to it, are appointed Curators to ſuch. For among the *Romans* all of the ſame Degree were admitted Tutors of Law, and the novel Conſtitutions do not exclude Cognats and Kinſmen by the Mother's Side; thoſe in the collateral Line had no Right of Repreſentation beyond the Third Degree of Brothers Sons, and the *Duplicitas Vinculi*, the Difference betwixt the full and half Blood, is not regarded in the civil Law farther than the Third Degree: Whereas with us the eldeſt, *Jure Primogenituræ* excludes others of the ſame Degree; Kinſmen by the Mother-ſide are not regarded; and the Repreſentation of Agnats is not ſtinted to the Third Degree. That by Agnats our Law underſtands only Kinſmen of the Father-ſide, is yet further clear from the Stile of the Brieve of Tutory, *Quis eſt Legitimus Agnatus*, i. e. *Conſanguineus ex Parte Patris*; and from the Rule of lineal Succeſſion, which doth not diſtinguiſh *inter Agnatos & Cognatos*. 3. Tho' *Leckiebank* be a Degree nearer than *Mornipea*, the Father hath the Advantage of the full Blood; his Grand-mother being Siſter-german to the fatuous Perſon's Father, whereas *Leckiebank*'s Mother was only Siſter Conſanguinean. And as *Mornipea* would be preferred to him in the Succeſſion, he muſt have Right to the Office of Tutory: It being a Principle in Law, That *ubi eſt Hæreditas, ibi etiam eſt Tutelæ Onus*, *Nov.* 118. *c.* 5. The Tutory muſt follow the *Jus Succeſſionis* in Heretage, and not that of Moveables. For as it will not be found, That in any Act of Parliament the Intereſt of the neareſt of Kin in Moveables is called Succeſſion: So the Office of Tutory paſſeth as Heretage *Jure Primogenituræ* to the eldeſt in the direct Line, and is not divided *in Capita*.

Replyed for Leckiebank. Interdum alibi eſt Hæreditas, alibi Tutela, L. 1. *ff. de Legit. Tut.* And in our Law the Right of Succeſſion is frequently diſtinct from the Office of Tutory: As when a Mid-brother dies, the youngeſt is Tutor of Law to his Children, albeit the immediate elder were to ſucceed; and by the *Act* 51, *Parl.* 7. *Ja.* 3. the neareſt Agnat of Twenty five Years of Age, ſhould be Tutor, tho' he be not to ſucceed. Again, it were reaſonable that the Office of Tutory ſhould rather go according to the Rule of Succeſſion in Moveables, than that of Heretage. In Reſpect that, as Tutory is an Office, ſo the Succeſſion in Moveables is tranſmitted by Way of Office; and is moſtly regulated, according to the civil Law, by the Degree of Propinquity, without Reſpect to the *Jus Repreſentationis*: And the civil Law is the Standart conform to which the Act of Parliament prefers Tutors and Curators to fatuous Perſons; whereas in the Matter of Heretage we for the moſt Part obſerve the feudal Law.

The Lords found, 1. That *Mornipea* being Minor the Time that *Leckiebank* got his Gift of Tutory dative to the Idiot, and now Major or of lawful Age; he hath Right to ſerve himſelf as Tutor of Law. 2. Having conſidered the Act of Parliament 1685 anent Curators to Idiots, with the Stile of Brieves, they repelled the Objection made againſt the Mover of the Edict, as not being Agnat to the Idiot. And 3. Preferred *Mornipea* as being of full Blood and neareſt in Succeſſion to the ſaid Idiot.

February 26, 1710. Robert Anderſon *Writer in* Edinburgh, *againſt* Alexander Forbes *of* Blackfoord.

IN the Action at the Inſtance of *Robert Anderſon*, againſt *Alexander Forbes*, who is by Profeſſion a Quaker, for Payment of 300 Merks *Scots* promiſed by him to the Purſuer, the Libel being referred to the Defender's Oath: The Lords allowed him, in Stead of an Oath in the uſual Form, to make his ſolemn Affirmation or Declaration in theſe Words, *I. A. F. do declare in the Preſence of Almighty God the Witneſs of the Truth of what I ſay*, &c. conform to the Statutes of *England*, 7 & 8 *W.* 3. *cap.* 34. 13, & 14. *W.* 3. *cap.* 4.

June 7, 1710. James Watſon *of* Saughtoun, *againſt* Alexander Brown *Merchant in* Edinburgh.

IN a Proceſs at the Inſtance of *James Watſon* of *Saughtoun*, as Heir to his Father, againſt *Alexander Brown*: The Defender was found liable upon the 24 Act, Parliament 1695, to pay to the Purſuer 2000 Merks with Annualrents and Penalty, contained in a Bond granted to his Father, by Captain *Brown* Maltman in *Leith* Father to the Defender; upon this Ground, That the Defender had intrometted with the Mails and Duties of his Father's Lands after his Deceaſe, notwithſtanding of a ſingular Title of Intromiſſion acquired by him in the Father's Lifetime. In Reſpect the Act 1695 declares that any apparent Heir entring to poſſeſs his Predeceſſor's Eſtate, or purchaſing any Right thereto, by himſelf or any other Way than as higheſt Offerer at a publick

Roup, without Colluſion, ſhall be liable as if he were Heir ſerved. Albeit it was alledged for the Defender, That the Statute for obviating the Fraud of apparent Heirs relates only to Rights purchaſed by them after their Predeceſſor's Deceaſe: And he got the Right in his Lifetime; when he could not ſerve Heir to him; ſeing *nulla eſt Hæreditas Viventis.*

Eodem Die. *The Lady* Cardroſs, *againſt* James Graham *of* Buchlivie.

THE Heretor of the Lands of *Buchlivie* obtained a Valuation of his Teinds in the Year 1633, and a Decreet of Sale in *February* 1634, againſt the Proprietars of the Lordſhip of *Cardroſs*, Titulars of theſe Teinds, decerning and ordaining them to denude themſelves thereof in his Favours at *Whitſunday* thereafter, to the Crop of which Year he was to enter, and pay the Price to them, upon their Performance. But in Caſe of their failing to deliver to him a valid Right to his Teinds, it was declared lawful for him, to conſign the Mony at the Term aforeſaid, and ſo to intromet with his own Teinds, and diſpoſe thereof at his Pleaſure; Or, if he, the Heretor, chuſed rather to detain, than conſign the Price, to pay the Annualrent thereof to the Titulars, till he got from them an heretable Right to his Teinds: without Prejudice to the Heretor to require the Titulars to denude in his Favours at the ſaid Term of *Whitſunday*, or any Time thereafter. The Lady *Cardroſs*, as Factrix for the Creditors of *Cardroſs*, purſued *James Graham* of *Buchlivie*, for certain bygone Teind-duties, who defended himſelf with the Decreet of Sale aforeſaid.

Alledged for the Purſuer. The ſaid Decreet is preſcribed, *non utendo* for the Space of 40 Years after the Date.

Anſwered for the Defender. The Heretor having his Option either to conſign the Price, or to retain it for his further Security upon paying Annualrent, is in the ſame Caſe as if he had conſigned; and his Right by the Decreet to require the Titular to denude at any Term, being *res meræ Facultatis*, can never preſcribe. Eſpecially conſidering, that he poſſeſſed both Stock and Teind of his own Lands; and the Decreet of Sale did furniſh a perpetual Exception to him againſt the Titular, according to the Rule, *Quæ ſunt Temporalia ad agendum, ſunt perpetua ad excipiendum.* Beſides, it ſtated the Defender in the ſame Caſe, as if he had got a Diſpoſition from the Titular, which could not have preſcribed: And there is no Difference as to the Poin of Preſcription betwixt a judical, and voluntary Sale of Teinds to the Hereto of the Lands, ſince by either the Teinds are conſolidated with the Stock i his Perſon; and *in omnibus Cauſis, pro Facto accipitur, id quo per alium Mor fit quo minus fiat, L. 29. ff. de Regulis Juris.* Again, a long Tack, which i our Law is eſteemed as an heretable Right, was found not to preſcribe *in totu quoad* the Obligation, but only as to bygone Duties preceeding 40 Years, 1 *January* 1669, Earl of *Athol* contra *Robertſon* of *Strowan.*

Replyed for the Purſuer. True, a poſitive Right doth not preſcribe *negativ non utendo*, ſo as to annul the Right; but only hath no Effect *retro* beyon 40 Years: But any Ground of Action competent to the Defender againſt th Titular to denude of his Teinds (which is the preſent Caſe) is clearly liab to the negative Preſcription; And the Preſtations *hinc inde*, betwixt the Titul and Heretor, of denuding and paying the Price, are meer Grounds of Actio So, 24 *February* 1669, Earl of *Kincardin contra* Laird of *Rothſay*, a Decreet o Sale not adjudging *de præſenti* the Teinds to the Heretor, but decerning th Titular to ſell them to him, upon Payment of the Price, was found to tran fer no Right to the Teinds till the Price was paid. 2. The Decreet of Sal ordaining the Titular to denude, and the Heretor to pay the Price, is exact like a Minute of Sale, which certainly preſcribes *non utendo*: And the Her

to

tor not having required the Titular to denude, his Poſſeſſion of the Teinds muſt be aſcribed, not to the Decreet of Sale, but to the Decreet of Valuation. 3. An Obligation to tranſmit is only equivalent to an actual Intromiſſion, where the Right is tranſmittable by ſimple Conſent; Whereas here the Heretor could never have Right without the Titular's actual denuding himſelf. Beſides, in this Caſe the Obligation to denude is preſcribed, and ſo can have no Effect. 4. As the Heretor could exclude the Titular from ſeeking the Price, by alledging that the Decreet of Sale is preſcribed: The Titular can't be denied the ſame Liberty to object the negative Preſcription to him, when required to denude. An Obligement or Ground of Action preſcribes by the negative Preſcription, to all Intents and Purpoſes of Exception, as well as Action. *V. G.* One purſued by me upon his Bond, could not defend himſelf with the Exception of Compenſation upon my Bond that is preſcribed: For no Exception that is not incorporated as a Reverſion *in Gremio* of the Right purſued on, is privileged from Preſcription. Nor was the Heretor's conſigning and offering the Price, any more *Res meræ Facultatis*, than purſuing any Obligement is, which yet is excluded by 40 Years Neglect.

Duplyed for the Defender. It being incumbent upon the Titular, to denude conform to the Decreet, againſt a certain Day, before any Performance upon the Heretor's Part, *Dies interpellavit pro Homine*; And it was needleſs for him to uſe Diligence, when the Price remained in his own Hands, and he was in Poſſeſſion of the Teinds. The Decreet can't be compared to a Minute, or Obligement to perform: For it was not only a Title of Action to the Heretor, to purſue for a Conveyance, or Diſpoſition of the Teinds, but alſo a Right to him to enter and poſſeſs, which he could never loſe *non utendo*, unleſs the Purſuer had acquired a contrary Right by the poſitive Preſcription. The Deciſion betwixt the Earl of *Kincardin* and *Rothſay*, tho' ſingular enough, doth not meet the Caſe. For it appears not, That there any certain Day was appointed for the Earl's denuding, and the Heretor's entring to poſſeſs, the Characteriſtick Difference in this Caſe; where the elapſing of the Term completed the Sale, without any Neceſſity upon the Heretor to require Performance from the Titular, whoſe failing to diſpone could only prejudice himſelf, *L.* 155. *ff. de Regulis Juris*, and, in the Conſtruction of Law, *pro Facto habetur.*

The Lords found, That the Preſcription *non utendo* doth take no Place in this Caſe: And therefore ſuſtained the Decreet of Sale.

June 9, 1710. John White *late Baillie of* Kirkaldie, *againſt* James Henderſon *and other Tenants in* Birkhill.

THe Tenants in *Birkhill* being charged at the Inſtance of Baillie *White*, upon a Bond of Preſentation granted by them when taken with Caption: They ſuſpended upon this Ground, That the Bond was null, becauſe the Name and Deſignation of the Writer thereof till after the Clauſe of Regiſtration, was not inſert with his own Hand, but by him who writ the reſt of the Bond, and filled up the Blanks, Date, Place, and Witneſſes. Seing the firſt Part of a Bond comprehends the Body, with the Writer's Deſignation; and the ſecond, the Date, Place, Witneſſes Names and Deſignations; and the Writer cannot be deſigned by another, but only by himſelf.

Anſwered for the Charger. No Law ever required inſerting the Writer's Name and Deſignation with his own Hand, but to inſert by any Perſon, anſwers both the Letter and Reaſon of the Acts 175. *Parl.* 13. *J.* 6. *Act.* 5. *Parl.* 3. *Ch.* 2. That all concerned may know the Writer in Caſe of Improbation; and Nullity of Writs or Rights can only be introduced by an expreſs

Law, or Act of *Sederunt.* Nay, albeit by the Act 1593, it be expreſly required, That the Writer's Name and Deſignation be mentioned, in all Evidents in the latter Part thereof, before inſerting the Witneſſes: Yet ſo tender were the Lords to annul Writs upon ſtrict Niceties, that till the Year 1681, the Writer's Deſignation was always allowed to be ſupplied by a Condeſcendance; And the not inſerting his Name before the Witneſſes, is never held to be a Nullity, if inſert at all. Writer and Witneſſes are in the Act 1681, coupled together, and their Names and Deſignations may be inſert in the ſame Manner: But ſo it is, that it ſufficeth to inſert the Names and Deſignations of Witneſſes by any Perſon's Hand, as well as by the Writer of the Body of the Paper, or by the Witneſſes themſelves.

The Lords repelled the Nullity, and ſuſtained the Bond. In Reſpect it was thought a dangerous Preparative, to annul Writs, upon Pretence, That the Writer's Name was not inſert with his own Hand: There being nothing more ordinary, than to ſend Bonds from *Edinburgh* to the remoteſt Places in *Scotland,* to be ſubſcribed aud filled up in the eſſential Parts; and Writs ſigned in the Country, are often remitted with a Note of the Date, Names and Deſignations of the Witneſſes, to be inſert by the Writer of the Body at *Edinburgh.*

June 13, 1710. *The Lady* Craigforth *and her Husband, againſt* Patrick Murray *of* Deuchar.

IN a Purſuit at the Inſtance of the Lady *Craigforth* and her Husband, againſt *Patrick Murray* of *Deuchar,* as repreſenting his Father (who was the Lady's former Husband) for Payment of her Jointure, the Defender having craved Compenſation for the Value of ſome Silver-plate intrometted with by the Lady after his Father's Death: The Purſuers were allowed to impugn the Relevancy of the Compenſation, by alledging, That it was not liquid; after they had required and got the Defender's Oath of Calumny upon the Verity of the Alledgeance. Albeit the Defender contended, That the Relevancy was not to be controverted by the Purſuers, after they had homologated the ſame, by obliging him to depone *de Calumnia*: Since Oaths are not to be given in vain, and even an Oath of Calumny is a Probation *in ſuo Genere*; and *fruſtra probatur, quod probatum non relevat.* For a Party may crave the other's Oath of Calumny, which is deſigned to obviate the Plea, without entring into the Diſpute of Relevancy.

June 14, 1710. *Captain* Brodie *againſt* Jean M'lellan *Relict of* James Bowden *late Baillie of* Edinburgh.

IN a Competition of the Creditors of the Earl of *Sutherland,* who had arreſted in the Hands of the Earl of *Murray,* as Debtor to him: Captain *Brodi* claimed Preference to Miſtreſs *Bowden,* becauſe his Arreſtment was anterio to hers.

Alledged for Miſtreſs Bowden. She muſt be preferred: Becauſe her Arreſtment, tho poſterior in Date to the Captain's, was laid on by Virtue of Letters of Horning upon the common Debtor's regiſtred Bond; Whereas hi Arreſtment was uſed upon a ſimple Dependance. And Arreſtments upon Decreets, that afford *paratam Executionem,* are ever preferred to anterior Arreſtments upon depending Actions: As Arreſtment upon Bonds, whereof th Terms of Payment are paſt, is preferable to Arreſtment uſed upon Bonds *currente Termino, July* 17, 1678, Lord *Pitmedden* contra *Patterſons, July* 29 1670, *Charters* contra *Neilſon.* For albeit Arreſtment upon a Dependence, o fo for Debt before the Term of Payment, might be effectual againſt the Debtor, to hinder him to diſpone the Subject arreſted, it can never compete with Arreſtment upon Decreets, whereby the Debtor's Goods might be poinded and taken away, before the Event of the Conſtitution of the other Debt.

Anſwered for Captain Brodie. He ought to be preferred: Becauſe, his firſt Arreſtment, tho' upon a Dependance, was a legal and ready Execution for his Debt, that was conſtituted by a Decreet before the preſent Competition. So that he is not in the Caſe of the Pratticks betwixt the Lord *Pitmedden* and *Paterſons*, and betwixt *Charters* and *Neilſon*, where prior Arreſters were poſtponed, becauſe at the Time of the firſt Competition, their Terms of Payment were not come; and Creditors having *paratam Executionem* for their Payment, could not be obliged to ſtop their Diligence, till others come up equal with them by getting their Debts conſtituted, which perhaps may never be done, thro' the common Debtor's having Grounds to exclude it. For Captain *Brodie* has now as ready Execution competent to him for his Debt, as Miſtreſs *Bowden* has for hers: And *cæteris Paribus*, he is preferable according to the Rule *prior Tempore, potior Jure.* So 8 *July* 1704, *Drummond* of *Megginſh* contra Lord *Preſtounhall* and other Creditors of *Balcaskie*, an Arreſtment at *Megginſh*'s Inſtance upon a depending Proceſs for Relief, was ſuſtained preferable to poſterior Arreſtments upon regiſtred Bonds: Becauſe before the Competition ended, *Megginſh* had got a Decreet upon his Dependance.

The Lords preferred Captain *Brodie*'s prior Arreſtment upon the Dependance.

une 15, 1710. Catharin Leſlie *Daughter to the deceaſt* James Leſlie *younger of* Tarrie, *againſt the Creditors of* Lauchlan Leſlie.

OLd *Robert Leſlie* of *Tarrie*, in his Son *James*'s Contract of Marriage with Miſtreſs *Jean Ramſay* Daughter to the Laird of *Balmain*, *obliged himſelf to pay* 8500 *Merks to* James *and his Spouſe in Conjunct-fie and Liferent, and to the Heirs and Bairns to be procreated of the Marriage in Fie*; *which failing, to the ſaid* James, *his Heirs and Aſſignies whatſoever*; And in Security thereof did infeſt them in his Lands, *James Leſlie* having after his Wife's Deceaſe, diſponed the Sum aforeſaid to *Lauchlan Leſlie* (who married his Siſter) deſigned in the Diſpoſition, his Brother in Law; And the ſaid Right being adjudged by *Lauchlan*'s Creditors; *Catharin Leſlie* only Child of the Marriage, raiſed Reduction thereof upon the Act of Parliament 1621, as being preſumed a gratuitous Deed in Favours of a conjunct Perſon, to the Prejudice of her a Creditor to the Granter, by the Proviſion in her Mother's Contract of Marriage.

Alledged for Lauchlan Leſlie's Creditors. 1. As *James Leſlie*, being undoubtedly Fiar, could have uplifted the Mony and diſcharged his Father, without re-imploying (the Contract containing no Clauſe to re-imploy) ſo he could freely diſpone the ſame. For *Catharin* is to be conſidered only as a Subſtitute to her Father, and not as his Creditor or Heir of Proviſion: The Grand-father, and not the Father, being obliged to pay the Mony. Yea, ſuppoſe her faint Intereſt by the Subſtitution, might have hindred the Father to provide the ſame to Children of a poſterior Marriage; it could never hinder or tie up his Hands from diſpoſing on't to others. The Act of Parliament was not intended to reſtrain all Commerce between Relations: but only to obviate fraudulent Deeds in their Favours, to the Hurt of extraneous Creditors, or ſuch Deeds in Favours of Childrenof one Marriage, to the Prejudice of thoſe of another;

which

which is not to be preſumed in this Caſe, where *Catharin Leſlie* who quarrels the Diſpoſition, is a nearer Relation to the Granter, than the Receiver is. 2. The Diſpoſition bearing to be granted to *Lauchlan Leſlie* for certain Sums of Mony received, cannot be quarrelled by *Catharin* as gratuitous, unleſs ſhe prove, That it was granted without any onerous Cauſe: Seing it is not to be ſuppoſed, that a Father would convey his Eſtate, by his Daughter an Infant, who never offended him, to a Brother in Law for pure Love and Favour. 3. *Actio Pauliana*, being founded on Fraud, is perſonal, and cannot afford Exception or Reduction againſt *Lauchlan Leſlie*'s Creditors, that were noways Partakers thereof: And by the Act of Parliament 1621, real Purchaſers *bona Fide*, or in Satisfaction of their lawful Debts, are not to be prejudiced.

Anſwered for the Purſuer. 1. If Heirs or Bairns of a Marriage, could not as Creditors, quarrel their Father's gratuitous Deeds in Prejudice of their Proviſion: The moſt ſolemn Marriage-Settlements might eaſily be overturned, and Contracts of Marriage were of no Uſe. Tho' *James Leſlie* as Fiar had a Power to upliſt, and diſpone for onerous Cauſes; he was Fiar *ſub Modo*, and could not diſpone gratuitouſly, in Prejudice of the Subſtitution in the Contract of Marriage, which is as effectual, as if he had been obliged to re-imploy the Mony when upliſted; Eſpecially in this Caſe, where the Mony is ſtill extant unupliſted. Law makes no Diſtinction betwixt Deeds granted to conjunct Perſons in Prejudice of Strangers, and ſuch as are made in Prejudice of Children: As is clear from the Caſe of *Donald Fuller*, and the Prattick betwixt *Drummond* and *Drummond*, *January* 31, 1679. Yea, the Reaſon of the Law ought to operate more in Favours of Heirs of Proviſion in Contracts of Marriage, as being moſtly incapable *ſibi vigilare*, to prevent fraudulent Conveyances, which other Creditors may do by Diligence. So that Heirs of Proviſion are Creditors with Reſpect to gratuitous Deeds; tho' ſome Times reckoned Heirs as to onerous Tranſactions. Whence it neceſſarly follows, 2. That the Diſpoſition granted to *Lauchlan Leſlie* the Granter's Brother in Law, doth not prove its onerous Cauſe: It being only in Favours of meer Strangers, that the Narrative of a Writ proves, till it be diſproved. No Man that conſiders the Deſign of the Act, which ſuppoſeth that Deeds may be eaſily made up betwix conjunct Perſons, in Prejudice of Creditors, with what Narratives they pleaſe, will ever imagine that a general Narrative of *onerous Cauſes*, will prove neceſſary Cauſes, and a juſt Price really paid; which the Statute expreſly requires. Beſides, ſuch general Terms of onerous Cauſes depend much upon th Apprehenſion of Parties; and a Trifle may paſs betwixt conjunct Perſons fo an onerous Cauſe. 3. There is a great Difference between Reductions upo the Statute 1621, and the *Actio Pauliana*: For in ſome Caſes, the interpoſe Perſon is obliged to make furthcoming the Lands, Goods and Gear diſponed and the Creditor will be preferred to the Subject; which is certainly mor than a perſonal Action. Again, tho' Reduction upon the Statute were no real, Fraud in a Tranſaction betwixt conjunct Perſons in Prejudice of Creditors is *Vitium reale*, which makes poſterior Tranſactions fall in Conſequence wit the firſt; Eſpecially where the ſecond Acquirer could not be ignorant of hi Author's Relation to the firſt Diſponer; as here where the Relation is expreſly mentioned in the Father's Diſpoſition to *Lauchlan Leſlie*, *January* 24 1680, *Crawford* contra *Ker*. Nor is there any Difference betwixt voluntary Purchaſers, and Creditors uſing Diligence: Seing the latter could only adjudge *omne Jus quod erat in Debitore, tantum et tale*, *Dirletoun Doubts and Queſtions Pag.* 21. and 175. And Adjudgers cannot be underſtood lawful Purchaſers by true Bargains, for juſt and competent Prices, in the Terms of the Act, *Mackenzie Obſerv. Pag* 32.

The Lords found, That *Catharin Leſlie* is in the common Caſe of an Hei of Proviſion, and has thereby Intereſt to quarrel any gratuitous Deeds done by y her Father to her Prejudice. And that the Diſpoſition granted by *James Leſlie* to *Lauchlan* his Brother in Law doth not prove the onerous Cauſe hereof; and that the ſame bearing the Relation betwixt the Diſponer and *Lauchlan Leſlie*, that they are Brethren in Law, *Lauchlan*'s Creditors are in no better Condition than he, and therefore muſt inſtruct the onerous Cauſe f the Diſpoſition, otherways than by the Narrative of the Writ it ſelf.

June 16, 1710. John Murray *eldeſt Son to the deceaſt* Gilbert Murray *of* Conheath, *againſt* James Murray *his younger Brother.* Vid. infra January 4, 1712, *inter eoſdem.*

IN the Action of Compt and Reckoning at the Inſtance of *John Murray*, againſt *James* his younger Brother, who had accepted a Factory from he Purſuer, bearing, *Power and Commiſſion to uplift and manage the Rents of he Lands of* Conheath *pertaining to their Father, and to ſubmit, tranſact, ompone and agree all Pleas, Differences and Controverſies ariſen, or that might riſe thereanent; without Prejudice to* James, *of any Acquiſition made or to be ade by him, of the Lands and Heretages aforeſaid, upon his own Induſtry, Pains nd Expence, either before, during, or after the Factory:* The Lords found, That whatever Rights the Factor acquired of the ſaid Lands conform to the ſt Clauſe of the Factory, viz. *That his Acceptance ſhould not be prejudicial to s Acquiſitions made or to be made*, muſt ſtand good only for a Security to im for the Sums Principal, Annualrents and Expences and Intereſts thereof pended by him, in purchaſing and proſecuting theſe Rights during the Facto- y; and that upon *John Murray*'s making Payment thereof, deducing *James*'s tromiſſions, the ſaid Rights ſhall be redeemable; and *James* be holden to enude in Favours of the Conſtituent, who muſt have the Benefit of the aſes, without Prejudice to Rights in the Factor's Perſon before the Factory: Albeit it was alledged for *James Murray*, That ſince he might accept the Fa- *ory with* what Conditions he pleaſed, *quæ dant Legem Contractui*, the laſt Clauſe muſt operate ſomething; *viz.* That his Acceptance ſhould not oblige im to communicate to *John* the Eaſes of his Acquiſitions aforeſaid, other- iſe it ſhould have no Effect, and *James* ſhould be equally liable, as if he d accepted a ſimple Factory. And ſuch a Clauſe is not inconſiſtent with Nature of a Factory; there being Mandates *in Gratiam et Mandantis et ndatarii.* For it was anſwered by the Purſuer, That a Factor, by the ature of his Truſt, is obliged to make the beſt he can of his Conſtituent's retenſions relative to the Subject of the Factory, *December* 16, 1668, *Fra- er* contra *Keith*, *December* 15, 1667, *Maxwel* contra *Maxwel.* Albeit all actories are not of a like Nature, yet the Clauſe founded on by the De- nder muſt be held *pro non adjecta*; ſince it is not only contrary to the ery Deſign of the Factory, but alſo to Law *cui non derogatur Pactis rivatorum*: And is equally reprobated as if a Tutor ſhould adject to his cceptance of the Office, that it might be lawful for him, to acquire to his wn Behoof, Rights affecting the Pupil's Heretage.

June 20, 1710. *Sir* George Hamilton, *againſt* William Dundas *of* Airth *and his Lady.*

THe Laird and Lady *Airth* having aſſigned to Sir *George Hamilton* ſeveral Debts due to them by *Alexander Hamilton* of *Grange*, particularly an djudication led upon the Eſtate of *Grange* in *February* 1678, in ſo far as ight be extended to 19000 Merks owing by them to Sir *George*; And *irth* having obliged himſelf and his Heirs to deliver the Adjudication betwixt and a certain Day, under a Penalty by and attour Performance; and being charged by Sir *George* upon the ſaid Obligement to deliver the Adjudication; he ſuſpended upon this Reaſon, That they had made all poſſible Search for the Adjudication, and could not find it, and the Charger could aſk no more than *Damnum et intereſſe Loco Facti impreſtabilis.*

The Lords found the Suſpenders liable only for Damage and Intereſt, in ſo far as the Charger's Right to the Sums in the Adjudication, might have been effectual againſt the Eſtate of *Grange*, had the Adjudication been delivered in due Time.

Eodem Die. *ACT of SEDERUNT againſt* Profaneneſs.

THE Lords of Council and Seſſion taking to their ſerious Conſideration, Her Majeſties pious Proclamation, of the Date the Eighteenth of *Auguſt*, in the Seventh Year of Her Reign, for puniſhing Vice, Profaneneſs and Immorality, Wherein Her Majeſty requires the Lords of Seſſion, and all other Judges to put the Laws and Acts of Parliament againſt Curſing, Swearing, Reproaching, and Mocking Religion and Piety; to Due and Punctual Execution, upon the Complaint of any Perſon whatſomever; and being Informed that Abuſes of that Kind are ſometimes Committed in the Outer-houſe, when the Clerks are Calling Proceſſes, in the Abſence of the Ordinary, at the Reading of the Minute-book, and ſundry other Times, to the great Scandal of Religion; And the Lords being Reſolved to Teſtifie their Diſpleaſure at ſuch Practices, They Declare they'll give all Due Encouragement to any who ſhall Inform againſt the Tranſgreſſors of theſe Acts, and will Proceed to Cenſure, and Puniſh them according to Law, And Recommend to thei Clerks to take Special Care, that no ſuch Abuſes be Committed in thei Reſpective Offices, or at the Times and Places foreſaid, and to Diſcover and Cauſe Delate the Offenders, and ſuch Abuſes, when Committed, and for th better Diſcovery of ſuch Guilty Perſons: The Lords Declare they will receiv Informations in their Boxes, either by Subſcribed, or Unſubſcribed Notes Condeſcending upon the Perſons Offending, the Time and Place the Offenc was Committed, and on the Perſons Witneſſes thereto; and for the makin this Act the more Effectual, The ſaid Lords Ordain theſe Preſents to be Printed and affixed upon the Walls of the Outer-houſe, and other Places needful, to gether with a Copy of Her Majeſties Gracious Proclamation foreſaid, tha none may pretend Ignorance, and all ſuch Scandalous Perſons may be brough to Condign Puniſhment, according to Law.

June 21, 1710. *Mr.* Patrick Strachan *Writer in* Edinburgh, *againſt the M giſtrates and Town-council of* Aberdeen.

IN the Competition betwixt Mr. *Patrick Strachan* and the Town of *Abe deen*, for the Mails and Duties of the Lands and Fiſhing of *Rutherſtan* Mr. *Patrick* founded on an Infeftment granted to his Father by *Andrew Skee* of *Rutherſtane* in *Anno* 1674; and the Town claimed Preference upon a expired Adjudication.

Alledged for Mr. Strachan. The Town's Adjudication could not expire i Prejudice of his Right, being null and informally led; in ſo far as it pr ceeds upon a Decreet *Cognitionis Cauſa*, againſt *Chriſtian* and *Margaret Skeen* as lawfully charged to enter Heirs Portioners to their Father and Gran father, in the Lands of *Rutherſtane*; Albeit they were never charged enter Heirs. For the Execution cites them, and their Tutors and Curato f for their Intereſt, *to compear before the Lords of Council and Seſſion, at the Day and Place within-contained*, which is only the Stile of a Citation upon an ordinary Summons; That, as it could not found a Decreet of Conſtitution, had no Renunciation been produced, could not be the Ground of a Decreet *Cognitionis Cauſa*, bearing a Renunciation to have been produced; a Renunciation being mainly calculated to free the Renuncer and his ſeparate Eſtate from his Predeceſſor's Debt.

Anſwered for the Town. 1. The Execution contains materially a Charge to enter Heir: In ſo far as it bears, *That the Meſſenger paſt at the Command of the within written Letters of general Charge to enter Heir, at the Inſtance of the within-deſigned, and in Name and Authority within-expreſt, ſummoned, warned and charged them to Compear before the Lords; and delivered an authentick Copy of the ſaid within Letters of general Charge to the Parties perſonally apprehended*, &c. *And that this he did after the Form and Tenor of the within Letters, and according thereto in all Points.* So that laying aſide the ſuperfluous Words, *ſummoned them to compear before the Lords*, &c. *Quæ pro non ſcriptis habentur*, the Parties could not be ignorant, that the true Intent of the Execution was to put them to enter Heir, or renounce. 2. Such an Objection is not now competent, not having been proponed by the Parties compearing in the Decreet *Cognitionis Cauſa*, but paſt from by their producing a Renunciation. For as the Nullity of an Execution upon a Summons to compear, could not be objected at the Inſtance of a Creditor of the Perſon cited, in Caſe he compear, and ſuffer Decreet to go out againſt him, without proponing the Nullity: So an apparent Heir compearing in a Proceſs raiſed againſt him, as lawfully charged to enter Heir, and giving in a Renunciation, without objecting any Nullity in the Execution upon the Charge, doth effectually exclude his Creditors from afterwards objecting the ſame. 3. An apparent Heir's Renunciation produced, is as ſufficient to found a Decreet *Cognitionis Cauſa*, notwithſtanding any Informality in the general Charge; as the Production of his Service as Heir, would be to procure a Decreet of Conſtitution againſt him; which could never be quarrelled even for the Want of a previous Charge to enter Heir, far leſs upon the Account of any Informality in ſuch a Charge, *January* 27, 1624, *Inglis* contra *Drummond*, *July* 14, 1631, *Blair* contra *Brown*.

Replyed for Mr. Strachan. He doth not object that the Execution of the general Charge was informal, but that there was no ſuch Charge, and the Execution produced not bearing a Charge to have been given, the Decreet *Cognitionis Cauſa* wanted a Warrant. No Conſequence is to be drawn from the ſupplying Defects of Executions and Citations by the Partie's Compearance, and homologating the ſame; to the ſuſtaining an apparent Heir's Compearance and Renouncing, to inſtruct that a Charge was given to him in the Terms of the Act of Parliament. For Citation to compear to anſwer to a Libel, is only deſigned to certiorate the Party that he may compear prepared to defend in the Proceſs, which End is ſufficiently anſwered by his ſiſting himſelf without any Citation and proponing peremptory Defences; And ſuch Executions are reckoned among the Warrants of a Decreet proceeding thereon: Whereas, the Execution of Letters of general Charge to enter Heir is not the Warrant, but the Ground and Foundation of a Decreet *Cognitionis Cauſa*. Beſides, the Execution queſtioned, tho' relative to Letters of general Charge to enter, cites the apparent Heir to appear before the Lords; and yet the Decreet *Cognitionis Cauſa* was pronounced by the Magiſtrates of *Aberdeen*. 2. The Parallel betwixt the Service of an Heir, and his Renunciation, doth not hold in the preſent Caſe: Becauſe a Charge to enter, when the Heir is ſerved, would be equally ſuperfluous, as a Charge to perform what is already implemented; Whereas if no Service be expede, nor other paſſive Title fixed againſt the apparent Heir, there is no other legal Expedient to a Creditor for getting Acceſs to the *Hæreditas jacens*, than by charging him to enter Heir. Nor is a Renunciation without a Charge ſufficient to procure a Decreet *Cognitionis Cauſa*: Becauſe, it muſt be expreſly libelled upon the Execution of a Charge to enter Heir, and not upon the Renunciation, which is produced only *in Termino*, for protecting the Party charged, and his Eſtate from a Decreet of Conſtitution; So that a Decreet *Cognitionis Cauſa*, without a previous Charge to enter Heir, is a Decreet without a Libel; and conſequently null. The Deciſions cited for the Defenders have no Contingency with the preſent Caſe: For in both the apparent Heir was charged to enter.

The Lords ſuſtained the Nullity objected againſt the Execution of the general Charge to enter Heir, as a ſufficient Ground to reſtrict the Town's Adjudication to a Security for their principal Sum and Annualrents.

June 23, 1710. John Grant *of* Auchriachan, *againſt the Duke of* Gordon.

J*Ohn Grant* raiſed Reduction of a Bond granted by *Robert Grant* in *Tombreck* his Father, in *April* 1686, to the Duke of *Gordon*, for 2000 Merks of Principal, with Annualrent and Penalty, and of a Bond of Corroboration thereof granted by himſelf in *November* 1705, after his Father's Deceaſe upon this Reaſon; That the original Bond granted by *Robert Grant* was for no onerous Cauſe, and not to be paid, providing the Granter behaved himſelf dutifully to his Grace, while he continued his Tenant, and ſhould never militate againſt his Heirs in Caſe he happened to die before any Action intented thereon; which was offered to be proved by the Duke's Back-bond in the Hands of *Gordon* of *Glaſtirum*; For recovering whereof the Purſuer crav'd a Term and Diligence. He pleaded, That his Father having never miſbehaved towards his Grace, nor been ſued in his Lifetime, the original Bond was void and null; and the Bond of Corroboration granted *Errore Facti alieni*, behoved to fall in Conſequence; ſeing *ubi principalis Cauſa non ſubſiſtit, nec ea quæ ſequuntur, Locum habent.*

Anſwered for the Defender. 1. The Purſuer cannot have a Term aſſigned for recovering the Back-bond, which, being his own Evident, he ought to have produced *in Initio Litis.* 2. *Eſto*, ſuch a Back-bond were produced, the Purſuer could found nothing thereon; ſince his granting the Bond of Corroboration imported, That he renounced all Exceptions againſt the Debt, paſs'd from the Back-bond, and acquieſc'd in the alledged Miſcarriage of hi Father.

Replyed for the Purſuer. 1. He muſt needs have a Diligence for recovering the Back-bond, ſince he condeſcends upon the Haver, who will not par with it till he be compelled. 2. Tho' the Purſuer by granting the Bond o Corroboration might be underſtood to have renounced, and paſt from Objections againſt the Bond corroborated upon any intrinſick Nullities, as th Want of Witneſſes, or the Writer's Deſignation, or the like: Yet it is eve competent to the Granter of a Corroboration, to except, That the Debt i the original Bond is not due; Eſpecially where the Exception is founded upon the Creditor's own Fact and Deed, as that the original Bond was diſcharged by him; and upon the Matter the Back-bond founded on by th Purſuer imports a Diſcharge.

The Lords found the Reaſon of Reduction relevant, and aſſigned to th Purſuer a Term to recover the Back-bond.

Eodem

Eodem Die. Janet Dalrymple *and* Skeen *of* Hallyards, *againſt* Daniel Johnſtoun.

IN an Advocation at the Inſtance of *Janet Dalrymple*, againſt *Daniel Johnſtoun*: An Arreſtment being laid on by Virtue of a Sheriff's Precept in a Perſon's Hand within his Juriſdiction, and that Perſon, having changed his Domicile; the Baillies of the Place of his preſent Reſidence, were found competent to judge in an Action of Furthcoming upon the Arreſtment, Albeit that was alledged to be contrary to the Deciſion *Smith* contra *Miller*, *March* 8, 1634; In Reſpect the Lords were not unanimous in that Prattick; And my Lord *Stair Inſtit. Lib.* 3. *Tit.* 1. §. 24, clears that one inferior Judge may ſuſtain Proceſs of Furthcoming, upon an Arreſtment laid on by Warrant of another.

June 27, 1710. *The Magiſtrates and Procurator-fiſcal of* New Galloway, *againſt* John Canon *of* Barley.

AT diſcuſſing a Suſpenſion of a Decreet of the Baillies of *New Galloway*, fining *John Canon* in 300 Merks for ſwearing Thirty Oaths, that is, in Ten Merks for each Oath, conform to the *Act* 19. *Par.* 1. *Seſſ.* 1. *Act* 22. *Par.* 2. *Seſſ.* 3. *Ch.* 2. upon this Ground, That the Act of Parliament mpoſing Ten Merks for ſwearing *toties quoties*, is to be underſtood of Ten Merks, not for every Oath, but for every Conviction; as the Words *toties quoties* are taken in the *Act* 38. *Par.* 1. *Seſſ.* 1. *Act* 21. *Par.* 2. *Seſſ.* 3. *Ch.* 2. and therefore in Church Judicatures, a Perſon is never cenſured as guilty of Relapſe, till after Conviction. The Lords found, That *toties quoties* in the Act of Parliament is to be underſtood of every Oath, and not of every Conviction only. But they modified and reſtricted the Fine to 100 lb. In Reſpect it was alledged for the Suſpender, That the Oaths were emitted by him in Paſſion when provoked by Abuſes he met with from the Magiſtrate and his Coy-duke, who tempted him to ſwear, that they might catch him in a Fine: And preceeding Provocation extenuates the Puniſhment of Crimes *in Foro Soli*, tho' not *in Foro Poli*; And it may be ſaid of Oaths vented in Paſſion (which is *brevis Furor*) that *Lingua juravi, Mente juravi nihil*.

June 28, 1710. *The Earl of* March, *againſt the Earl of* Leven.

THe deceas'd Earl of *March* having procured from the Queen a Commiſſion under the great Seal, to be Governour of the Caſtle of *Edinburgh*, *durante Beneplacito*, dated *December* 31, 1702, and ſealed the 14 *January* 1703; and having ſerved in that Station till after *Whitſunday* 1704: The preſent Earl, as deriving Right from his Father, purſued the Earl of *Leven* the ſucceeding Governour, for Payment of the firſt half Year's Victual Rent, payable to the Governour of the Caſtle for the Crop 1704, that had been uplifted by the Defender.

Anſwered for the Defender. The Purſuer hath no Right to any Part of the Crop 1704: In Reſpect the ſame was payable only betwixt *Yuil* and *Candlemas* thereafter, and his Father's Commiſſion was revoked long before, and a new One granted to the Earl of *Leven*, aſſigning expreſly to him the whole Caſtle Rents for the Crop 1704.

Replyed for the Purſuer. The Queen's Gift to the Defender is only to be underſtood *civiliter*, That he ſhould have the Crop 1704, from the Time he began to be Governour: And the re-calling the Earl of *March*'s Commiſſion cannot wrong him of the Pay and Perquiſites due for his Service. It is notour, that Military commiſſioned Officers, are paid to the Day of their Death, or Deprivation. Yea, Crops of Victual are divided according to the Intereſt of Parties between the Heir and Executor: So Miniſters ſerving the Cure after *Whitſunday*, or Liferenters ſurviving that Term, have unqueſtionable Right to half a Year's Stipend or Liferent.

Duplyed for the Defender. The Rents being only aſſigned to the Governour for his Service, as payable betwixt *Tuil* and *Candlemas*; and a Power reſerved to recal the Aſſignation at Pleaſure any Time before the Rent is due, *i. e.* before the Term of Payment; no Part of the Rent is due, unleſs the Governour ſerve till the Term of Payment; as is clear from a Deciſion in the Parallel Caſe, *June* 24, 1630. *Scrimzeor* contra *Denmiln.*

The Lords preferred the Earl of *March* to the half of the Crop 1704.

July 4, 1710. John White *late Baillie of* Kirkaldie, *againſt* James Henderſon *and other Tenants in* Birkhill.

James Henderſon, *Alexander Donaldſon*, *William Paterſon*, and *John Morris*, Tenants in *Birkhill*, taken with Caption for a civil Debt, at the Inſtance of Baillie *White*, having, to obtain their Liberty, obliged themſelves conjunctly and ſeverally by a Bond of Preſentation, to pay the Debt in the Caption to the Baillie againſt the 20 *June* 1709, or elſe to preſent themſelves Priſoners to the Meſſenger that Day, betwixt 11 and 12 Hours, within the Dwelling-houſe of *Thomas Lawſon* in *Bamblea*, without paſt Bill or Suſpenſion, under the Pain of 1000 Merks by and attour Performance: The Lords found, That *James Henderſon*'s compearing and offering himſelf Priſoner for himſelf, and in Name of the other Co-obligants, who had no lawful Excuſe for not appearing, was not ſufficient to free them from the Penalty in the Bond of Preſentation; Albeit Payment by one of ſeverals bound jointly and ſeverally, would liberate the reſt, and *Henderſon* behoved either to pay the Penalty, or go to Priſon.

July 5, 1710. *The Creditors of* Dumfermling *againſt Mr.* David Cowpe *late Factor appointed by the Lords upon that Eſtate.*

IN the Compt and Reckoning at the Inſtance of the Creditors of *Dumfermling*, againſt Mr. *David Cowper* their Factor, the Creditors charge him with the Prices at which he ſold the Victual.

Anſwered for Mr. Cowper. He can be obliged to compt only at the Fiar-prices, as the moſt equal for both Parties. For a Factor being ſuppoſed t ſell for ready Mony, is preſumed to get no more than the Fiars; and if h ſell to a Day in Proſpect of a higher Price, he thereby runs a Risk, if th Merchants happen to break *medio Tempore, et quem ſequitur Incommodum, &c* Nay, it is viſibly to the Advantage of Creditors that the Fiars be the Rule with this Quality; That the Factor get no Allowance for the Charges o ſelling and diſpoſing of, or receiving the Victual, or doing Diligence for the Price, or upon the Account of the Buyer's turning inſolvent; and no ſuch Allowance is claimed by Mr. *Cowper.* Beſides, by eſtabliſhing of the Fiars a the Standard, the Creditors have this further Benefit, That the Charge againſt the Factor is liquidated by an Extract of theſe, without the Trouble and Expence of a Probation, which any other Rule would require. And ſhould a Factor be obliged to anſwer for the Prices ſold at, he hath Reaſon to ask Allowance in his Diſcharge of all Charges and accidental Loſſes by the Sale, which may ſometimes reduce the Price far below the Fiars. 2. Mr. *Cowper* is content to hold Compt at the Prices he received for the Victual, if the Creditors will take it complexly, and accept of theſe Prices every Year, tho' ſometimes below the Fiars, which cannot be thought unreaſonable; ſeing they who reap the Advantage, ſhould alſo ſuffer the Loſs.

Anſwered for the Creditors. Factors, as Truſtees for the Creditors, getting both Allowance for their neceſſary Charges, and a Salary for their Pains; are bound to do exact Diligence, and compt for the Prices ſold at, or inſtruct hat they ſold *bona Fide* to Perſons reſponſible at the Time, upon uſual Security, and at the Term of Payment did Diligence, and could not recover he Prices: For Law preſumes, That a Truſtee liable to Diligence, received what he ought and ſhould have received. Therefore if he ſold to ſome above, nd to ſome below the Fiars, he muſt compt for the Fiars when he ſold below hem, and at the Price he ſold for, when above them. Seing to allow a Factor, who ſold perhaps for a third above the Fiars, to be liable in all Events nly for the Fiars, were to free him from Diligence, which is the Conſequence of his Truſt and Office. And why ſhould not a Factor named by the Lords compt for Prices received, as well as the Factors of private Men.

Replyed for Mr. Cowper. The Diſparity betwixt the Lords Factors, and thoſe f private Men is, That the latter do commonly follow their Maſter's particular nſtructions; Whereas the former muſt act upon their Peril: And a Maſter nay from his own private Knowledge of Circumſtances, diſpenſe with the oing of Diligence, or the like; But nothing can be allowed in a Factor's xoneration before the Lords, without the niceſt Probation of Circumſtances.

The Lords found, That the Creditors Charge muſt be conſtituted againſt Mr. *owper*, either according to the Fiars, or the Prices he ſold at; reſerving to im to be heard upon what Diligence he was liable for, and what Eaſe he may laim upon the Account of his not recovering Payment of the whole agreed Prices from the Merchants.

Eodem Die. *The Lord* Gray *againſt Sir* William Hope.

N the Reduction *ex Capite Inhibitionis*, at the Inſtance of the Lord *Gray*, againſt Sir *William Hope*, the Defender objected, That the Purſuer's Inhibition was null, in Reſpect the Witneſſes in the Execution are not deſigned n the Body of the Writ, conform to *Act.* 5. *Par.* 3. *Ch.* 2. 1681. But both their Names and Deſignations adjected in a marginal Note; which, tho' ſigned by the Meſſenger, can't be reputed as in the Body of the Writ, unleſs atteſted by the Subſcription of Witneſſes, or that the Writ bear, That the Witneſſes therein were alſo Witneſſes to the marginal Note: Seing *eadem eſt Ratio Totius, et Partis*, one Part of the ſame Writ can't be more privileged than another; But all of it muſt be verified by the ſame Solemnities. And therefore, as the Body of the Writ would be null, if wanting the Subſcription of Witneſſes, the Margin is null for that Defect.

Alledged for the Purſuer. In the Stile of Law, the Body of a Writ comprehends all except the Subſcription and Solemnities. Was ever a Margin refuſed at the Regiſters to be taken into the Body of the Book? Are not the Deſignation of Witneſſes even in probative Writs frequently added upon the Margin, and reckoned a fulfilling of the Act 175, *Par.* 13. *J.* 6. *Nec temere ſunt mutandæ quæ ſemper habuere certam Interpretationem*, L. 23. ff. *de Legibus*. 2. There is a Difference between Witneſſes to the Subſcription of Parties, and Witneſſes to the Acts of Notaries, and Meſſengers: The former ing Witneſſes to the Parties Subſcription only, and not obliged to know the

Tenure of the Writ, or that the Facts therein-mentioned are performed accordingly; Whereas the latter are Witneſſes to Facts required in Law to be done by the Meſſenger, which properly ſpeaking are the Execution. The Act of Parliament 1681, requires indeed ſubſcribing Witneſſes in Inſtruments of Notaries, and Executions of Meſſengers, and that theſe Witneſſes be deſigned in the Body of the Writ; But requires not ſuch Inſtruments or Executions to have all the Solemnities of probative Writs, as the Writer's Deſignation, and the Witneſſes to the Subſcription of the Meſſenger, or Notary. For were it neceſſary for Witneſſes to atteſt the Verity of the Meſſenger's Subſcription, Executions would be docketed as probative Writs, *viz.* That the Meſſenger, for the more Verification, had ſubſcribed the ſaid Execution before ſuch Witneſſes: Whereas the Docket of a Meſſenger's Execution runs thus, *And for the more Verification of this my Execution, I and the ſaid Witneſſes have ſubſcribed theſe Preſents.* Which Difference betwixt probative Writs, and Executions, is owned by the Statute 1681, in ſo far as it expreſly appoints, That Witneſſes to the former, know the Party, and ſee him ſubſcribe, or give Warrant to a Notar, or ſee him touch the Pen, or hear him acknowledge his Subſcription; and doth not require any ſuch Thing from Witneſſes in Executions. Yea, it bears, That no Execution ſhall be ſufficient to infer Interruption of Preſcription in real Rights, unleſs the ſame be done before ſubſcribing Witneſſes who were preſent at the doing thereof.

Anſwered for the Defender. The Act of Parliament makes no Difference in this Point, betwixt Executions and other Writs: For the words, *Unleſs the ſame be done before Witneſſes preſent at the doing*, comprehend the whole Execution as reduced into Writ, and ſigned by the Meſſenger, without whoſe Subſcription it is not a complete Execution. And as Stamping was formerly neceſſary for verifying the Meſſenger's Subſcription, and diſpenſed with by the Act 1686, in Reſpect ſubſcribing Witneſſes were afterwards to be adhibited: So the Subſcriptions of the Witneſſes muſt atteſt and confirm the Verity of the Meſſenger's Subſcription.

Replyed for the Purſuer. Stamping Executions was abrogated, becauſe found a vexatious and inſnaring Solemnity, of no Uſe: And the Act of Parliament doth not mention it to have been taken away in Conſideration of the ſubſcribing of the Witneſſes. 2. There is no Inſtance, or which is the ſame thing in Law, it is very rare to ſee Witneſſes in Executions deſigned alſo Witneſſes to the Margins, far leſs to ſuch Margins as are no Part of the Fact they are required to witneſs, *viz.* their own Deſignation.

The Lords repelled the Objection againſt the Execution of the Purſuer's Inhibition.

July 7, 1710. William Buntine *ſecond Son to the Laird of* Airdoch, *againſt* Archibald Buchanan *of* Drummakill.

W*illiam Buchanan* of *Drummakill* having by his Bond provided 5000 Merks to his only Daughter *Jean*, ſhe marrying by Advice and Conſent of *George Lindſay* of *Braxholm*, and *John Cuningham* of *Ballindalloch*, or any of them that ſhould be alive at the Time, and that the Bond ſhould be null in Caſe ſhe married without ſuch Conſent: *William Buntine* Husband to *Jean Buchanan*, as Aſſigny by his Contract of Marriage, purſued *Archibald Buchanan*, as repreſenting *William* his Father, for Payment of the Proviſion.

Anſwered for the Defender. Becauſe Marriage is favourable, and our Law and Cuſtom hath taken ſome Liberty in annulling all Reſtrictions thereof, he doth not quarrel the Validity of the Bond, *quatenus* it can be thought a reaſonable Proviſion; but only *quoad Exceſſum*, in ſo far as the Father, out of his anxious Deſire of a good Marriage to his Daughter, hath given her Tocher far above what his Circumſtances and the Condition of his Fortune could bear: Which, being a pure Donation, is not to be paid but upon preciſe Performance of the Conditions thereto adjected, *L.* 4. *C. de Donat. quæ ſub Modo.* And ſo it is, that the ſaid *Jean Buchanan* married the Purſuer, without the previous Conſent of any of the Nominees, whereby the Irritancy in the Bond was incurred.

Replyed for the Purſuer. Such Clauſes irritant are unfavourable and held in Law *pro non adjectis*, eſpecially where the Child (as in this Caſe) doth match with her equal in Quality and Fortune: And *Ballindalloch* the only ſurviving Truſtee named by the Father hath judicially declared that he hath nothing to object againſt the Match. 2. The Clauſe cannot militate againſt the Purſuer, unleſs it had been intimated to his Wife before her Marriage, *December* 3, 1680, Laird of *Fetternier* contra Lord *Semple*, *February* 21, 1681, *Hamilton* and *Baird* of *Saughtounhall* her Husband, contra *Hamiltons.* 3. The Alledgeance that the Proviſion exceeds what the Granter's Eſtate could then allow, is frivolous: For it is expreſly contrary to the Narrative of the Bond, bearing, *That it had pleaſed GOD to bleſs him with a Fortune, and that it was juſt and reaſonable that his Children be competently provided with ſuch moderate Proviſions as his Eſtate is able to bear*; and the Father knew beſt his own Condition.

Duplyed for the Defender. Narratives in ſuch Kind of Writs, being only Stile of Courſe framed by Writers, do not prove the Deſign of the Granter: And ſeing the moſt that can be inferred from the Narrative is a Preſumption, that muſt yield to Truth. Nor could *Ballindalloch*'s Approbation *ex poſt facto* import, That he would concur to the Deed if it were yet to be done; but only that, ſince what is done cannot be retrieved, he would agree and make the beſt of what cannot be helped.

The Lords repelled the Defence, and found that the Clauſe irritant in the Bond, is not relevant to infer a Reſtriction of the Sum.

Eodem Die. Iſobel Maver *Spouſe to* James Cowback *Weaver in* Elgin, *and the ſaid* James *for his Intereſt, againſt* Alexander Ruſſel *in* Pluſcardin.

IN a Proceſs at the Inſtance of *Iſobel Maver* and her Husband, againſt *Alexander Ruſſel*: The Lords ſuſtained a Diſcharge ſubſcribed by a Notary for *Iſobel Maver* the Purſuer: Albeit the Notary's Aſſertion bore not that ſhe touched the Pen, but only that at her Command, who could not write her ſelf, as ſhe affirmed, he had ſubſcribed theſe Preſents for her.

July 11, 1710. *Mr.* Robert Dumbar *of* Myreland, *and other Tutors of Sir* Robert Gordon *of* Gordonſtoun *Supplicants.*

ALbeit the Lords are in Uſe to ſequeſtrate a Pupil ſome Days before his Pupillarity expires, to prevent his being influenced to his Prejudice, in the Election of his Curators: Yet they refuſed, upon the Application of *Myreland* and other Tutors of Sir *Robert Gordon* of *Gordonſtoun*, to ſequeſtrate Sir *Robert* any Days before expiring of their Tutory; in Reſpect the Tutors were appointed by the Pupil's Father, in the Terms of the *Act* 8, *Parl.* 1696, to continue Curators; unleſs theſe would poſitively renounce to be Curators. Albeit it was alledged for them, That they were not bound to declare their Mind in that Matter, till the Iſh of their Office of Tutory; but probably they would decline to be Curators; and then the Pupil would be in the ſame Caſe as if he had no Curators named: Therefore he ought to be ſequeſtrated ſome Days before he go out of his Pupillarity, to qualify him for making a good Choice of Curators in the Event of the Nominees refuſing to accept.

July 12, 1710. *Sir* Alexander Bannerman *of* Elſick, *and other Creditors of Sir* William Forbes *of* Monimusk, *againſt the Maſters of the Queen's* College *in Old* Aberdeen *and the Presbytery of* Garioch.

MR. *William Watſon* Miniſter at *Leſlie* having named *Mary Ramſay* his Spouſe his Executrix and univerſal Legatrix, and bequeathed in his Teſtament, the Sum of 5400 Merks *Scots* to be ſtocked in a reſponſible Debtor's Hand, that ſhe might enjoy the Annualrent thereof during her Lifetime; and the principal Sum after her Deceaſe might be imployed for maintaining Four Burſars in the Queen's College of *Aberdeen*, *Viz.* Two of Philoſophy, to be preſented by the Maſters, and Two of Divinity to be preſented by the Preſbytery of *Garioch*: *Mary Ramſay*, in Satisfaction of the Mortification, aſſigned and delivered up to Sir *William Forbes* of *Monimuſk*, Bonds granted by *Davi Forbes* of *Leſlie* for 2189 Pound to her Husband, and ſo many other Debts as exactly anſwered the Sum aforeſaid of 5400 Merks, all confirmed by her in his Teſtament; and took a Backbond from Sir *William*, narrating theſe Bonds, and that Aſſignation was granted for Payment of the mortified Sum; and obliging him to free and relieve her thereof, and to pay the ſame in ſo far as he ſhould receive and uplift of the Sums aſſigned. Sir *William Forbes* renewed *Leſlie*'s Bonds in his own Name. After whoſe Affairs went in Diſorder, Sir *Alexander Bannerman* and others Creditors of Sir *William* arreſted in *Leſlie'* Hand all Sums due by him to their Debtor, and obtained a Decreet of Forthcoming before the Sheriff of *Aberdeen* againſt him, upon his deponing that h was Debtor to *Monimuſk* in 2189 Pound in the Way and Manner above mentioned. The Maſters of the College, Miniſters of the Presbytery an *Mary Ramſay* arreſted alſo the Debt, in *Leſlie*'s Hand, who ſuſpended upo Multiple-poinding. At the diſcuſſing whereof, it was alledged for them That they are preferable, becauſe *Leſlie* having deponed *Parte referente*, tha he was no otherways Debtor to *Monimuſk* than by Reaſon of the Aſſignatio he got to his Bonds that were due to Mr. *Watſon*, and the Aſſignation bein ſo qualified by the Backbond: *Monimuſk*'s Right was in Truſt for Behoof o the Mortification; and his Creditors can have no better Right by their Dil gence, than their Debtor had.

Anſwered for Sir Alexander Bannerman and other Creditors of Monimus The Patrons of the Mortification have no Intereſt in *Leſlie*'s Bond: In ſo fa as neither did Mr. *William Watſon* make any ſpecial Aſſignation of *Leſlie*'s Deb to the mortified Uſe; nor did the Relict aſſign it to the Patrons of the Mort fication, but only to *Monimuſk*, whoſe Faith ſhe followed. Now the *old* De due by *Leſlie* to Mr. *Watſon*, was by Innovation ſtated in the Perſon of *Mon muſk*, which his Creditors have duly arreſted: And the Patrons of the Mort fication have neither Aſſignation to the new Bond from *Monimuſk* th Creditor; nor have they affected it any manner of Way. For the Backbon narrates only the onerous Cauſe why the Granter became Debtor for th mortified Sum: And it doth not follow, That, becauſe *Leſlie* was Debtor t the Relict, and ſhe aſſigned the Debt to *Monimuſk*, who became Debtor to th Patrons, *ergo Leſlie* is Debtor to them. Seing my Debtor's Debtor becomes n my Debtor, till once I get the Debt aſſigned to me, or affect it by Arreſtmen Yea, as *Leſlie* might have ſafely and *bona Fide* paid the Mony to *Monimuſk* So his granting a new Bond without any other Narrative than borrowed an received, was all one as if, upon his paying down the Mony, *Monimusk* had lent it again to him; and *Leſlie*'s Oath can't prove that there was another onerous Cauſe for his granting ſuch a liquid Bond.

Replyed for the Patrons of the Mortification. They don't plead their Intereſt in *Leſlie*'s Debt from the Teſtament, but from the Relict's Deed, who aſſigned it for ſuch an End: And the Creditors of *Monimusk* cannot be heard to object againſt *Leſlie*'s Oath, as not probative againſt them, ſince it was given upon their Reference.

The Lords preferred the Patrons of the Mortification to *Monimusk*'s Creditors.

July 14, 1710. Iſobel Moncrieff *Spouſe to* John Brown *Merchant in* Bruntiſland, *againſt* Catharin Monipenny *Relict of* George Moncrieff *of* Sauchop.

I*Sobel Moncrieff* as neareſt of Kin to *George Moncrieff* her Brother, purſued Reduction of a Teſtament alledged to have been made by him *November* 19, 1707, in Favours of *Catharin Monipenny* his Relict, upon this Ground; That, contrary to the Act 5, Parliament 1681, the inſtrumentary Witneſſes did not ſee the Teſtator ſign his whole Name, but only *George Mon*, and the Writer obſerving his Hand to waver thro' Faintneſs, took him by the Wriſt, and aſſiſted him to make the Motion of his Hand toward the writing the reſt of his Name, and he died within a Quarter of an Hour thereafter: Whereas the Law requiring Witneſſes to ſee the Party ſubſcribe, is not ſatisfied by ſeeing an inchoated Subſcription, but they muſt ſee it completed, which is conſonant to the civil Law, *L.* 17. *C. de Fide Inſtrumentorum*, *L.* 15. *C. de contrah. Empt.* Now *George Mon* might be apply'd to other Names as to *George Monrô*, &c, as well as to *George Monteith*.

Anſwered for the Defender. Our Law requires no more to ſuſtain a Teſtament, than a ſufficient Indication of the Defunct's Mind in Writ: It being ſufficient with us that one Notary, or a Miniſter, ſign for a Party that cannot writ, notwithſtanding the *Act* 80, *Parl.* 1579; And Minors, Wives, and interdicted Perſons, can *per ſe* make a Teſtament, tho' they can do no other Deed, unleſs authorized by their proper Conſenters. Beſides, our Law allows of Subſcriptions by the initial Letters of Name and Sirname, *January* 20, 1631, *Houſtoun* againſt *Houſtoun*, *February* 14, 1633, *Grierſon* againſt *Grierſon*, which is not ſo good as the Subſcription in Queſtion. How can the leading of the fainting Teſtator's Hand be conſidered as unwarrantable, when it is ordinary to aſſiſt the Arms and Hand of paralitick Perſons, who, without being ſettled by ſome outward Aſſiſtance, could never be able to ſubſcribe their Name? And *George Mon* in this Teſtament beginning with theſe Words, *I George Moncrieff, &c.* can no more be apply'd to *Monro* or any other Name, than it could be apply'd to *Montalto* or *Montmorancy*.

Replyed for the Purſuer. Albeit Teſtaments once made are favourably interpreted, the Laws of all Nations are careful that the Solemnities deviſed for obviating Fraud, be nicely obſerved: And if we have but few teſtamentary Solemnities, they ſhould be more exactly noticed. 2. If the Teſtator was not able to finiſh his Subſcription, without Aſſiſtance, he was *ſcribere neſciens ob Infirmitatem*: And therefore could only ſign by a Notary and Witneſſes ſpecially required. The officious leading his Hand in ſuch a Caſe, was a very criminal Impoſition, at leaſt muſt have the ſame Effect in Law to annul the Subſcription, as Supportation uſed to have for taking off the Alledgeance of *Liege Pouſtie*, by going to Kirk and Market, in Reductions *ex Capite Lecti*. 3. The imperfect Subſcription quarrelled, can't be thought ſo good, as Subſcription by initial Letters, which is perfect in its Kind: Seing in this Caſe, the Defunct's ſtopping before he finiſhed what was intended, might have happened through a Change of his Mind.

The Lords found the Reaſon of Reduction relevant, That the Teſtament was not ſubſcribed in the Terms of the Act of Parliament 1681, and finiſhed by the Deſunct himſelf without Aſſiſtance.

Eodem Die. *Mr.* Malcolm M‘gibben, *againſt the Managers of the Woollen Manufactory at* Newmills.

IN the Competition betwen Mr. *Malcolm M‘gibben,* and the Managers of the Woollen Manufactory at *Newmills,* for Sums due to Major General *M‘cartney* out of the Equivalent: *M‘gibben* founded on a Bill or Precept drawn by the Major General *Auguſt 6,* 1700, upon *James Ramſay* then Paymaſter of the Regiment of Footguards, *Ordering him to pay Thirty three Pound* Sterling *out of his Clearings of the Months of* July, Auguſt, September, October, November, *and* December 1698, *in full of his and Hautboies Dues from the ſaid Regiment, when received*; On which Bill Mr. *Ramſay* wrote, *Accepts when the Clearance comes to my Hand*; And 'twas intimated to the Commiſſioners of the Equivalent *June* 24, 1707. The Managers of the Manufactory at *Newmills,* (who had uſed Arreſtment in the Hands of the Commiſſioners, upon a regiſtred Bond granted to them by the ſaid Major General for 89 ℔. 18 ſh. 4 d. *Sterling*) claimed Preference to *M‘gibben*; in Reſpect their Debt was unexceptionable: Whereas his Precept was conditional, payable out of a certain Fund when received by Mr. *Ramſay,* and the Condition never being purified, could not be conſidered as an effectual Conveyance; albeit it is a good Inſtruction of the Debt againſt the Drawer. For the Order to pay out of the Clearance of ſuch Months, was intended to point out the Fund of the Creditor's Payment, and to free the Accepter from being liable to pay out of any other of the Drawer's Effects.

Anſwered for M‘gibben. The Precept doth conſtitute a pure and ſimple Debt againſt the Drawer, tho' there be a Condition adjected to the Accepter's Payment. 2. Its being payable out of a particular Fund, implies a virtual Aſſignation thereto. For albeit the Bill, in Order to *M‘gibben's* more Conveniency, was made payable by Mr. *Ramſay* when the Fund came to his Hand: Yet the Fund it ſelf, tho' never received by him, muſt ſtill be liable to that Debt. And the Bill intimated to the Commiſſioners of the Equivalent long before the Competitor's Arreſtment, carries Right to as much of the Clearance in their Hands, as will ſatisfie the ſame: Juſt as if the Major General had aſſigned it to *M‘gibben,* and for his better Payment ordered Mr. *Ramſay* to pay the ſame when received; And therefore *M‘gibben* ought to be preferred.

The Lords preferred *M‘gibben* the Creditor in the Bill.

July 15, 1710. John Barclay *againſt Mr.* David Barclay *of* Touch.

IN the Action at the Inſtance of *John Barclay* third Son of the ſecond Marriage to Mr. *David Barclay* of *Touch,* againſt Mr. *David Barclay* now of *Touch* as repreſenting Mr. *David* his Grandfather; for Payment of One thouſand two hundred Merks, as the Remainder of Four thouſand two hundred Merks contained in the Grandfather's Bond of Proviſion, in Favours of the Children procreated or to be procreated betwixt him and *Anna Hamilton* his ſecond Wife. The Grandfather having granted an heretable Bond for One thouſand Pound to each of *Robert* and *James Barclays,* two of his three Children of that Marriage and afterwards granted Bond for, and paid other Five hundred Merks to *Robert*

bert: The Lords found, That albeit *Debitor non Præſumitur Donare*, yet the Five hundred Merks was not to be imputed in Payment of any Part of the One thouſand two hundred Merks, and the Brocard took no Place in this Caſe. Becauſe, 1. The Bond for the Five hundred Merks bore, *In Reſpect of the One thouſand Pound formerly provided to* Robert *was liferented, and the Granter was willing to provide him to a Sum for his Education, he obliged himſelf, by and attour the ſaid One thouſand Pound, to give, content and pay to the ſaid* Robert, *the Sum of Five hundred Merks*; Which Narrative imported the ſaid Sum to be a meer Gratuity. 2. Old Mr. *David Barclay* not being Debtor to *Robert* at the granting of the Five hundred Merk Bond, there can be no Place for the Brocard, *Debitor non Præſumitur*, &c. And it's clear he was not Debtor, being under no Obligation to give him more than the One thouſand Pound already provided, which was more than his Share: And perhaps it may be ſaid he was under no Obligation to give *Robert* any Thing, having the Privilege to divide the Sum among the Bairns at his Pleaſure. Albeit it was alledged for the Defender, That *utcunque* his Grandfather ſhewed more Kindneſs to *Robert*, than to his other Children of the ſecond Marriage, by giving him the additional Proviſion of Five hundred Merks; it was never intended as a free Donation, not to be imputed in Payment of the capital Sum, wherein he ſtood bound to the Children of the Marriage.

July 18, 1710. Walter Gibſon *late Provoſt of* Glaſgow, *againſt* Mungo Cochran *Merchant there*.

IN the Compt and Reckoning at the Inſtance of *Walter Gibſon*, againſt *Mungo Cochran*, for his Intromiſſions with the Rents of the Purſuer's Lands, as Factor appointed by the Lords for the Behoof of his Creditors.

Alledged for the Defender. Tho' a Factor named by the Lords upon a ſequeſtred Eſtate, is holden to Compt to the Debtor's Creditors, conform to a Rental; and the Defender's Intromiſſion began by the Factory for their Behoof, yet he afterward got a Diſpoſition in Truſt from the Purſuer, by Virtue whereof he tranſacted all the Debts: And how ſoon theſe came in his Perſon, was no longer to be conſidered as the Creditors Factor, but as Truſtee to the common Debtor, who having intrometted promiſcuouſly himſelf, can put the Defender to anſwer only for his actual Intromiſſions.

Replyed for the Purſuer. *Mungo Cochran* being impowered by the Lords to uplift the Purſuer's Rents excluſive of all others, he was obliged to do exact Diligence, and to Compt for the ſame. His voluntary ſuffering the Purſuer to intromet, could not invert or alter the Nature of his Factory and Truſt, but operate only a perſonal Defence againſt the Intrometter, That he cannot ſeek twice Payment; And in ſo far as the Purſuer did not intromet, the Defender ſtands accomptable for exact Diligence: Becauſe only the Defender had a Title to intromet, or do Diligence for Payment; the Heretor of a ſequeſtred Eſtate being quite diveſted, and his Right not to be redintegrated by the Factor's Tolerance.

The Lords found the Defender liable to compt at a Rental, and not for his actual Intromiſſions only.

Eodem Die. Alexander Gibſon *of* Dury, *againſt* John Trotter *of* Mortounhall, *and the Executors of Mr.* Gilbert Clerk *of* Pitteuchar.

HElen *Trotter*, with Conſent of *John Foulis* Apothecary, having granted to the deceaſt *John Gibſon* of *Dury in Anno* 1669, a Diſpoſition of an old Appriſing of the Earl of *Hume*'s Eſtate, wherein the Granters excepted from the Warrandice, a Diſpoſition made by him to Mr. *George Trotter* of *Cheſterhall*, of the Lands appriſed, in ſo far as concerned, or might be extended to 3000 Merks; and alſo their Diſpoſition of theſe Lands to the Executors of Mr. *Gilbert Clerk* of *Pitteuchar*, in ſo far as might be extended to 4000 Merks: In a Reduction, Improbation and Declarator at the Inſtance of *Alexander Gibſon* now of *Dury*, as having Right to the Diſpoſition in Favours of *John Gibſon* his Predeceſſor, againſt *John Trotter* of *Mortounhall*, as repreſenting Mr. *George Trotter*, and the Executors of Mr. *Gilbert Clerk*; The Lords found the Defenders obliged to take a Day to produce the Diſpoſitions excepted in the Warrandice of that granted to the Purſuer's Author. Albeit it was alledged for the Defenders, That their Rights being acknowledged *in Gremio* of the Purſuer's, reſerved and excepted out of it, he cannot quarrel or reduce the ſame. In Reſpect it was anſwered for the Purſuer, That the Exception in the Warrandice of his Right, doth not make a Right to the Defenders, but only ſecure from Recourſe againſt the Granter. And ſo doth not hinder the Purſuer to quarrel and reduce the excepted Rights upon Nullities, or to declare the ſame to be ſatisfied and extinct by the Receiver's Intromiſſions with the Rents of the Subject diſponed.

Eodem Die. William Sinclair *of* Roſlin, *and* James Sinclair *one of the Clerks of the Bill-chamber his Tutor Supplicants.*

THe Lords in a Reduction at the Inſtance of *William Sinclair* and his Tutor, againſt *Andrew Wauchop* of *Niddery*, reduced an Aſſignation granted by the deceas'd *Alexander Sinclair* of *Roſlin* the Purſuer's Father, to the Defender of 12000 Merks, reſting to the Cedent by *George Lockhart* of *Carnwath*, and declared the ſame to belong to the Purſuer as the Cedent's neareſt Proteſtant Relation, in the Terms of the Act of Parliament for preventing the Growth of Popery, to whom he Ordained it to be given up to be cancelled: In Reſpect the Purſuer having offered to prove by the Defender's Oath, That the Aſſignation was granted to him in Truſt, to the Behoof of the Congregation *de propaganda Fide*, or ſome Popiſh Society; the Term was circumduced againſt him, and he was holden confeſt for refuſing to depone.

July 19, 1710. James Ramſay *and* Daniel Reid *his Aſſigny, againſt* David Spalding *of* Aſhintilly.

JOhn Steuart of *Clockfoldich* having inacted himſelf Cautioner for *Joſeph Watſon*, in the Suſpenſion of a Charge, againſt him at the Inſtance of *James Ramſay*; and the Charger having obtained a Decreet finding the Letters orderly proceeded, and diſcuſſed the Cautioner; he purſued *David Spalding* who had (before the late *Act* of *Sederunt* concerning Atteſters) atteſted his Sufficiency, and obliged him, his Heirs and Executors for the ſame.

Alledged for the Defender. He ought to be Aſſoilzied, becauſe the Cautioner was habite and repute Solvent at the Time of his Atteſtation, which imported no more; and did not oblige the Atteſters for the Cautioner's future and eventual Inſolvency. Seing Atteſters are taken for the Security of the Clerks of the Bills when doubtful of the Sufficiency of offered Cautioners, that they, if found liable in ſubſidiary Actions, may recur againſt the Atteſters for Relief. And as it would be a good Defence for theſe Clerks that the he Cautioner was held and reputed ſolvent when they received him : So he Atteſter can be no farther liable, *December* 17, 1667, *Paterſon* contra *Homes*.

Replyed for the Purſuer. The Lords repelled ſuch a Defence made for an ttefter, *December* 16, 1698, Sir *Donald Bayn* contra : But whatver a ſimple Atteſtation, which is the Caſe of the Deciſion 1667, might be nderſtood to import; Yet the Defender's atteſting the Sufficiency of *Clockoldich*, and obliging him and his for the ſame, muſt be underſtood *cum Efectu*, to make him liable *ſubſidiarie* for the Cautioner's real, and not putave Solvency, in the ſame Manner as the Cautioner was liable for the prinipal Debtor.

Duplyed for the Defender. Theſe Words in the Atteſtation *and I oblige me r the ſame*, are only exegetick of the former Part of the Sentence, *viz.* That he Cautioner was ſufficient at the Time. And the late *Act* of *Sederunt* roviding, That Atteſters in Time coming ſhould be liable as Cautioners, mplies, That theſe were not liable in that Manner before.

The Lords found the Defender's Atteſtation doth not oblige him for the ufficiency of the Cautioner ſimply, but only for his Sufficiency at the Time f the Atteſtation.

uly 20, 1710. William Aliſon *Merchant in* Dundee, *againſt* John Duncan *Merchant there.*

Ohn *Duncan* having granted a Bond to *Helen Straitoun* Daughter to *Robert Straitoun* Apothecary in *Dundee*, narrating, *That Mr.* Patrick Yeaman *ndweller there, her Uncle, had aſſigned to him certain Sums, under the expreſs Proviſion and Condition of his granting the Obligement under-written; And herefore binding and obliging him to pay to the ſaid* Helen Straitoun 1000 *lb. at the next Term after her Marriage; ſhe always acquainting him therewith, nd taking his Conſent thereto, if alive at the Time. Helen Straitoun* with Conſent of her Father, but without acquainting *John Duncan*, married *Robert Chryſtie*; who with her aſſigned to *William Aliſon John Duncan*'s Bond. *Duncan* being charged at the Inſtance of the Aſſigny, ſuſpended upon this Reaſon, That the Cedent having failed to acquaint the Suſpender of her Marriage, which is the Condition in the Bond, the Obligement is null.

Anſwered for the Charger. Not only is the Condition in the Bond, as *contra Libertatem Matrimonii*, to be held *pro non adjecta*; but alſo it is moſt odious and *contra bonos Mores*: In ſo far as it tends to make the Creditor depend more in the Election of a Husband upon Mr. *Duncan*, than upon her own Father whom Law preſumes to have the moſt tender Regard for her Welfare and Intereſt. 2. There being no Quality in Mr. *Patrick Yeaman*'s Aſſignation to Mr. *Duncan*, which was the onerous Cauſe of his granting the Bond, it was unwarrantable in him to clog his Bond with any ſuch Quality.

The Lords repelled the Reaſon of Suſpenſion.

Eodem Die. *Mr.* Alexander Brown *of* Thornydikes *elder*, *againſt* George Brown *his eldeſt*, *and* Alexander Brown *his ſecond Son.*

OLd *Thornydikes* having, after providing *George* his eldeſt Son in his Contract of Marriage to 100 lb. *Sterling* yearly during his own Lifetime, and to the Fie of the Lands of *Thornydikes*, diſponed the Lands of *Baſſindean* to *Alexander* his ſecond Son in his Contract of Marriage; whereby by the old Father denuded of all, and reduced to extream Want and Miſery thro' his exuberant Fondneſs to his Children, was neceſſitated to purſue a Proceſs of Aliment againſt them: Founding his Claim upon the Law of Nature and Nations, That obligeth Children to maintain their indigent Parents, tho' they got nothing from them; and much more obligeth the Defenders to allow *Beneficium Competentiæ* to their aged Father who diveſted himſelf of his All in their Favours, *L.* 5. §. 2. *ff. de agnoſcendis et alendis Liberis et Parentibus*, *L.* 1. *Eodem.*

The Defenders did not much controvert the Purſuer's Title to an Aliment; but each of them endeavoured to free himſelf of the Burden, by throwing it over upon the other.

Alledged for the eldeſt Son. He could be liable to no Part of his Father's Aliment, till the Lands of *Baſſindean* diſponed to the ſecond Son be firſt diſcuſs'd: Becauſe, when the eldeſt Son got the Lands of *Thornydikes* diſponed to him, his Father retained a Competency to ſubſiſt himſelf and his Family; And it was by his poſterior Diſpoſition to the ſecond Son, That he was reduced to Miſery and the Want of Bread; Which *Beneficium Ordinis* is agreeable to the Deciſion, *January* 7, 1682, *Hamilton* Fiar of *Ardrie* contra *Hamilton.*

Anſwered for Alexander Brown the ſecond Son. Both their Diſpoſitions from their Father are *in pari Caſu*, and upon a Level, except that the Subject diſponed to *Alexander* is ſcarce the Half of what the eldeſt Son got. The Pretence that the ſecond Son ſhould be diſcuſs'd before the eldeſt is altogether imaginary, and without any Foundation: Seing the Tie upon Children to aliment their Parents, is not founded ſo much upon poſitive Law as upon the Law of Nature, whereby there is no Order of Diſcuſſion among thoſe of the ſame Degree; who being equally near in Point of Relation, ar liable *pro rata* according to their Abilities and Circumſtances. And if any *Beneficium Ordinis* were competent, it would turn the Burden in the firſt Plac upon the Child that enjoys moſt of the Parents Means, and conſequentl upon the eldeſt Son in this Caſe, who has a double Portion. The Prattick betwixt the Fiar and Liferentrix of *Ardrie* is alien from the Purpoſe: Fo there the Liferentrix was aſſoilzied from alimenting the Heir; not only becauſe at the conſtituting her Liferent, there was a ſufficient ſeparate Eſtat to maintain him, but alſo becauſe he had no Blood-relation to her.

The Lords modified an Aliment of 50 lib. *Sterling* to the Purſuer, whereof 30 lib. ſhould be paid by the eldeſt Son, and 20 lib. by the ſecond.

Eodem Die. *The Magiſtrates and Town-council of* Paiſley, *againſt their Vaſſals.*

THe Burgh of *Paiſley*, and the Lands within its Territory being value in the Ceſs-books of the Shire of *Renfrew*, to 1077 lib. 6 ſh. 8 d And the Magiſtrates having been for many Years in Uſe to pay out of th Revenue of the Burgh the whole *Quota* of the publick Ceſs due for the Vaſſals Lands, as well as for the Town's Property: did at length raiſe a Proceſs againſt their Vaſſals, for Repetition of what had been formerly paid o their Account; and to have it found and declared, That they are liable i Time coming for a Proportion of the Ceſs effeiring to their Lands and Tenements.

Alledged for the Defenders. They ought to be aſſoilzied. Becauſe, 1. An Payments made by the Magiſtrates out of the Patrimony of the Burgh i which every Member of the Community has an Intereſt, were rational Acts o Adm

Adminiſtration: And the Stock of the Burgh could never be better applyed than for defraying the common Debt of the Burgh, and its Burgeſſes. 2. The Defenders have preſcribed an Immunity from Payment of any Part of the Ceſs, or relieving the Town thereof, and have ſo long poſſeſs'd their Properties paying a Feu-duty *pro omnialio Onere* conform to their Charters, *July* 22, 1634, *Forreſter* contra *Feuars* of *Bothkenner*: So that the Town have ſubjected themſelves to the Payment of the whole *Quota* of the Ceſs by their Uſe of Payment upwards of Fourty Years.

Replyed for the Purſuers. The Patrimony of the Burgh ought not to be applyed for defraying the private Debts of Heretors, or other Burgeſſes, but only for ſupporting the publick Exigencies of the Burgh, in Relation to the Magiſtracy, Juriſdiction and other general Concerns of the Community; as the Payment of Miniſter and School-maſter's Stipends, repairing the Streets and publick Works, *&c.* And the Magiſtrates, who are but Adminiſtrators, could not miſapply it to any other End. 2. Preſcription cannot be obtruded in this Caſe, Becauſe, 1. The Community who are in the Caſe of Minors cannot be prejudiced by the Adminiſtrators undue Application of the publick Mony in Favours of one Set of Burgeſſes, when all are alike concerned therein. 2. The Defenders cannot preſcribe a Right of Immunity from Ceſs againſt the Town their Superiors; partly, becauſe that Ceſs is of the Nature of an annual Preſtation, being impoſed from Year to Year; partly for that a Vaſſal cannot preſcribe Exemption from Payment of his Feu-duty, the Superiors Right being acknowledged *in Gremio* of the Vaſſals. And tho' the *Reddendo* of a Feu-duty *pro omni alio Onere*, may found the negative Preſcription as to all other Caſualities of Superiority: Yet Ceſs being no Caſuality but *Debitum Fundi* eſtabliſhed by publick Law upon all Lands not expreſly exempted; and the Superior's Payment of the Vaſſal's Proportion being *meræ Facultatis*, the Defenders can never preſcribe upon ſuch Uſe of Payment againſt the Community. Nor is the Deciſion betwixt *Forreſter* and the *Feuars* of *Bothkenner* to the Purpoſe; ſince no Argument can be drawn from Preſcription of Immunity from the Duties of an Office of Forreſtry, which are not exempted by Law from the general Rule of Preſcription, to the Preſcription of Immunity from a Land-ceſs, which was never thought to fall under the Negative Preſcription.

The Lords found the Defenders liable for Ceſs in Time coming, and remitted to the Ordinary to hear them upon their Exemption for Bygones.

Eodem Die. James Sclanders *Tenant in* Newtoun, *againſt* George Hill *Baillie in* Queensferry.

IN a Competition for Mails and Duties of *John Sands* his Lands in *Culroſs*, betwixt *James Sclanders*, and Baillie *George Hill* Adjudgers.

Alledged for Baillie Hill. Sclanders's Adjudication is null, in Regard it proceeds on an Aſſignation to a Bond of 200 lib. *Scots* (which in the Conſtruction of Law is a Writ of Importance) ſubſcribed only by two Notaries, and three Witneſſes contrary to the *Act* 80. *Par.* 1579, that requires Writs of Importance to be ſubſcribed by two Notaries, and four Witneſſes, if the Party cannot write.

Replyed for Sclanders. There is no poſitive Rule in Law determining what are Writs of Importance, but it is left *in Arbitrio Judicis*: And 200 lib. is not a Sum of great Import. 2. He is content to reſtrict his Adjudication to a Security for 100 lib. and to come in for that *pari Paſſu* with *Hill*, albeit his Adjudication be not within Year and Day of *Sclanders*'s: And in many Caſes the Lords ſuſtained Bonds and Legacies for Sums exceeding 100 lib.

tho wanting the Solemnities of Law, if reſtricted to that Sum, *December* 19, 1629, *Eliot* contra *Mortoun*; And nuncupative Teſtaments beyond 100 lib. are allowed to ſubſiſt for that Sum.

Duplyed for Baillie Hill. The Lords by their uniform Practice have determined Writs for Sums exceeding 100 lib. to be Writs of Importance; and often found ſuch to be *ſimpliciter null*, when diſconform to the Act 1579, *January* 31, 1623, *Fotheringham* and *Scrimzeor* contra *Watſon*, *November* 1623, *June* 21, 1681, *Couts* contra *Reid.* The Lords never ſuſtained unformal Obligements for the reſtricted Sum of 100 lib. except either when the greater Sum was payable at different Terms, which made it look like different Obligements; or when the Share of each of ſeveral Coobligants not bound jointly and ſeverally, was under 100 lib. or in the like circumſtantiate Caſes. But however hard it might be thought, to annul a Bond altogether in Favours of a covetous Debtor upon ſuch a Pretence; there is no ſuch Hardſhip by annulling *ſimpliciter* an unformal Aſſignation: Becauſe, the Debt ſtanding ſecure by the Bond, a Right thereto may be again made up, when this Aſſignation is out of Doors. Nay further, a Bond for a diviſible Sum may ſtand good for a Part, and be null as to the Reſt: Whereas the Creditor's Right by the Aſſignation, being *Jus individuum*, muſt be effectual for the whole Sum aſſigned, or not at all; And reſtricting the Aſſignation to a Part of the Sum, could not hinder the Cedent to renew it *quoad* the *Superplus*, or to do Diligence for it in his own Name. Albeit a nuncupative Teſtament for more than 100 lib. be ſuſtained for that Sum; no Argument can be drawn from thence in Favours of Conveyances *inter Vivos*: Becauſe, Law indulgeth many Defects in Teſtaments, that the laſt Will of dying Perſons may have Effect; As a Teſtator who cannot write is allowed to ſubſcribe by a Notary and two Witneſſes, *&c.*

The Lords ſuſtained the Aſſignation granted to *James Sclanders* with the Adjudication following thereon, in ſo far as extends to the Sum of 100 lib. with Annualrent thereof from the Date of the Decreet: And allowed both the Adjudgers to come *in pari Paſſu.*

July 21, 1710. *The Lord* Gray, *againſt Sir* William Hope.

IN the Reduction *ex Capite Inhibitionis* at the Inſtance of the Lord *Gra* againſt Sir *William Hope* mentioned *ſupra*, *July* 5, The Defender objecte farther againſt the Execution of the Inhibition, That it was null. Becauſe 1. It bears only, *That the Meſſenger affixed a Copy at the Market-croſs*, an not that he affixed and left a Copy there, which is the ordinary Stile o Executions: Leaving a Copy being as neceſſary a Solemnity in an Execution at the Market-croſs againſt the Lieges, as either three Oyeſſes, ope Proclamation and publick Reading, which are not ſo much noticed, or Delivery of a Copy to one perſonally apprehended, or Six audible Knocks i an Execution at one's Dwelling-houſe, *February* 12, 1670, *Napier* contr *Gordon* of *Grange*, *Stair Inſtit. Tit. Confiſcation* §. 4; Becauſe what is affixed is not neceſſarily left, it being ordinary for Meſſengers to cauſe tear o immediately what they affix. 2. The Execution is null for bearing only *And for the more Verification, I have ſubſcribed the ſame*, whereas it ſhoul have born, That I, and the ſaid Witneſſes have ſubſcribed. Seing as before the Act of Parliament 1686, an Execution was null that did not bea to have been ſtamped when *de Facto* the Stamp was affixed, *M'kenzie* Obſer. on the *Act* 87. *Par.* 6 *J.* 5 *July* 22, 1626, *Stewart* contra *Achanny* So this Execution, now when ſtamping is no longer neceſſary, is null fo that it mentions not that the Witneſſes, as well as the Meſſenger did ſub ſcribe. For nothing is preſumed to be done, ſave what the Officiar teſtifies that he has done, and is ſo aſcertained as Law requires.

Anſwered for the Purſuer. No Law requires expreſly to leave, but only to affix a Copy upon the Croſs. Beſides, affixing implies leaving, which is leſs: Seing whatever is affixed, is underſtood to be left, but *e contra* Copies may be left, that are not affixed. Tearing off the Copy *ex incontinenti* by the Meſſenger or his Aſſiſtants, being an unwarrantable Practice, is not to be preſumed: For *Nemo præſumitur malus*, and *omnia præſumuntur ſolenniter acta*, unleſs the Defender prove the contrary. Albeit ſome Executions bear, *That Copies were affixed and left*, that is but tautological Stile, the laſt being implied in the firſt. Nor can the Prattick betwixt *Napier* and *Gordon* advance the Defender's Purpoſe: Seing there the Execution did not bear that a Copy was either affixed or left; which is to be preſumed from the Inhibiter's not founding any Argument upon the Sufficiency of affixing a Copy to ſupport his Diligence. Again, where Solemnities are not introduced by Statute, but only by Cuſtom, Executions implying the ſame have been ſuſtained, *June* 21, 1681. *Lundie* contra *Trotter*. 2. The Objection againſt the Execution, that, tho' Witneſſes ſign it, it doth not bear them to have ſubſcribed, is of no Moment: For the Act 1681, that firſt introduced the Neceſſity of ſubſcribing Witneſſes, requires only that the Deeds mentioned in the Executions be done before Witneſſes ſubſcribing, and not that the Executions bear theſe to have ſubſcribed, which is but a Piece of late Stile uſed ſometimes ſince the Act 1681, or rather ſince the Statute 1686. Beſides, there was more Reaſon to annul an Execution for not bearing that it was Stamped, altho' *de Facto* the Meſſenger's Stamp was affixed; than to annul Executions ſubſcribed by Witneſſes, becauſe they do not bear that Witneſſes ſubſcribed: Seing a Meſſenger might put to his Stamp *ex poſt facto*, and it could not appear from the Regiſter, That Executions were Stamped, unleſs they mention affixing the Stamp; Whereas Witneſſes Subſcriptions to Executions are recorded, tho' Executions bear not that the Witneſſes ſubſcribed.

The Lords repelled both the Defender's Objections, and ſuſtained the Execution.

Eodem Die. William Henderſon *Merchant in* Edinburgh, *againſt* Janet Graham *Relict of* William Robertſon *Merchant there.*

IN the Suſpenſion raiſed by *Janet Graham*, of a Charge at the Inſtance of *William Henderſon*, againſt her upon her Bond, whereby ſhe, to redeem her Son *Andrew Robertſon* from Impriſonment for Debt at *Durham*, *obliged herſelf to preſent him at his Shop in* Edinburgh, *to the Charger his Creditor at a certain Day, without Suſpenſion, paſt Bill, or Siſt of Execution, or elſe to pay the Debt*: The Suſpender was found not to have implemented her Bond, by preſenting him at the Day, without any judicial Siſt of Execution given in his Favours by the Lords of Seſſion. In Reſpect the ſaid *Andrew Robertſon* defended himſelf from Incarceration, by producing an Atteſtation under the Hand of an Officer in the Lord *Carmichael*'s Regiment, that he was liſted as a Dragoon in that Regiment, which was a legal Siſt of Execution with a Witneſs, authorized by Act of Parliament. And it's the natural Import of a Bond of Preſentation, That the Debtor's Perſon be ſo preſented, as the Creditor be not hindred from committing him to Priſon thro' his, or the Preſenter's Fact, *July* 7, 1681. *Bolſten* contra *Scot*. Albeit it was alledged for *Janet Graham* the Suſpender, That her Obligement to preſent her Son without Siſt of Execution, could no more be underſtood counteracted by his Liſting himſelf a Soldier, which was no Fault; than if he had been made a Peer, which would have alſo ſtopped perſonal Diligence againſt him.

Eodem Die. *Lieutenant Colonel* John Erskin *of* Carnock, *againſt Sir* George Hamilton.

JAmes *Henderſon*, who in *Anno* 1633, appriſed the Lands of *Tulliallan* from Sir *John Blackadder*, was in the Year 1634, infeſt upon a Charter under the great Seal. In the 1637, this Appriſing was diſponed to Mr. *Robert Bruce* of *Broomhall*, who in the Year 1648, diſponed the ſame to *Edward* Earl of *Kincardin*, Sir *James Murray* of *Skirling*, *James Loch* of *Drylaw*, and Mr. *Henry Charters* proportionably and *pro rata*, excepting from the Warrandice, a Declaration made by the Diſponer in *Anno* 1642, *Declaring that* Henderſon's *Appriſing was conveyed to him for the joint Relief of himſelf*, George Bruce, *and* John Rhind, *of their Cautionry for* Patrick Wood, *and alſo to the Behoof of* James Loch *and* Thomas Charters *for their Intereſt and proportionable Relief of a Bargain of Salt betwixt the Laird of* Tulliallan *and them, and other Sums due by him to them.* In the Year 1670, Sir *John Henderſon* of *Fordel*, as Heir to *James Henderſon* Leader of the Appriſing, with Conſent of Sir *Alexander Bruce* of *Broomhall*, as Heir to Mr. *Robert Bruce* his Father, granted a Diſpoſition, narrating the Diſpoſition 1637, in Favours of Mr. *Robert*, and diſponing the Appriſing to *Alexander* Earl of *Kincardin*, in Reſpect no Reſignation was made, nor Infeſtment expede in Favours of Mr. *Robert Bruce*. Upon this Diſpoſition (from the Warrandice whereof the Diſpoſition 1637 is excepted) the Earl was infeſt: And Colonel *Erskin* having Right thereto as Purchaſer of the Eſtate of *Kincardin*, pleaded Preference thereupon, to all Rights of the Lands of *Tulliallan* conveyed to Sir *George Hamilton*.

Anſwered for Sir George Hamilton. Henderſon's Appriſing cannot be objected to him, in Regard it was diſponed within the Legal, to Mr. *Robert Bruce*, for the Behoof of *Patrick Wood*, *Thomas Charters*, and *James Loch* Sir *George*'s Authors, who had the Right of Reverſion, and conſequently became extinct in the Perſon of their Truſtee, ſo as it could not afterwards be tranſmitted by the Appriſer's Heir to any other Perſon: As was found concerning *Duncan Lindſay*'s Appriſing *February* 8, 1709, *ſupra* in this ſame Cauſe. For Appriſings within the Legal are moſt eaſily extinguiſhed by Payment, Intromiſſion with the Rents of the Lands appriſed, or any other Way of ſatisfying the Debt, without Neceſſity of formal Reſignation, or Renunciation: And a Diſpoſition to the Reverſers or their Truſtee, was equivalent to a Diſcharge of the Debt, which, without Regiſtration, would undoubtedly extinguiſh the Appriſing.

Replyed for Colonel Erskin. 1. Appriſings before completing by Infeſtment, may indeed be qualified by the Appriſer's Bonds or Declarations granted within the Legal: But after Infeſtment hath followed, they cannot be taken away by any ſuch perſonal Deeds; Eſpecially when latent and never regiſtred or publiſhed any Manner of Way within the Legal, *July* 6, 1661, *Telfer* contra *Maxtoun*, *July* 31, 1666, *Southesk* contra *Huntley*. Beſides, there is a Difference betwixt the Debtor's acquiring Right to an Appriſing, and the doing of it by a ſecond Appriſer or other Reverſer: Seing it extinguiſheth by Confuſion in the Perſon of the former, and not in the Perſon of the latter. Nay, my Lord *Dirletoun Doubts*, if even by the Debtor's purchaſing an Appriſing, it would be extinguiſhed in Prejudice of a ſingular Succeſſor, without a Reſignation and Re-conveyance, as in other Infeſtments. Nor is the Speciality that Appriſings are extinguiſhable by Intromiſſion with Mails and Duties, introduced by the Act 6. *Par.* 1621, to be extended, at leaſt not to ſuch diſſimilar Caſes as ours: For, upliſting Mails and Duties is a publick Deed, which Men cannot be ſo ignorant of as private Deeds, and unregiſtred Renunciations. 2. Tho a Perſon having Right to the Reverſion of an Appriſing, could extinguiſh it by a latent Diſcharge or Renunciation; yet by taking a Diſpoſition, which of its own Nature is a Conveyance, he declares that his Deſign is not to extinguiſh the Appriſing, but to have it ſubſiſt: And if ſuch a Diſpoſition ſhould have an extinguiſhing Effect, it were impoſſible for a ſecond Appriſer, to get an effectual Right to a firſt Appriſing for his own Security. In *Duncan Lindſay*'s Caſe, *Patrick Wood* the Reverſer ſignified his Deſign to extinguiſh the Appriſing by regiſtrating the Diſpoſition in the Regiſter of Reverſions: Whereas Mr. *Robert Bruce* by his taking a Diſpoſition, and not a Renunciation, and in ſtead of recording it in the Regiſter of Reverſions, tranſmitting it to others, hath demonſtrated, that he had no Deſign to extinguiſh the Appriſing. 3. *Henderſon*'s Appriſing came not in the Perſon of the Reverſer's during the Legal, by being diſponed to Mr. *Robert Bruce* for their Behoof: For that is not proved by the Diſpoſition 1648; And no Reſpect can be had to the Exception therein of the Declaration 1642: Since *non creditur Referenti, niſi conſtet de Relato*, and that Declaration is not produced. Again, tho' it were produced, yet being granted after the Legal, and kept latent till after the Earl of *Kincardin* the Colonel's Author acquired Right, his expired Appriſing cannot be affected or qualified therewith: For Lands cannot be conveyed by Declarations, but only by Charter and Seaſin. 4. *Eſto* That Mr. *Robert Bruce* had been Reverſer, and that the Diſpoſition made to him could have extinguiſhed the Appriſing; yet ſtill he could paſs from it as well as from an Order of Redemption, had he uſed one: And *ita eſt*, that he paſſed from it by his conſenting to the Diſpoſition made by *Henderſon*'s Heir in *Anno* 1670, to the Earl of *Kincardin*, which revived the Appriſing.

Duplyed for Sir George Hamilton. It doth not alter the Caſe, that Mr. *Robert Bruce*'s Declaration of the Truſt was long after expiring of the Legal: Becauſe, the Diſpoſition in Favours of Mr. *Robert*, being never completed by Infeftment, might ſtill be qualified by Declarations and Back-bonds, as he might be abſolutely denuded by a ſimple Diſpoſition of his perſonal Right. And all being long prior to the Right acquired by the Earl from the Appriſer's Heir, there was no *medium Impedimentum* to hinder Mr. *Robert Bruce* to qualifie his own Right, by declaring it to have been a Truſt in his Perſon *ab Initio*. Mr. *Robert*, who was Truſtee to Sir *George*'s Authors, could not paſs from the Extinction of the Appriſing, by the Diſpoſition to him in that Quality, by his conſenting to the Deed of *Henderſon*'s Heir in Favours of the Earl. 2. Whatever might be pretended by any third Party acquiring *bona Fide* for onerous Cauſes from the Appriſer's Heir, without any Relation to the prior Diſpoſition made to Mr. *Robert Bruce*; yet the Diſpoſition 1670, by *Henderſon*'s Heir to the Earl, narrating the anterior Diſpoſition to Mr. *Robert*, and that it was granted for making the ſame effectual to the Earl, is to be underſtood affected with the Burden of Mr. *Robert*'s Right, with whom the Heir was made to concur only for the more Security: And Mr. *Robert* being fully denuded of his Right which was but perſonal, by the Diſpoſition 1648, the Diſpoſition 1670, to Earl *Alexander*, was clearly *a non habente Poteſtatem*, and therefore can have no Effect.

Triplyed for the Purſuer. Perinde eſt to the Colonel, as deriving Right from the Earl, whether Mr. *Robert Bruce*'s Declaration of Truſt was before or after the Earl's Right, ſince it never came to Light till after his Purchaſe: And if he hath counter-acted his Truſt, thoſe concerned may purſue his Repreſentatives as accords. The mentioning Mr. *Robert*'s Right in the Diſpoſition to the Earl, and excepting it out of the Warrandice, import not that the Earl's Right is with the Burden of that: For Mr. *Robert*'s Right is narrated as a

Thing that never took Effect; and excepted from the Warrandice, to free *Henderſon*'s Heir from the Penalty of granting double Rights, and from the Earl's Recourſe againſt him upon the Warrandice, in Caſe he were excluded by Mr. *Bruce*'s Right. Beſides, the Diſpoſition 1648, is not mentioned in the Earl's Right. It can't be pretended, That becauſe the Diſpoſition to Mr. *Robert Bruce* was but a perſonal Right, his Conveyance in *Anno* 1648, did ſo denude him, as he could not effectually make a ſecond in Favours of the Earl: For tho' the Granter of a ſecond Right is liable in Warrandice to the Receiver of the firſt, the ſecond is always preferable, if firſt completed; As a ſecond Aſſignation to a perſonal Bond firſt intimated, will be preferred to the firſt. And as my Lord *Stair Inſtit. Tit. Diſpoſitions*, obſerves, If one not infeſt, diſpone to two Perſons, the Obtainer of the laſt Diſpoſition will be preferred, if the Diſponer's Right be completed by his Diligence. Beſides, the Colonel founds not on the Diſpoſition 1670, as flowing principally from Mr. *Robert Bruce*, but as a valid Right granted by the Heir or *Henderſon* who was infeſt, and the only Perſon from whom a real Right could be tranſmitted.

The Lords ſuſtained the Diſpoſition of *Henderſon*'s Appriſing to the Earl of *Kincardin* in *Anno* 1670, notwithſtanding of the Declaration in the 1642, and the Diſpoſition in the Year 1648, And therefore preferred Colonel *Erskin's* Right derived from the Earl, to that founded on by Sir *George Hamilton*.

Eodem Die. Robert Johnſton *of* Keltoun *and other Creditors of the deceaſt* Alexander Maxwell *of* Tarrauchtie, *againſt* John Maxwell *eldeſt Son to the ſaid* Alexander *and* John Maxwell *of* Breckenſide.

IN the Competition for Mails and Duties of the Lands of *Tarraughtie*, betwixt *Alexander Maxwell*'s Creditors, and *John Maxwell* his eldeſt Son: The Lords found an Adjudication led in the Name of *John Maxwell* of *Breckenſide* a Papiſt, upon a gratuitous Bond granted by the ſaid *John Maxwell* to him, null by the *Act* 3. *Par.* 1700, for preventing the Growth of Popery. Albeit the ſaid Adjudication was led for the Behoof of the Granter of the Bond, who is a Proteſtant. And it was alledged for him, That it was not the Meaning of the Statute to prejudice Proteſtants, or to hinder them to imploy Papiſts as their Truſtees, except allennerly in the Education of Youth, and the Management of their Affairs: Whereas the Granter of the Bond was Major, and ſo not to be ſuppoſed that he could be ſeduced by the Influence or Converſe of his Popiſh Truſtees.

July 25, 1710. Jean Chalmers *Relict of* David Lyon *of* Banchrie, *againſt his Creditors.*

J*Ean Chalmers* Heireſs of the South-part of the Lands of Weſter *Banchrie*, and the Mill thereof, yielding ſeven Chalders of yearly Rent, ſome Months after her marrying *David Lyon*, without any Contract, when ſhe was about 15 Years of Age, entred with him into a Contract, whereby ſhe diſponed her Heretage in Favours of him and her in Conjunct-fie and Liferent, and the Heirs and Bairns to be procreated betwixt them in Fie; and he obliged himſelf to provide 6000 Merks of his own Mony with the Conqueſt during the Marriage, to him and her, and the longeſt Liver in Conjunct-fie and Liferent, and the Heirs and Bairns of the Marriage in Fie; providing that if *David Lyon* happened to die before *Jean Chalmers* without Children, ſhe ſhould not only Liferent the 6000 Merks and her own Heretage, but have Power to diſpoſe of 4 of the ſaid 6000 Merks; but in Caſe of her ſurviving him with Bairns of the Marriage, ſhe reſtricted her ſelf to the Liferent of the 6000 Merks, and the Conqueſt, and if *David Lyon* happened to outlive her without Children of the Marriage, ſhe had Power to diſpoſe of her own Heretage, without Prejudice to his Courteſie. *David Lyon* having died *obæratus* before his Wife, leaving Children of the Marriage, ſhe, to hinder his Creditors from carrying away her Fortune, raiſed Reduction of the Contract of Marriage upon, 1. The Ground of Minority and Leſion, ſeing the Husband could not authorize his Wife *in Rem ſuam*. 2. As being *Donatio inter Virum & Uxorem*.

Anſwered for David Lyon's Creditors. 1. As Minors can marry without Conſent of Curators; ſo they can enter into Contracts in Contemplation of Marriage, and the Purſuer cannot be allowed to reduce upon Minority and Leſion, becauſe, ſhe did not revoke *intra Annos utiles*. 2. The Diſpoſition by the Wife is not a revocable Donation: Becauſe, there being no prior Contract of Marriage, it was for an onerous Cauſe, *November* 24, 1664, *M'gill* contra *Ruthven* of *Gairn*. There was no Leſion, the Terms of the Contract being equal and rational as Matters ſtood at the Time: And no ſupervening Alteration in the Husband's Circumſtances, which diſappointed the Wife's Expectation by the Settlement can be a Ground of Reſtitution.

Replyed for the Purſuer. 1. She was certainly leſed, in not only quitting the Fie of her Eſtate, but alſo in excluding her ſelf from the very Liferent thereof, for an uncertain Proviſion ſecured only by the Husband's perſonal Obligement, which is come to nothing. Beſides, the Condition that ſhe ſhould liferent her own and her Husband's Means, and have ſome Power of Diſpoſal, is of no Weight; ſeing it depended upon an uncertain Event, neither to be preſumed nor deſired, *viz*. The Nonexiſtence of Children, which are the chief End of Marriage. And there are not wanting Deciſions where the Lords have reduced ſuch Contracts of Marriage: Witneſs that betwixt *Caſtlehill* and his Lady, who was afterwards married to *Mauldſley*; and that betwixt *Alexander Reid* and *Anna Byers*. As to the Prattick *M'gill* contra *Ruthven*, the Leſion there did not appear ſo conſiderable, the Wife being provided to a competent effectual Liferent. Beſides, it makes againſt the Defenders, for the Lords reſtored to her the Liferent of certain Sums aſſigned by her without reſerving her own Liferent. 2. The Purſuer's not revoking, and raiſing Reduction *intra Annos utiles*, can be no Reaſon to exclude her Pretenſions: Becauſe ſhe timeouſly after Diſſolution of the Marriage revoked and raiſed Reduction of the Deed; and ſhe was not *valens agere* during the Marriage, being then as a Minor *ſub Cura & Reverentia maritali*.

The Lords ſuſtained the Reaſon of Reduction founded on enorm Leſion, to repone the Purſuer to the Liferent of her own Heretage diſponed by the Contract: But repelled the Alledgeance of *Donatio inter Virum & Uxorem*.

Eodem Die. *Mr*. Simeon Mackenzie *of* Allangrange, *againſt* Donald Mackenzie *of* Kilcowie.

UPon a Submiſſion made by *Alexander Mackenzie* of *Kilcowie* Heretor of the Barony of *Allans*, the *Bog* of *Drummure* being decerned by a Decreet Arbitral *in Anno* 1677 to be a Part of theſe Lands; and he having in the Year 1678 diſponed to Mr. *Roderick Mackenzie* Advocate the Barony of *Allans* with the Pertinents, and delivered to him the Writs and Evidents upon Inventory, comprehending the Decreet Arbitral: Mr. *Simeon Mackenzie*, who derives Right to the Barony of *Allans* by Progreſs from Mr. *Roderick*, purſued a Declarator of Property and Moleſtation, againſt *Donald Mackenzie* Grand-child and Heir to the ſaid *Alexander Mackenzie*, and his Tutor, for declaring that the *Bog* of *Drummure* belongs to the Purſuer, and that he, his Tenants and Servants ought not to be moleſted in the Poſſeſſion thereof.

Alledged for the Defender. He is content to debate with the Purſuer, if he will reſtrict his Libel to a Moleſtation. But he ought to be aſſoilzied from the Concluſion of Declarator of Property: Becauſe, his Grand-father died in the Poſſeſſion of the *Bog* in Controverſie, and himſelf is Minor, *qui non tenetur placitare ſuper Hæreditate paterna.*

Replyed for the Purſuer. His Declarator of Property not being founded on his ancient Rights and Evidents, but upon the poſitive Deed of the Defender's Predeceſſor, *viz.* His Submiſſion and the Decreet Arbitral following thereon, aſſigned and delivered by him, with the Diſpoſition of the Barony of *Allans* to the Purſuer's Author, whereby he the Defender's Predeceſſor was abſolutely and as fully denuded, as if by a liquid Obligement under his Hand he had obliged himſelf to diſpone the ſaid *Bog*; or had acknowledged it to be Part and Pertinent of *Allans*: The Defender can pretend to no Privilege of Exemption from anſwering to both the Concluſions of the Purſuer's Libel.

The Lords found, That the Brocard *Minor non tenetur placitare* takes no Place in the preſent Caſe: and therefore repelled the Defence.

Eodem Die. William Roſs *of* Aldy, *againſt* Charles Roſs *of* Ey.

C*Harles Roſs* having granted to *William Roſs* a proper Wadſet of the Lands of *Littleallan*, whereupon he was infeſt and got Poſſeſſion, and ſome Years thereafter ſet them in Tack to the Granter of the Wadſet: After expiring whereof he uſed Requiſition, and thereupon charged the Reverſer to pay the Sum in the Wadſet. He the Reverſer made Offer of the Mony under Form of Inſtrument, and conſigned it: But *William Roſs* chuſing rather to retain the Wadſet than to accept of his Mony, purſued *Charles Roſs* to remove from the Lands of *Littleallan*.

Alledged for the Defender. He could not be decerned to remove, in Reſpect that upon the Wadſetter's Requiſition and Charge he had offered and conſigned his Mony, which Conſignation, being equivalent to Payment, extinguiſhed the Wadſet Right.

Replyed for the Purſuer. The Requiſition and Charge could not hinder him to proſecute his removing, ſince he paſt from his Requiſition: As a Reverſer premoniſhing the Wadſetter to take his Mony may, after conſigning the ſame, take it up again before Declarator of Redemption, or the Wadſetter's Acceptance. Eſpecially conſidering, That it is provided in the Contract of Wadſe that no perſonal Diligence ſhould prejudice or looſe the real Right; and th Reverſer hath uſed no Premonition, nor raiſed a Declarator of Redemption.

Duplyed for the Defender. The Clauſe in the Wadſet, That uſing perſona Diligence ſhould not looſe the real Security, imports only, That the rea Right ſhould ſubſiſt till Payment were made, notwithſtanding of perſona Diligence: But it cannot ſubſiſt after the Defender's Conſignation, which i equivalent to Payment. Nor needed the Defender to uſe any Premonition when he was diſtreſſed and charged by the Purſuer, who cannot now pa from his Requiſition and Diligence, when *Res non eſt integra.* There is a grea Difference between a Reverſer's premoniſhing the Wadſetter to take hi Mony, and thereafter paſſing from the Requiſition, and a Wadſetter's reſilin after his uſing Premonition, and charging for Payment: For a Wadſetter hat no Prejudice by the Reverſer's paſſing from his Requiſition; whereas it wer highly prejudicial to the Reverſer, if after he hath raiſed Mony to ſatisfy th Wadſetter's Requiſition and Charge, he ſhould be forced to keep it dead i his Hand, and ſuffer the Wadſetter to enjoy the Rents of his Eſtate.

Th

The Lords ſuſtained the Defence, That *Charles Roſs* could not be decerned to remove after his Conſignation of the Sums in the Wadſet, upon the Purſuer's Requiſition and Charge. *Vid. November* 14, 1710, *inter eoſdem.*

Eodem Die. James Murray *Merchant in* Edinburgh, *againſt Sir* Robert Blackwood *Merchant there.*

IN the Competition betwixt *James Murray*, who had adjudged the deceas'd *Patrick Murray* of *Livingſtoun* his Share of the capital Stock of the *African* Company, due out of the Equivalent, and Sir *Robert Blackwood*, who, as Executor Creditor to *Patrick Murray*, had confirmed the ſame: The Lords ſuſtained Sir *Robert*'s Confirmation and preferred him. Albeit it was alledged for Mr. *Murray*, That every Part of the joint Stock of the *African* Company was originally heretable; being eſtabliſhed by Charter and Infeſtment held of the Crown of *Scotland*, for Payment of a Hogſhead of Tobacco, and deſtined not to be uplifted nor tranſmitted to new Proprietars but according to the Rules of the Company: And therefore no ſupervening Change by Diſſolution of the Company, did alter the Intereſt of Heir or Executor, or Creditors adjudging or confirming; tho' it might render the Subject arreſtable or moveable.

July 27, 1710. Margaret Hay *and* William Caruthers *Merchant in* Edinburgh *her Husband, againſt Doctor* John Hay *her Father.*

DOctor *John Hay* having in his Contract of Marriage with his firſt Wife, in Caſe there ſhould be but one Daughter of the Marriage, and he ſhould have a Son of any ſubſequent Marriage to debar her from ſucceeding to 20000 Merks provided to the Doctor by the deceas'd Sir *John Nisbet* of *Dirletoun*, obliged himſelf to pay to that Daughter 4000 Merks at her Marriage or Majority, and other 4000 Merks after his Deceaſe, with Annualrent from the reſpective Terms: *Margaret Hay* only Child of that Marriage, with the Concurrence of her Husband, purſued her Father (who was married a ſecond Time but had no Son) for Payment of the firſt 4000 Merks. Who alledged that the ſame being only payable *ſub Conditione*, in Caſe he ſhall have a Son to exclude his Daughter from *Dirletoun*'s Mony; Payment cannot be ſought till the Condition exiſt, by his having a Son, as is obſerved by *Dirletoun*, *Deciſ.* 172, *Ramſay* contra *Carſtairs*.

Replyed for the Purſuers. Had it been the Meaning of Parties, that the Daughter ſhould claim nothing from her Father, till it appeared whether he would have a Son ſurviving him, the whole 8000 Merks ſhould have been payable only at his Death: Whereas the making her Marriage or Majority the Term of Payment of 4000 Merks, and ſuſpending the Payment of the other 4000 Merks till the Defender's Death, clearly entitle the Daughter to exact 4000 Merks preſently, ſeing ſhe is both Major and married. The Deciſion betwixt *Ramſay* and *Carſtairs* doth not meet the preſent Caſe; Becauſe there the whole 20000 Pound was payable to Heirs-female at one Term, *viz.* Their Age of Fifteen in Caſe they were excluded by Heirs-male of the ſame Marriage; and both the Parents were alive at the Time of the Purſuit at the Inſtance of a Daughter, ſo that there was then a Poſſibility not only of Heirs-male who would have excluded her, but alſo of more Daughters who would have diminiſhed her Claim.

Duplyed for the Defender. Altho' the Term of Payment of the firſt Moiety be come, it remains ſuſpended till the Condition exiſt, which is adjected to the

Obligement it ſelf: And the Daughter's Marriage or Majority was only made the Term of Payment, that Annualrent might be due from that Time if the Condition ſhall thereafter be purified. At leaſt, the Defender cannot be obliged to pay the firſt 4000 Merks preſently, unleſs the Purſuers find Caution to reſtore the ſame in Caſe they ſucceed to *Dirletoun*'s Mony.

The Lords found the 4000 Merks due to *Margaret Hay*, with Annualrent thereof ſince her Marriage, and decerned the Defender to make Payment thereof at the Term of *Martinmas* next, upon the Purſuer's finding Caution to reſtore it in Caſe ſhe ſucceed to *Dirletoun*'s Mony.

Eodem Die. John Vere Kennedy *Supplicant, againſt* John Stuart *Writer to the Signet.*

UPon a Complaint at the Inſtance of *John Vere Kennedy*, againſt *John Stuart*, for raiſing Letters of Horning againſt the Complainer, upon an Act of the General Convention of the Royal Burrows, appointing him to pay 500 Pound to Mr. *Alexander Clark* and *John Fraſer*, as a Part of the Damage they ſuſtained thro' their being unjuſtly incarcerated and detained Priſoners at *Camp-vere*, to which the Complainer was acceſſory: The Lords found the raiſing of the Horning warrantable. In Reſpect it was anſwered for Mr. *Stuart*, That the *Act* 6. *Parl.* 19. *Ja.* 6. allows to raiſe Horning upon Acts of the Burrows. And it doth not alter the Caſe, that the Act appoints the Complainer to pay, and doth not decern him to pay: For moſt of the Acts of the Burrows run in that Strain, and an Appointment to pay, is the ſame with a Decerniture.

Eodem Die. John Lamb *Dier in* Edinburgh *Supplicant, againſt* James Cleland *Meſſenger, and* Thomas Gibſon *Apothecary there.*

JOhn Lamb having complained upon *James Cleland* and *Thomas Gibſon*, for Contempt of the Lords Authority, by incarcerating the Complainer, upon a Caption againſt him at the Inſtance of *Thomas Gibſon*, after Intimation of a Siſt upon a Bill of Suſpenſion: The Lords found the Incarceration unwarrantable: And therefore aſſoilzied the Complainer from Expences to *Gibſon* the Creditor. Notwithſtanding that he the Complainer was in the Meſſenger's Hands before the Siſt was either procured or intimated: And it was alledged in Anſwer to the Complaint, That a Meſſenger's touching one and keeping him Priſoner in his Hands, has all the legal Effects of actual Impriſonment; In ſo far as ſuch a Priſoner could not be effectually releaſed upon a Suſpenſion, without a Charge to ſet at Liberty; more than one could be ſet out of Priſon without ſuch a Charge. Whence it is, That Siſts upon Bills of Suſpenſion run ordinarly thus, Siſts Execution, *&c.* unleſs the Party be in the *Meſſenger's* Hands. But tho' the Commitment of *John Lamb* to Priſon, after Intimation of the Siſt of Execution, was not warrantable: The Lords found the Meſſenger, or his Imployer, not liable to pay any Expences to him upon the Account of his Incarceration, in Reſpect they had a probable Ground for thei Miſtake.

Eodem Die. Thomas Main *Merchant in* Linlithgow, *againſt* James Maxwell *Merchant in* Glaſgow *and Partners.*

THomas Main Creditor to *Robert Simpſon* Merchant in *Stirling*, having arreſted in the Hands of *Robert Falconer* Clerk to the Weigh-houſe of *Glaſgow*,

Glaſgow, and in the Hands of the Tackſmen thereof, Ten Hogſheads of Tobacco lying in the ſaid Weigh-houſe, as belonging to *Robert Simpſon*, to whoſe Wife it was ſold and weighed over by *James Maxwell* and Partners in her Sight, and purſued a Forthcoming.

Alledged for James Maxwell. The Parcel of Tobacco could not be made forthcoming to the Purſuer: Becauſe, The Property thereof was never tranſferred to *Robert Simpſon*; the Sale being incomplete till the Price be paid, or *Fides habita de Pretio*, either expreſly, or tacitly by actual Delivery of the Goods.

Replyed for the Purſuer. The Property of the Tobacco was fully tranſmitted to *Robert Simpſon*, by the Seller's weighing over the ſame to his Wife in the publick Weigh-houſe: Eſpecially conſidering, That the Casks were marked with *R. S.* the initial Letters of *Robert Simpſon*'s Name. For a Contract of Sale is perfected *ſolo Conſenſu*: And our Law allows no Hypotheck to the Seller, for the Price of the Goods ſold.

The Lords found, That a Declaration of the Weigh-houſe Clerk of *Glaſgow*, bearing that *James Maxwell* had weighed over to *Robert Simpſon*'s Wife Ten Hogſheads of Tobacco, weighing 4500 Pound Weight, marked *R. S.* did tranſmit the Property to *Simpſon*; and that therefore it ought to be made forthcoming to *Thomas Main* his Creditor Arreſter.

Eodem Die. *Colonel* John Erskin *of* Carnock *Supplicant*.

THE Lords upon a Petition given in by Colonel *John Erskin*, craving a Warrant to the Clerks to regiſter a Bond of Preſentation, granted to him by *John Anderſon* Sheriff Clerk Depute of *Aberdeen*, and *Alexander Charles* Procurator there, found, That the Bond could only be regiſtred in Order to Conſervation, and not in Order to Diligence, in Reſpect it bore only Conſtitute our Procurators.

Eodem Die.

THE Lords ordered the Names of the Advocates and Writers for the Poor to be inſert in all Remits to them upon Bills for *gratis* Warrants.

July 29, 1710. Alexander Baillie *of* Caſtlecarie, *againſt* William Brown *of* Seabegs.

ALexander Baillie *of* *Caſtlecarie*, who is Vaſſal to *William Brown* of *Seabegs*, having within a Year after his Father's Deceaſe, ſerved Heir to him, and charged *Seabegs* by a firſt and ſecond Precept out of the Chancery to enter and infeſt him, upon a Charter preſented with the bygone Feu-duties, and a Bond to do what further ſhould be found needful: *Seabegs* ſuſpended after the laſt Requiſition upon this Ground, That the Offer of the Feu-duties was not ſufficient, in Reſpect he had raiſed a Declarator of Nonentry, which entitled him to the full Rent of the Charger's Lands ſince the Citation, and till that was paid, the Suſpender was not bound to enter him Vaſſal.

Anſwered for the Charger. His Superior could have no Right to the full Rent, ſince the Citation in the Declarator of Nonentry: Becauſe, the Summons was raiſed within the *Annus deliberandi*.

Replyed for the Suſpender. His Vaſſal was cited within the Year, but the Day of Compearance was after elapſing thereof, which is ſufficient, *June* 26, 1667, *Dewar* contra *Paterſon.* As albeit the Act of Parliament diſchargeth Summons to proceed upon Charges to enter Heir until after elapſing of Fourty Days, yet uniform Practice ſuſtains the raiſing and executing Charges to enter Heir, and Summons thereon *ſimul & ſemel*, when both the Fourty Days and the Days of the Summons are ſuffered to expire before calling of the Summons.

Duplyed for the Charger. If a Superior might compel his Vaſſal to enter within the Year under the Pain of a Year's Rent, he the Vaſſal would thereby have no Benefit by the *Annus deliberandi*; but behoved to ſubject himſelf raſhly to his Predeceſſor's Debts, to ſatisfie the unreaſonable Deſire of his rigorous Superior. The Prattick cited for *Seabegs* makes againſt him: For there, the Lords found no Proceſs till a new Citation; in Reſpect the former was given within the Year.

The Lords repelled the Reaſon of Suſpenſion, and found the Letters orderly proceeded.

Eodem Die. James Fairholm *Merchant in* Edinburgh, *againſt* Kenneth Mackenzie *of* Aſſint.

PRoceſs was ſuſtained upon a Summons at the Inſtance of *James Fairholm*, againſt *Kenneth Mackenzie*, as repreſenting Mr. *John Mackenzie* of *Aſſint* his Father, for Payment of One thouſand Merks, with Annualrent and Penalty, for which Mr. *John* ſtood ingaged to the Purſuer, as Cautioner for the Lord *Duffus*. Albeit the Defender was Minor, and Mr. *Alexander Mackenzie*, Colonel in His Majeſties Footguards, his ſole Tutor was in *Spain*, and not cited upon Sixty and Fifteen Days, as one out of the Kingdom; nor yet edictally at the Market Croſs of *Dornock* in *Sutherland*, where the Minor's Lands ly; and the Summons was inrolled only againſt *Kenneth Mackenzie*, tho' his Tutors were concluded againſt in the Libel. In Reſpect *Kenneth Mackenzie* was perſonally cited in Doctor *Mackenzie*'s Houſe at *Fortroſe*, where he reſides at the School; And his Tutors and Curators in general, were cited edictally at the Market Croſs of the Head Burgh where the Minor dwells. And it was needleſs to inrol againſt Tutors, who are only called edictally *pro Intereſſe*, and not concluded againſt in the Libel *Nominatim*, but only as Tutors in general *ex Stilo*.

November 8, 1710. Walter Monteith *Merchant in* London, *and* William Cuningham *Writer in* Edinburgh *his Factor*, *againſt Captain* Andrew Douglaſs *and* John Cuningham *of* Ballindalloch *his Factor*.

CAptain *Andrew Douglaſs* having aſſigned to Mr. *Alexander Leckie* of *Daſhers*, a Bond granted to him by Sir *Alexander Kennedy* of *Colzean* and *John Kennedy* his Son, for Five hundred Pound *Sterling*, upon Mr. *Leckie*'s granting to the Captain a Backbond; declaring the Aſſignation to be in Truſt, except as to One hundred and ſixty Pound then advanced to him, and obliging himſelf to hold compt to the Captain for the *Superplus*: *Walter Monteith*, upon the Faith of this Aſſignation, lent ſeveral Sums to *Leckie*, for which he got three Bonds, and thereupon raiſed Horning, and arreſted in the Hands of *Colzean* as Debtor to *Leckie*, and purſued a Furthcoming. Wherein Captain *Douglaſs* compearing, craved Preference to the *ſuperplus* Debt owing by *Col-*

zean over and above the One hundred and ſixty Pound. Becauſe, perſonal Bonds and Aſſignations may be qualified and reſtricted by ſuch Backbonds; which are of the ſame Force, as if the Granter of the Backbond had granted a Diſcharge, and operate not only againſt the Aſſigny, but alſo againſt his Creditors and ſingular Succeſſors, *July* 6, 1676, *Gordon* and *Sheen* againſt *Crawfurd*, *February* 5, 1678, *Mackenzie* againſt *Watſon* and *Stuart*. Seing in perſonal Rights every one ought to know and rely upon the Condition and Faith of his Author; *Et Nemo poteſt transferre plus Juris in alium quam ipſe habet*: Which muſt far more hold in this Caſe, where the Aſſignation and Backbond being of the ſame Date, the latter is underſtood to be *Pars Contractus*, and *Pactum ex incontinenti adjectum*.

Alledged for Walter Monteith. The Aſſignation bearing to have been granted for an equivalent Sum then advanced, he a trading Merchant, was *in bona Fide* to truſt the Aſſigny, and not obliged to know of any private latent Backbond, induſtriouſly granted to tempt and inſnare Perſons to lend Mony to *Leckie*. And the Lords are in Uſe to diſcourage ſuch fraudulent Practices, *December* 4, 1665, *Thomſon* againſt *Henderſon*, *July* 2, 1673, *Jackſon* againſt *Maſſon*, *December* 4, 1673, *Reid* of *Ballochmyle* againſt *Reid* of *Dalvelling*.

Anſwered for Captain Douglaſs. No Reſpect to the Inconveniency, that *Monteith* could not know of the Backbond: Seing the ſame may be pretended againſt Diſcharges or Grounds of Compenſation, which are as latent, and yet affect ſingular Succeſſors.

The Lords found, That the Backbond doth reſtrict, affect and qualifie the Aſſignation; and therefore preferred Captain *Douglaſs*.

Eodem Die. William Borthwick *of* Fallahill, *againſt Mr.* Robert Arbuthnot, *one of the Accomptants in Exchequer*.

IN the Competition betwixt *Fallahill* Executor Creditor to the deceas'd Colonel *William Borthwick* of *Johnſtounburn*, and Mr. *Robert Arbuthnot* Donatar of the Colonel's ſingle Eſcheat, for 177 ℔. 19 ſh. *Scots* of Arrears due to him out of the Equivalent: The Donatar claimed Preference upon this Ground, That his Gift being duly ſealed and regiſtred eight Months before the other's Confirmation, was a legal Aſſignation to the eſcheat Goods, for Payment of the Debt due by the Rebel to the Donatar before the Rebellion.

Anſwered for Fallahill. He ought to be preferred, his Debt being conſtituted by the Rebel's Bond long before the Rebellion; and his Diligence for Payment compleated before Declarator of the Gift of Eſcheat: Becauſe, the Confirmation is a complete Aſſignation to the Executor Creditor affording *Jus ad Rem, & in Re*, and immediate Acceſs to the Subject confirmed. Whereas on the other Hand, it was never pretended, That a ſealed Gift not declared, is a complete Aſſignment: Seing Gifts of that Nature paſs *Periculo Petentis*, and it is only known by the Declarator, that the Caſuality is duly fallen.

Replyed for Mr. Arbuthnot. The Gift of Eſcheat, after appending the Seal to it, is a complete Aſſignment to the eſcheat Goods, requiring no Intimation to the Rebel's Debtors, whom it is not neceſſary to call in the general Declarator (which *nihil novi Juris tribuit*) but only to call himſelf or his Repreſentatives: And a Donatar's Gift for Payment of his own Debt (and ſuch is Mr. *Arbuthnot*'s) was preferred to an Arreſter of the Rebel's Goods after the Gift, tho' before Declarator, *February* 23, 1623, *Thomſon* againſt the Laird of *Murtle*.

Duplyed for Fallahill. Tho' generally Declarators *nihil novi Juris tribuunt*, but only eſtabliſh, aſcertain and declare what was formerly obtained: Yet Declarators of Eſcheat are of a ſeparate Nature; and other Declarators have their own ſpecial Effects, as in a Declarator of Nonentry, the whole Mails fall due to the Superior after Citation. 'Tis true that the Rebel *ipſo Facto* by the Rebellion falls from his own Right to his Goods: But by our Law and Cuſtom, a lawful Creditor before the Rebellion, completing his Diligence before Declarator of the Gift, is preferred to the Donatar, *Stair, Inſtit. Lib.* 3. *Tit.* 3. §. 16. *Dirletoun*'s Doubts, *Page* 80. *Mackenzie, Inſtit. Page* 77. and the *Note* in the *Appendix, Page* 238. *February* 24, 1637, *Pilmuir* againſt *Gagie*. And our benign Princes did ever accompt *id ſolum noſtrum, quod Debitis deductis eſt noſtrum.*

Triplyed for Mr. Arbuthnot. The Prattick betwixt *Pilmuir* and *Gagie* is wholly foreign to the preſent Purpoſe; The Queſtion there being betwixt a Creditor and a Donatar of Eſcheat, whoſe Gift was poſterior to the Arreſtment.

The Lords found, That *Fallahill* had the firſt complete Right to the Colonel's Arrears due by the Commiſſioners of the Equivalent, which was the Subject of the Competition; and therefore preferred him to the Donatar of Eſcheat.

November 9, 1710. *The Juſtices of Peace within the Shire of* Wigtoun *againſt* Robert Martin *of* Mooll.

Robert *Martin* of *Mooll* perſonally cited to appear before the Juſtices of Peace of the Shire of *Wigtoun*, the 6 of *October* 1709 at the Quarter Seſſion, to anſwer to a Complaint given in againſt him by *James M'culloch* his Tenant, for beating and abuſing him, and to find Caution for keeping the Peace in Time coming, not compearing, was again, by Warrant of the Juſtices aforeſaid, perſonally cited to the ſame Effect, and failing to appear upon the ſecond Citation: The Juſtices fined him in Fifty Pound *Scots* for his two ſeveral Contumacies, which Decreet he ſuſpended. The Lords reſtricted the Fine to *Ten* Pound *Scots*, conform to the Limitations and Inſtructions given to inferior Judges; albeit there was a double Contumacy: In Reſpect the Suſpender was but once fined. And the Lords ſeemed to be clear, That a Perſon could not be fined for not finding Bail to keep the Peace, but only might be committed to Priſon, as in the Caſe of Lawburrows.

November 14, 1710. Robert Dewar *eldeſt Son to* George Dewar *Wright in* Edinburgh, *againſt* Margaret Wright *his Father's Relict.*

In a Proceſs at the Inſtance of *Robert Dewar*, againſt *Margaret Wright* his Father's Relict: The Lords refuſed to ordain her to reſtore to the Purſuer a Silver Medal that had been gifted to her by his Father *Intuitu Matrimonii*, the Marriage having followed; albeit it diſſolved within Year and Day by the Husband's Death. Here was *Lis de paupere Regno.*

Eodem *Die.* William Roſs *of* Aldy, *againſt* Charles Roſs *of* Ey.

In the Proceſs of removing, at the Inſtance of *William Roſs*, as proper Wadſetter of the Lands of *Littleallan*, againſt *Charles Roſs* Granter of the Wadſet: The Lords *July* 25, 1710, found, That *Charles Roſs* having, upon *William Roſs*'s Requiſition and Charge for Payment of the Sum in the Wadſet made Offer and Conſignation thereof under Form of Inſtrument; *William*

Roſs could not thereafter paſs from his Requiſition and Charge, and inſiſt in the Removing: Albeit *Charles Roſs* had uſed no Order of Redemption.

William Roſs reclaimed, and repreſented, That there being no Offer of Payment, nor Conſignation, before he inſiſted in his Removing, he is not obliged to accept of the Mony until lawful Premonition be made to him, in the Terms of the Contract. Whereupon the Lords found, That the Purſuer might paſs from his Charge, and inſiſt in the Removing, reſerving to *Charles Roſs* to uſe an Order of Redemption as accords, in the Terms of the Contract of Wadſet. Albeit it was alledged for him, That tho' an Infeftment of Wadſet extinct by the Wadſetter's Premonition or Requiſition, revives by his paſſing from the Order: Yet a Charge of Horning uſed upon the Requiſition, cannot be ſo paſt from, *Stair*, *Inſtit. Lib.* 2. *Tit.* 10. §. 22. In Reſpect it was anſwered for *William Roſs*, That a Requiſition and Charge have the ſame Effect, *Stair*, *Lib.* 2. *Tit.* 1. §. 4. *Spotſwood*, *Tit. Aſſignation*, *Donaldſon* againſt *Donaldſon*: And the Citation by *Charles Roſs* out of *Stair*'s Inſtitutions muſt be underſtood, where the Wadſetter hath not given ſufficient Evidence of his paſſing from the Charge, by making Uſe of his Infeftments.

November 21, 1710. William Hamilton *of* Wiſhaw, *againſt* John Moir *of* Cairnhill.

AN Agreement betwixt *William Hamilton* of *Wiſhaw*, and *Gavin Moir* of *Cairnhill*, was drawn up in Form of Articles, written upon half a Sheet of Paper: Theſe to be performed by *Cairnhill* upon the firſt Page thereof, ſigned by both Parties and Witneſſes, without inſerting or deſigning the Writer and Witneſſes; And thoſe to be performed by *Wiſhaw*, upon the ſecond Page, at the Foot whereof both Parties obliged themſelves to perform the above and within Articles, betwixt and a certain Day; then the Writer and Witneſſes are duly inſerted and deſigned, and both Parties and Witneſſes do again ſubſcribe. *Wiſhaw* purſued *John Moir*, as Heir to *Gavin Moir* his Father, to perform his Part of the Articles.

Alledged for the Defender. Proceſs can't be ſuſtained againſt him, upon the Articles to be performed by his Father; Becauſe the ſame bear no Date, nor the Names and Deſignations of Writer and Witneſſes inſerted.

Replyed for the Purſuer. The Law requires Writer and Witneſſes to be inſerted and deſigned in the End of the Writ: And it is ſo here. For this mutual Agreement is but one *idem Corpus Juris*, anſwering to the Inſcription on the firſt Page; and the Articles in the laſt Page expreſly relate to the firſt: And long miſſive Letters written upon ſeveral Pages are obligatory, tho' the laſt Page be only ſubſcribed; and Writer and Witneſſes are only inſerted and deſigned under the laſt Page or Docket of fitted Accompts conſiſting of many Pages.

Duplyed for the Defender. Inſerting on the ſecond Page the Writer and Witneſſes Names and Deſignations, doth no more ſupply the Nullity of the firſt Side of the Contract, than if it had been written upon different Sheets: For the Articles of the firſt Side might have been blank, and filled up at Pleaſure. And tho Accompts and miſſive Letters have, by our uniform Practice, been found not to fall under the Act of Parliament; Obligations and Contracts are not ſo privileged. 2. It required a Statute, to allow Decreets and Securities to be written Book-ways; and yet in theſe not only is each Page ſubſcribed, but the Number of Pages and the Writer and Witneſſes are mentioned: Whereas the ſecond Side of theſe Articles do not bear, That the Witneſſes ſubſcribing were alſo Witneſſes to the firſt Side; or that it was written of the ſame Date, and by the ſame Writer.

The Lords found the Writ probative, and repelled the Defence: In Reſpect the laſt Page is relative to the firſt.

November 23, 1710. ACT *of* SEDERUNT, *Anent Factors on Bankrupt Eſtates.*

THE Lords of Council and Seſſion conſidering the many Inconveniencies ariſing to the Lieges when Application is made to them by Creditors on bankrupt and incumbred Eſtates, for nominating Factors to uplift the Rents thereof, That Writers and other Dependents upon the Seſſion get themſelves to be named Factors to theſe Eſtates, who being called to compt and reckon for their Intromiſſions, prolong theſe Proceſſes to an intolerable Length, to the great Vexation and Expence of the Creditors: For preventing of which Abuſe in Time coming, the Lords declare all Writers, and other Dependers on the Seſſion wholly incapable of any ſuch Truſt or Office by the Authority of the Lords, notwithſtanding they ſhould impetrate the Conſent of the Creditors; And if any ſuch Factory be extracted, That the ſame ſhall be void and null, without Prejudice to the Creditors to call theſe Factors and their Cautioners to Accompt, as if they were lawfully appointed: Declaring likeways, That if ſuch Perſons ſhall ſuppreſs their Deſignation by their ordinary Imployment, and depending on the Seſſion, that they may obtain ſuch Factories, they ſhall be incapable of managing Proceſſes thereafter, and be impriſoned during the Lords Pleaſure. And ordain theſe Preſents to be printed and affixed on the Wall of the Outer-houſe, and other Places needful.

November 24, 1710. *Colonel* George Preſton, *againſt Colonel* John Erſkin.

IN a Reduction and Improbation at the Inſtance of Colonel *Preſton*, againſt Colonel *Erskin*: The Lords refuſed to allow Writs to be received in againſt which a Decreet of Certification was fairly extracted; albeit Payment of the Purſuer's Expences was offered.

Eodem Die. Thomas Law, *Son to* William Law *Taylor in* Jedburgh, *againſt* Thomas Turnbul *of* Firth.

IN the Action at the Inſtance of *Thomas Law*, againſt *Thomas Turnbull*, as repreſenting his Father, for Payment of a Bond granted by him to the Purſuer's Father: The Lords were clearly of Opinion, That a Bond granted by an interdicted Perſon without Conſent of his Interdictors, could not be ſupported as valid by their ſubſcribing Witneſſes to it.

November 28, 1710. *Lord* Alexander Hay, *againſt the Earl of* Glaſgow, *and other Creditors of* Spot.

THE Gift of *Archibald Murray* of *Spot* his Liferent Eſcheat acquired by Lord *Alexander Hay* (who purchaſed the Barony of *Spot* by a Minute of Sale, after *Archibald Murray* had been denounced and regiſtred at the Horn) being found to accrew to the Rebel and his Creditors; with the Burden of the Expence of the Gift, and Debt in the Horning, and other Sums Lord *Alexander* had advanced to the Rebel; And it being found, That others of his Creditors ranked in Lord *Alexander*'s Backbond to the Exchequer, had Right to the Annualrent of the Price in the Terms of the Minute, as coming in Place of the Rents of the Lands: Lord *Alexander* craved Allowance out of the

Price of Sixteen thouſand Merks, contained in an heretable Bond, granted by the common Debtor to Miſtreſs *Patricia Ruthven,* from whom he had Right.

The Earl of *Glaſgow* and other Creditors in the Backbond, ſought to be preferred to the ſaid heretable Bond, upon this Ground; That albeit the Obligement therein to infeſt, was prior to the Denunciation, and the Seaſin following thereupon prior to the Gift of Eſcheat; yet Seaſin was not taken within Year and Day after the Denunciation.

Alledged for Lord Alexander Hay. Voluntary Deeds of the Vaſſal after Denunciation, don't indeed cut off the Superior from his Liferent Eſcheat; but Infeſtment by a Rebel who ſtood ſpecially bound and obliged to grant it before the Rebellion, being a neceſſary Deed, which he might have been compelled to grant, hath always been ſuſtained to prefer the Creditor; Which is plainly Lord *Alexander*'s Caſe. And ſeing Liferent Eſcheat is only a Caſuality introduc'd by Statute, as a Penalty for Diſobedience to the Law: When it falls to the Crown, there ſeems to be the ſame Reaſon for the Preference of lawful Creditors completing their Rights before the Gift or Declarator thereon; as in the Caſe of ſingle Eſcheats, to prefer a lawful Creditor before the Rebellion, doing Diligence or completing his Right after the Gift, before Declarator, which is always done.

Anſwered for the other Creditors. There is a great Difference betwixt the ſingle and Liferent Eſcheat: In ſo far as the former falls to the Sovereign, *Jure Coronæ* by the Rebellion; Whereas the latter is competent to every Superior, by Reaſon of the Fee, and that the Vaſſal being in the Conſtruction of Law *Capite Minutus,* cannot ſerve the Superior; And a Gift of Liferent Eſcheat needs no Declarator to complete it. Tho' the Bond and Precept of Seaſin were granted before the Denunciation, it ſtill continued in the State of a perſonal Obligement, till after the Caſuality fell to the Fisk: And perſonal Obligements cannot compete with the Superior, or Donatar of the Liferent Eſcheat. Seing Infeſtment was not taken within the Courſe of the Rebellion, That is, within Year and Day after the Denunciation; *Jus erat quaſitum Domino Superiori,* which no poſterior Infeſtment can take from him. And ſeing the Gift and Declarator adds no new Right to the Superior, but only declares what was his by the Denunciation, and the Rebel's continuing Year and Day at the Horn; 'tis all a Matter, whether the Infeſtment be prior or poſterior to the Gift, *Stair, Inſtit. Page* 265.

Replyed for Lord Alexander Hay. All the Deciſions preferring the Donatar, were in Caſes where the Infeſtment was taken after the Liferent Eſcheat was gifted: Whereas the Infeſtment in Queſtion is more than Year and Day anterior to the Gift.

The Lords found the Gift of Eſcheat preferable to the heretable Bond.

Eodem Die. James Wood *Merchant in* Edinburgh *Supplicant, againſt* Mr. Robert Fullarton *Writer to the Signet.*

JAmes *Wood* having given to Mr. *Robert Fullarton* his Agent an execute Horning at his Inſtance, againſt *William Mackie*; in Order to cauſe denounce him and raiſe a Caption: Mr. *Fullarton* put the Horning and Charge in the Hands of *Thomas Breakinrig* Meſſenger to denounce *William Mackie,* who did denounce before expiring of the Days of the Charge; And upon that Denunciation, when regiſtred, Mr. *Fullarton* raiſed and ſigned a Caption. *James Wood* being fined by the Lords in Twenty Pound *Sterling,* for impriſoning *Mackie* upon that unwarrantable Caption; he complained to their Lordſhips, and craved that Mr. *Fullarton* might be found liable to reimburſe him of the Fine:

Anſwered for Mr. Fullarton. The Law of Nature and the civil Law obligeth indeed to Reſtitution where Damage is occaſioned *Dolo malo* or by Deſign: But here no Dole nor Fault can be charged upon him. And albeit Artificers *affectare non debent quod non intelligunt*; this is not to be extended to liberal Sciences: Otherwiſe a Lawyer failing to propone a good Defence that might have occurred to another, ſhould be liable to make up the Client's Damages ſuſtained thro' the Omiſſion; and Judges might be reached for Damages, when their Sentences fall to be reviewed and reduced. 2. That which gave Riſe to Mr. *Wood*'s Damages, was the Fact of the Meſſenger (a Perſon held and reputed knowing in his Office, a publick Officer whom the Law hath intruſted for that End, and obliged to find Surety to anſwer any Demands upon him *Ratione Officii*) *viz.* The Denunciation: Which, having no obvious Nullity *ex Facie Scripturæ*, and being duly regiſtred, was a ſufficient Warrant to Mr. *Fullarton* to raiſe a Caption, without noticing the Charge. And in a parallel Caſe, *March* 4, 1628, *Scot* contra *Banks*, a Meſſenger was found *in bona Fide* to poind, altho' the Decreet, upon which the Letters proceeded, did not bear the Perſon's Name. 3. *Et ſeparatim*, ſeing the Meſſenger (whom Mr. *Fullarton* had Reaſon to preſume to have executed his Office faithfully) was the original Occaſion of Mr. *Wood*'s Damages, thro' the wrong Denunciation, he and his Cautioner ought firſt to be diſcuſſed: Mr. *Fullarton*, who had no Acceſſion to the executing of the Denunciation, being at moſt but liable *ſubſidiarie*.

Replyed for James Wood. He having put the Horning in the Hands of Mr. *Fullarton* his Agent, to raiſe a Caption; and Mr. *Fullarton* having imployed ſuch a Meſſenger, and followed his Faith implicitely, in raiſing the Caption, without examining the Charge and Denunciation, both which were his Warrant: He was *in Culpa lata, quæ Dolo æquiparatur*, and muſt keep Mr. *Wood indemnis*; either *ex Contractu Mandati*, as having accepted a Mandate from him; or *ex Contractu Locati*, as having hired his Pains to him. A Lawyer's Advice is not parallel to this Caſe, for *Conſilii non fraudulenti nulla eſt Obligatio*; and there is a Difference betwixt giving Advice and exercing a commiſſion'd Office. Again, Writers to the Signet are under other Sorts of Ties, as to Writs preſented to the Queen's Signet and Seals, concerning which the Lords do frequently inculcate Injunctions upon them; than as to private Writs and Securities, drawn by them according to the Agreement of Parties. It cannot be pretended, That there is any ſuch Contract betwixt a Judge and contending Parties, as there is betwixt an Agent and his Client. Beſides, whatever may be in the Inſtances of Judges and Lawyers, *Incommodum non ſolvit Argumentum.* 2. It is not Mr. *Wood*'s Concern to diſpute the Caſe betwixt Mr. *Fullarton*, and the Meſſenger; both being *in Culpa*, and liable to him. The Caſe of *Scot* and *Banks*, is nothing to the Purpoſe, for there the Meſſenger poinded exactly conform to the Letters, and was not bound to ſeek any other Warrant: Whereas it is not every Denunciation that warrands a Caption, but only a due and orderly Denunciation (as the Stile bears) which plainly refers to the Execution or Charge. 3. Its abſurd to pretend, That the Meſſenger muſt be firſt diſcuſſed; ſeing Mr. *Wood* hath directly nothing to do with the Meſſenger, he imployed only Mr. *Fullarton* who received the Horning and undertook to complete the Diligence whereof the Denunciation is a Part, and imployed a Meſſenger of his own chooſing unknown to Mr. *Wood*.

The Lords decerned Mr. *Fullarton* to pay to *James Wood* Twenty Pound *Sterling* as the Damage paid by him to *William Mackie*.

November 29, 1710. Hugh Mitchel *of* Dalgain, *againſt* Jean Baillie *Relict of* Thomas Shearer *Merchant in* Glaſgow *and* Thomas Shearer *her Son.*

IN the Action at the Inſtance of *Hugh Mitchel*, againſt *Jean Baillie* and *Thomas Shearer*, for Payment of the Teinds of Two Acres of Land called *Iſholm*, belonging to and poſſeſs'd by the Defenders, to which Teinds the Purſuer claimed Right by a Charter of Adjudication and Infeſtment thereon.

Alledged for the Defenders. The Charter of Adjudication is not a ſufficient Title, unleſs the Adjudication it ſelf, with a Right to theſe Teinds, in the Perſon of him they are adjudged from were inſtructed: Adjudications being only relative Rights, taken and granted *Periculo Petentium.*

Replyed for the Purſuer. A Charter and Seaſin is a good Title, againſt ſuch as have no Right at all. The Purſuer is not obliged to produce his Author's Right unleſs there were a Competition upon a better Right: As a Tenant could not, in a Proceſs of Mails and Duties at the Inſtance of an Adjudger, object againſt the Adjudger's Title.

Duplyed for the Defenders. Every Heretor hath a kindly Right to the Teinds of his own Lands, ſo long as a better doth not appear.

The Lords found no Proceſs at the Purſuer's Inſtance, unleſs he produce the Adjudication it ſelf, and inſtruct a Right to the Teinds in the Perſon againſt whom the Adjudication was led.

November 30, 1710. Charles M'kie *of* Southfield, *againſt* John Paton *Merchant in* Edinburgh.

AGnes Paton Relict of *Archibald Paton* Merchant in *Edinburgh*, diſponed and aſſigned, a Bond of 1000 Pound granted to her by the Lairds of *Clackmannan* and *Kennet*, in Favours of *Margaret Paton* her Daughter, with this Proviſion: *In Caſe* William Paton *late Baillie of* Edinburgh *my Son ſhall queſtion, quarrel or reduce this Right, then I aſſign her in Lieu thereof to* 1000 *Pound reſting by him to me, which I diſcharge him of, in Caſe of his not quarrelling, queſtioning or reducing the ſaid Right, but conſenting to and ratifying the ſame.* The Lords found, That *William Paton*, by the foreſaid Clauſe, was bound not only to conſent to and ratify *Agnes Scot*'s Diſpoſition to *Margaret Paton* her Daughter, but alſo to aſſign and diſpone the Debt in Favours of the ſaid *Margaret Paton.*

December 5, 1710. *Mr.* Michael Potter *Miniſter of* Kippen, *againſt* James Ure *of* Shirgartoun, *and Mr.* James Ure *Writer to the Signet his Son.*

THE Lords, at the Inſtance of *James Ure* of *Shirgartoun* and his Son, advocated, upon Grounds of Iniquity, from the Presbytery of *Dumblain*, the Deſignation of an Augmentation of Glebe in Favours of Mr. *Michael Potter.* Albeit it was alledged for the Presbytery, That they, as come in Place of the Biſhop, being Judges *in prima Inſtantia*, had a privative Juriſdiction, and the Lords could not advocate from them: More than Divorces could be advocated from the Commiſſaries, or Cauſes Maritim from the Admiral.

December 8, 1710. John Rule *Son to the deceas'd* John Rule *Chirurgion in* Dumfreis, *againſt* Andrew Purdie *Merchant in* Edinburgh.

MArtin Newal Merchant in *Dumfreis* made a Diſpoſition, containing a Procuratory of Reſignation of a Tenement of Land in that Burgh, to

James Robſon Merchant there; who, without being legally infeſt, diſponed it to *John Robſon* his Brother, *Andrew Purdie*'s Author, with a Procuratory to reſign, Precept of Seaſin, and Aſſignation to all Writs in his Perſon, and *John Robſou* was infeſt *in Anno* 1693. Thereafter *John Rule* Chirurgion in *Dumfries*, as Creditor to *James Robſon*, adjudged from him *Martin Newal*'s Diſpoſition, and upon the Procuratory therein, *John Rule*, as Heir to the Adjudger his Father, being infeſt, raiſed a Proceſs of Mails and Duties againſt the Tenants. *Andrew Purdie* who derived Right from *John Robſon*, compearing for his Intereſt, craved Preference: In Reſpect the Diſpoſition to his Author was anterior to *John Rule*'s Adjudication, and did totally denude *James Robſon*.

Replyed for John Rule. The Diſpoſition to *John Robſon Purdie*'s Author, never having been intimated till the preſent Competition, after that *John Rule*, by adjudging the Procuratorie in the Diſpoſition granted by *Newal* to *James Robſon*, and infeſting himſelf thereon, acquired the real Right, which till then continued in the Perſon of *Newal*; he Mr. *Rule*, as having the firſt complete Right, is clearly preferable. For albeit Adjudications, which are legal Aſſignations, require no Intimation to complete them: Yet naked Diſpoſitions, as other perſonal Aſſignations, tranſmit not effectual Rights to the Receivers, without Intimation; and are preferable according to the Date of the Intimation.

Duplyed for Purdie. A Diſpoſition of an heretable Right whereon no Infeſtment hath followed, doth fully denude the Diſponer, without Neceſſity of Infeſtment, or Intimation, *July* 27, 1626, The Laird of *Anſtruther* contra *Black*: And in the late Caſe betwixt Mr. *David Dewar* and *David French*, It was found, That Mr. *David Dewar*'s firſt Adjudication of Lands to which his Debtor had only Right by Diſpoſition without Infeſtment, did quite denude the Debtor; and he was preferred to *David French*, a poſterior Adjudger, who ſtood infeſt by Virtue of the Procuratory of Reſignation containe in the common Debtor's Diſpoſition. The Reaſon of the Diſparity betwixt a Diſpoſition of Land, and an Aſſignation to a moveable Bond is: Becauſe the Land is properly Debtor to one that hath a Diſpoſition thereof, and ſ that Diſpoſition wants no Intimation to perfect it; Whereas an Aſſignatio of a Bond, muſt be intimated to the Granter who is Debtor, to put him *i mala Fide* to pay to the Cedent. 'Tis in vain for *Rule* to plead upon *Martin Newal*'s not being diveſted by the Diſpoſition to *James Robſon*: Sein the Queſtion is not betwixt Perſons deriving Right from *Newal* who was la infeſt, but only betwixt thoſe whoſe common Author *James Robſon*, bein never Infeſt, was ſufficiently denuded by his diſponing the Procuratory t *John Robſon*, before *John Rule* adjudged. 2. *Eſto*, that Intimation had bee neceſſary to perfect the Diſpoſition in Favours of *John Robſon*, yet that, being an heretable Right, was ſufficiently intimated by his publick Infeſtmen and the long Debate in the preſent Competition, and ſeveral Years Poſſeſſio before *John Rule*'s Infeſtment as Heir to his Father.

Triplyed for John Rule. *John Robſon*'s Infeſtment cannot ſupply the Wan of Intimation of the Diſpoſition in his Favours: Becauſe, Seaſins are no properly Intimations, but only Publications of real Rights. And tho' *Joh Robſon* might, by Virtue of the general Clauſe in the Diſpoſition to him a ſigning to all Writs, have been infeſt upon the Procuratory in *Newal*'s Di poſition; Yet he not having taken Infeſtment upon that, but only upon th Procuratory in the Diſpoſition, granted by *James Robſon* (who being neve duly infeſt, could give no effectual Precept for infeſting another) *John Robſon* Seaſin is null as granted *a non habente Poteſtatem*; And ſo cannot be ſuſtaine as an Intimation of the Procuratory in *Newal*'s Diſpoſition. Nor can th Deciſion betwixt *Dewar* and *French* influence the preſent Caſe: In Reſpe

bot

both *Dewar* and *French* were Adjudgers, and the firſt Adjudication, being a legal Aſſignation, was a complete Aſſignation without Intimation; Whereas a ſimple Diſpoſition affords no *Jus in Re*, but only *Jus ad Rem*, which, tho' effectual againſt the Granter and his Heirs, or againſt Tenants, where no Perſon competes upon a better Right, is never complete againſt ſingular Succeſſors, till Seaſin follow thereon.

The Lords found, That *James Robſon* having only a perſonal Right by Diſpoſition without Infeftment, the Diſpoſition made by him to *John Robſon Andrew Purdie*'s Author, did fully denude him, without Neceſſity of Intimation; ſo that the Subject could not be thereafter adjudged from him; and therefore preferred *Andrew Purdie*.

December 13, 1710. *Sir* William Craigie *of* Gairſey, *againſt Sir* Alexander Douglaſs *of* Egleſhaw *and other Freeholders of* Orkney.

SIr *William Craigie* purſued Sir *Alexander Douglaſs*, and other Freeholders of *Orkney*, to make Payment of 9600 lib. *Scots* due to him for his Fees as Commiſſioner for the Stewartry of *Orkney*, to the ſeveral Parliaments betwixt the Years 1681, and 1702, mentioned in a Certificate of his Attendance under the Hand of one of the Clerks of Parliament.

Alledged for the Defenders. All the Inhabitants of the Iſles of *Orkney* and *Zetland*, erected by the Act of Parliament 1669, into one Stewartry, being liable for their Proportions of the Purſuer's Fees, and none of the Heretors of *Zetland* being cited; no Proceſs can be ſuſtained againſt the Defenders, till all Parties having Intereſt be in the Field, that it may be known what every one's Proportion is.

Replyed for the Purſuer. He was not bound to cite any Heretors of *Zetland*, ſeing none of theſe ſigned his Commiſſion, and he could not know that they had any Intereſt in electing a Commiſſioner for *Orkney*: But the Defenders muſt cite them, inſtruct their Capacity to vote in ſuch Elections, and their being liable to Commiſſioner-fees, and produce their Valuations, before they can pretend to any proportionable Deduction upon their Account. Beſides, the Valuations of *Orkney* and *Zetland*, in Order to proportion the Ceſs, were diſtinguiſhed by Order of the Treaſury in the Year 1693, and *Orkney* made to pay Two Parts, and *Zetland* a Third: And the Purſuer inſiſts againſt the Defenders only for Two Thirds of his Fees.

The Lords found, That *Orkney* and *Zetland* being one Stewartry, the Purſuer muſt call the Freeholders of both Iſles, and prove their Valuations, ſo as each may be liable only for their own Share. For it was thought, that the Valuations in Order to Aſſeſſment could not be a Rule in this Caſe: Seing theſe only who hold *in Capite* are liable for the Fees of Commiſſioners to the Parliament.

Eodem Die. *Mr.* William Cuningham *late Provoſt of* Irvine, *againſt the Skippers of* Irvine *and* Saltcoats.

MR. *William Cuningham* having charged the Skippers of *Irvine* and *Saltcoats*, upon a Decreet obtained at his Inſtance, againſt them before the Admiral, to pay, in the Terms of the Act 55 Parliament 1661, Fourty Shilling *Scots* for every Cocket, procured from him, who is Clerk of the Cockets of *Irvine* and *Saltcoats*, by a Liferent Gift from the Sovereign, purchaſed before the Union of the two Kingdoms: The Skippers ſuſpended, and raiſed Reduction of the ſaid Decreet upon this Ground, That, by the

Fourth and Sixth Articles of the Union, there is not only a Freedom of Trade and Navigation, but a general Communication of all other Rights, Privileges and Advantages; and all manner of Allowances and Incouragements in Relation to Trade, that obtained in *England* before the Union, are expreſly given to *Scotland*; conſequently the Skippers there muſt have the *Engliſh* Eaſe of their Cocket-dues.

Replyed for Mr. William Cuningham. By the Twentieth Article of Union, Liferent-offices in *Scotland* being ſpecially reſerved, and his Office being ſuch; it muſt be effectual to him in the ſame Manner as if the Treaty had not been, or as he enjoyed it before. The Fourth or Sixth Articles, which only concern Burdens and Duties having an immediate Influence upon the Subject of Trade, don't influence the Cocket-dues, which are not an Impoſition upon the Subject of Trade, ſeing the Nature and Quantity of the Cargo, Export and Import doth not alter them: but are a perſonal Preſtation or Fee due by the Maſters of Ships, to the Man imployed in that Office, for his Service in writing them free Paſſes. And it were impracticable to reduce all caſual or remote Burdens concerning Navigation to one Standard; For at that Rate Seamens Wages, Anchorage, and Shore-dues, which differ in different Places, ſhould be the ſame every where. Again, even the Sixth Article excepts Duties upon Import and Export, which the Subjects of either Kingdom are ſpecially exempted from by their private Rights. Which Exception (tho' the Privilege of Exemption only be expreſt) muſt be underſtood to comprehend all private Rights, as well thoſe extending the Burden, as thoſe exempting from it: The Reaſons for both being the ſame. Again, that all private Grants in Favours of particular Perſons, were underſtood to be reſerved, at leaſt not comprehended under the general Article, is plain from ſeveral Inſtances. The City of *London* enjoys particular Privileges, both of Exemption from, and exacting Burdens not uſual in other Places. Particularly it is exempted from the Priſage which is a Tun of Ten, or Two of Twenty, and above of all imported Wines, paid in many Places of *England*, by ancient Cuſtom, for the Uſe of the Sovereign's Family. And tho' there be no particular Exception of the Privilege of the *Eaſt-India* Company in the Articles of Union, theſe are all without Controverſie enjoyed as formerly. Again, albeit the Privileges competent to the Sugary of *Glaſgow*, and the *Aquavitæ* Brewers in *Farrentoſh* in the North of *Scotland*, be not expreſly reſerved in the Article of Exciſe; Yet the Barons of Exchequer have never yet determined againſt them. Nay farther, as *poſteriora derogant prioribus*: The Twentieth Article muſt be underſtood to qualifie the preceeding general Rule in the Sixth Article.

Duplyed for the Suſpenders. The Twentieth Article reſpects only Offices concerning civil Right in Matters of Property, and not Offices abou Trade, which are liable to ſo many Viciſſitudes and Changes, as that th Dues thereof are ſtill alterable by ſupervenient Law. Yea, even Offices o civil Right, which ſavour more of the Nature of Property, have not onl been regulated, but quite taken away by ſubſequent Laws. Were not th Profits and Powers of the Commiſſariot Courts abridged ſince the Revolution for the publick Benefit; albeit the Commiſſars and their Clerks ha their Commiſſions for Life? And when the Council and ſome other Judicatures were aboliſhed, their Clerks and Macers loſt their Offices. It's fr volous to pretend, That Cocket-dues are not an Impoſition upon the Subjec of Trade, but only a Servant's Fee: For by the ſame Reaſon it might b pretended, That the Dues of Collectors, Surveyors and other Officers of th Cuſtoms do as little concern the Subject of Trade, and that any ſuch O ficer having been in Uſe before the Union to exact double of what the En gliſh Eſtabliſhment allows, might continue ſo to do, on Pretence of a Life

ren

ent Gift in his Favours. Again, Cocket-dues being univerſal upon all Export, and exacted every where, it is not in the Caſe of local or caſual Dues, which are only exacted at particular Places, on the Account of certain Conveniencies obtaining there, and no where elſe. 2. Tho particular Exemptions from paying Duties (which is the Caſe of the Inſtances of the City of *London*, *Eaſt-India* Company, Sugary of *Glaſgow*, and *Aquavitæ* Brewers n the North) are excepted in the Sixth Article; the Privilege of exacting more than the ordinary Duties, is no where excepted. And the Duty of Priſage in *England*, if any be, is but accidental and local, as the Mark upon the Pack or Tun here at *Edinburgh*, and ſo do not concern the Caſe of Cocket-dues, which are univerſal upon Trade.

The Lords found, That the Charger's Liferent Right to the Clerk's Office was not taken away by the Union; but ſuſtained the Reaſon of Suſpenſion and Reduction, that now ſince the Union, he can claim or exact no more than what was paid in *England* for the Cocket-dues, at the Commencement of the Union.

Eodem Die. Joſeph Young *Merchant in* Edinburgh, *againſt* Henry Nisbet *of* Dean.

JOſeph Young having charged the Laird of *Dean*, upon a Decreet obtained againſt him before the Sheriffs of *Edinburgh*, to make Payment to *Joſeph* 147 lib. 14 ſh. 9 d: *Dean* ſuſpended upon this Ground; That 106 lib. muſt be deduced, for which he had got Credit from the Charger by his Miſſive Letter dated in *May* 1706, bearing, *That there remained* 57 *lib.* 10 *ſh. of Ballance of the Sum contained in the Decreet due by the Suſpender; after giving him Credit for all that was paid by him to the Charger, and taking off* 106 *lib. due to the Suſpender by Captain* Richardſon, *and that the* Charger *intreated the Suſpender to pay the ſaid Ballance, and let him have* Captain Richardſon's *Papers with a Right thereto.* Upon which the Suſpender 22 *September* laſt offered theſe Papers to the Charger, with a Right thereto under Form of Inſtrument; which Inſtrument bears, That the Charger acknowledged the Suſpender's having made ſuch an Offer in due Time.

Replyed for the Charger. He had good Reaſon to refuſe to accept a Right to Captain *Richardſon*'s Debt 22 *September* laſt: His Circumſtances being then far altered to the Worſe from what it was at the Date of the Charger's Letter. And where a Right is to be perfected in Writ, there is *Locus Pænitentiæ*, till the Terms be agreed on, and the Writ extended, ſubſcribed and delivered. 2. The Inſtrument taken by the Suſpender, cannot prove that prior and timeous Offers were made of the Papers, and a Right thereto: Seing the Aſſertion of a Notary cannot prove the Emiſſion of Words or Expreſſions at that Time, far leſs what paſt at other Times, before which he had no Warrant to aſſert, but the Suſpender's telling him it was ſo.

Duplyed for the Suſpender. Albeit in verbal Communings, requiring to be perfected in Writ, either Party is allowed to reſile, till that be done: Yet here the Suſpender's granting a Right by Tranſlation of *Smeatoun*'s Debt, and Mr. *Young*'s accepting thereof by his ſubſequent Miſſive Letter, did fully complete the Bargain, and exclude all Pretence of reſiling. 2. Tho' in Competition of heretable Rights, Seaſin (without the Warrant thereof produced) is not ſuſtained: Yet in this Caſe, where there is a Proteſtation by one Party againſt another, about ſomething to be done by either, the Notary by his Office is common Truſtee for both, and obliged faithfully to inſert in his Inſtrument what is required by the one, and the other's Anſwer thereto; and to furniſh both with Extracts when required.

The Lords found, That the Suſpender having ſubſcribed a Right of *Smeatoun*'s Debt to the Charger, and he having accepted thereof by his miſſive Letter; there was no *Locus Pœnitentiæ*, and found the Letters orderly proceeded only for the Ballance of 57 *Lib.* 10 *Shil*: The Suſpender always proving by the Notary and Inſtrumentary Witneſſes, That the Charger had acknowledged by his Anſwer to the Suſpender's Proteſt, That the Offer of Captain *Richardſon*'s Papers, and a Right thereto, was made *debito Tempore*.

December 14, 1710. Euphan Smith *Daughter to the deceaſt Mr.* John Smith *of* Browſterland, *and* Hugh Wallace *Merchant in* Cummock *her Husband againſt* William Smith *now of* Browſterland.

THe deceas'd Mr. *John Smith* diſponed his Land Eſtate to his eldeſt Son *William*, and granted a Bond of Proviſion to his five younger Children after-mentioned, as a Competency for their better Living: Wherein he obliged himſelf, his Heirs and Executors, to pay to *Patrick Smith* 2000 Pound, to *Beatrix* 3000 Merks, to *Suſanna* 2000 *Lib.* and to *John* and *Euphan* 5000 Merks, equally betwixt them, *&c.* And that at the firſt Term of *Whitſunday* or *Martinmas* after the Granter's Deceaſe, when ever the ſamen ſhould happen, with the ordinary Annualrent from the Term of Payment. Provided that the Sums of Mony ſo paid, ſhould be in full Satisfaction of all Portion natural, or what elſe they, or either of them could aſk or crave thro' the Father's Deceaſe; and that, in Caſe of any of theſe Children's Deceaſe without lawful Heirs of their own Body, their Portion ſhould be divided equally among the reſt ſurviving. *John Smith* died before his Father, and *Patrick* died after him, but conveyed what was reſting of his Portion by Teſtament in Favours of his eldeſt Brother *William*, for good Offices received from him.

Euphan Smith and her Huſband for his Intereſt, purſued *William* her eldeſt Brother, as repreſenting their Father, for Payment of her own Portion, and her Share of *John* and *Patrick*'s.

Alledged for the Defender. He is not liable to the Purſuer for any Part of *John*'s Portion: Becauſe, he being furniſhed by his Father with all Neceſſaries during his Lifetime, and dying before the Father, wanted not the Sum o 2500 Merks provided to him, as a Competency for his better living. Again, neither Principal nor Annualrent being due till the next Term after the Father's Death, and it being uncertain if *John* would ſurvive his Father; *Dies incertus habetur pro Conditione*: Which Condition failing by *John*'s happening to die before his Father, made the Proviſion fall, 17 *January* 1665 *Edgar* contra *Edgar*.

Replyed for the Purſuer. The Terms of the Subſtitution are general without diſtinguiſhing, whether the Inſtitute Children, die before, or after the Father. 2. Had not the Father inclined, That the Portion of the deceaſing *quandocunque*, ſhould belong to the Survivers, he would immediately upon *John*'s Death, have altered the Bond; which he did not, tho he lived after *John* a conſiderable Time. Who doubts that the vulgar Subſtitution, *ſi Hæres non erit*, comprehends the Caſe, *ſi Hæres eſſe non potuerit*, by dying before the Teſtator? Or was it ever alledged, That a Bond payable to any Perſon at the Granter's Death, and failing him to a third Party, is not due, if the firſt Creditor die; or that a Debtor is free, by his Creditor's dying before the Term of Payment? 3. *John* had a Right to his Proviſion, which would by his Death have paſſed to his Heirs, had it not been for the Subſtitution which divides it equally among the ſurviving younger Children: For *dabo cum moriar*, or *cum tu morieris*, is not an Obligement conditional, but in *Diem certum*, which *ceſſit licet non venit*, L, 79. *ff. de Condit. et Demonſtrat. Vinnii Comment,*

ment. in Inſtit. de Verb. Obligat. §. 2. The Deciſion betwixt *Edgar* and *Edgar* is miſapplied, being in the Caſe of a Bond payable to Children at a certain Age, which was uncertain to exiſt, and *pro Conditione habebatur*: Whereas it is moſt certain that all muſt die. 4. Whether *John* had Right or no, by dying before his Father; and whether the Father's Death be conſidered as a certain, or uncertain Day; *Euphan* being expreſly ſubſtituted in the Event of *John*'s dying without Children of his own Body, which hath fallen out, ſhe hath Right. For the Right of a Subſtitute depends not upon a Succeſſion to the firſt Inſtitute, but upon the Condition of the Subſtitution; And the Inſtitute failing is conſidered, as if his Name had never been mentioned in the Bond: It being a Principle, that *Subſtitutus ſub Conditione, exiſtente Conditione, habetur pro Inſtituto.* So in the Caſe of Tailzies: It cannot be pretended, That if the firſt Inſtitute die before the Granter, the whole Subſtitutes are cut off.

Duplyed for the Defender. In this Caſe *Dies nec ceſſit, nec venit*, the Obligement being payable at an uncertain Day, *viz.* To *John Smith* if he lived till the Term after his Father's Death, albeit it was certain the Father would die. The Defender's Caſe is much ſtronger than that of the *Edgars*: For *John*'s Proviſion had no Effect; Whereas the *Edgars* ſurvived the Granter of the Proviſion, and enjoyed an Intereſt of 5 *per Cent.* provided to them till *they* ſhould attain to the Age appointed for Payment of the principal Sum. The Clauſe of Diviſion is no Part of the Obligement conſtituting the Portion, but is only adjected after it: So that where the Obligement for the Portion ceaſeth thro' not Exiſtence of the Condition, the Portion, which is not, cannot be divided. Again, the Words, *In full Satisfaction of all Portion natural, or other Things that can be craved thro' the Father's Deceaſe*, neceſſarly import, that *John* could lay no Claim to it, without ſurviving his Father: Seing a Portion natural is only due at the Father's Death. The Preſumption from the Father's not cancelling the Bond, is of no Weight; the Father having died ſhortly after his Son, and had little Time to think of Buſineſs: Nor was it neceſſary to alter the Bond, which ſubſiſted as to four of the Children, and did evaniſh as to *John*, by failing of the Condition expreſt.

The Lords found, That the Purſuer hath Right to her Share of *John's* Portion, who died before his Father; in Reſpect of the Subſtitution in the Bond of Proviſion.

The Purſuer did further inſiſt for a Share of *Patrick*'s Portion, who died after his Father.

Anſwered for the Defender. He hath Right to what is unpaid of *Patrick*'s Portion, as Executor and univerſal Legatary to him, which he was made by the Defunct out of a rational and grateful Senſe of the many good Offices and Services he had done to him, by taking ſpecial Care of his Education, and getting him into a Poſt.

Replyed for the Purſuer. *Patrick* could not by any gratuitous Deed in Favours of the Defender, evacuate the Father's expreſs Subſtitution of the younger Children to *Patrick*'s Portion in the Caſe of his dying without Heirs of his own Body, *January* 31, 1679, *Drummond* contra *Drummond*; 10 *February* 1685, the College of *Edinburgh* contra *Wilſon* and *Scot*: For Subſtitutes are to be conſidered as Heirs of Proviſion, and as Creditors in the Succeſſion.

Duplyed for the Defender. By the Courſe of Deciſions, Deeds, if juſt and rational, albeit not for onerous Cauſes in Mony or Value, are ſuſtained, notwithſtanding Deſtinations, Subſtitutions, Clauſes of Return, or Diviſion. Particularly, 16 *June* 1676, *Mitchel* contra *Littlejohn*, a Donation without an onerous and neceſſary Cauſe to a Wife, who died within Year and Day of the Marriage, was ſuſtained as a juſt and rational Deed. As to the Deciſions cited by the Purſuer, they do not meet the preſent Caſe. For in that of *Drummond* contra *Drummond*, the Bond of Proviſion to the Siſters expreſly contained a Clauſe, That it ſhould return to the Granter himſelf and his Heirs, which is ſtronger and more favourable than a Subſtitution: And *Patrick*'s diſpoſing by Teſtament in Favours of his Father's Heir, is rather fortified by that Prattick. The other Caſe betwixt the *College* and *Wilſon*, is as little to the Purpoſe. For there the Mony was lent by *Mortimer* the Mother, and the Bond contained a Proviſion, That failing Heirs of the Son's Body, the Mony ſhould return to the Mother: Which was of the Nature of a Proviſion or Condition, and not a ſimple Subſtitution. And the Mother was not under that Obligation to provide her Son, as the Father was: Seing *legitima non debetur ex Parte Matris, ſed tantum ex Parte Patris.*

Triplyed for the Purſuer. By the civil Law, no Inſtitute could diſappoint the Subſtitution, even by onerous Deeds, *L.* 3. §. 2, 3, 4. *Cod. communia de Legat. et Fidei-commiſſ. Cujac. Oper. quæ edi voluit, Tom.* 1. *Conſ.* 22. And tho' our Law hath ſo far receded from the civil Law, as to allow to diſpone for onerous Cauſes, it allows not of rational, in Oppoſition to onerous Deeds: For what is reaſonable or unreaſonable, is not a Queſtion in Law, but a Queſtion of Prudence, which is moſt uncertain according to the various Opinions of Mankind. And as to the Deciſion cited by the Defender, it makes nothing for him, many Things being allowed *Favore Matrimonii et Liberorum*, which is a moſt onerous Cauſe, that ought not to be drawn in Conſequence.

The Lords found, That *Patrick* could diſpoſe upon his Portion or Proviſion by Teſtament, or otherways, for Cauſes reaſonable, tho' not onerous, notwithſtanding of the Subſtitution in the Bond of Proviſion.

December 15, 1710. Walter Forſyth *Fleſher in* Falkland, *againſt* Margaret Ritchie *Relict of* Steidman *Fleſher in* Kirkaldie.

WAlter *Forſyth* having purſued *Margaret Steidman* before the Juſtices of Peace of *Fife*, as repreſenting her Huſband, upon the paſſive Titles, for Payment of 29 *lib. Scots*: The Lords advocated the Cauſe upon this Ground, That the Juſtices of Peace are not competent to judge in Actions upon the paſſive Titles, except for ſmall Debts expreſly allowed by the Act Parliament 1661, to be purſued before them.

Eodem Die. *The Lord and Lady* Ormiſtoun, *againſt* John Hamilton *of* Bangour.

IN the Compt and Reckoning at the Inſtance of the Lady *Ormiſtoun*, as Executrix to the Lord *Whitelaw*, againſt *John Hamilton* of *Bangour* as Heir to him: The Lords found, That the Purſuer could not have Allowance out of the Executry, of extraordinary Expence neceſſarly diſburſed in expeding the Confirmation, occaſioned by the Fault and Means of the deceas'd Mr. *James Hamilton* of *Bangour*, apparent Heir to the Defunct, in Prejudice of the Defender, who is ſerved Heir to him. Albeit he the Defender alſo repreſents the ſaid Mr. *James Hamilton* his Father, againſt whom no Action was brought upon that Head in his Lifetime.

December 16, 1710. David Muſchet *of* Callihat, *againſt* John Harvy *of* Black-houſe.

BY Contract betwixt *Callihat* on the one Part, and *Alexander Steuart* of *Craigtoun* and *John Harvy* of *Black-houſe* on the other Part, 10 *April* 1703, 1703, *Callibat* diſponed his Wood to them, for which they obliged them and their Heirs to pay to him 1060 *lib. Scots* at the Terms therein-mentioned. After *Craigtoun* turned inſolvent and died, *Callibat* charged *John Harvy* for Payment of the whole Sum, who ſuſpended upon this Reaſon, That he could only be liable for the half of the Price of the Wood: In Reſpect he was not bound conjunctly and ſeverally with *Craigtoun.*

Anſwered for the Charger. The Suſpender and *Craigtoun*, being Co-partners in the Bargain, and *correi debendi*, are both liable *in ſolidum.*

Replyed for the Suſpender. Co-partnery is not to be preſumed without expreſs Conſent of Parties, which cannot be alledged here. For every Communion infers not a Society: There is no Society betwixt Heirs-Portioners, who are Owners of the Heretage *pro indiviſo*; Nor is there a Co-partnery betwixt two Perſons buying, or giving Commiſſion to buy one and the ſame Thing, *L.* 31. L. 32. *ff. pro Socio, Stair Inſtit. Lib.* 1. *Tit.* 16. §. 1; Albeit there is an accidental Communion betwixt theſe.

Replyed for the Charger. Albeit in the Caſe of Bonds of borrowed Mony, which is diviſible *eo Momento*, that it is received, the Co-obligants not being bound conjunctly and ſeverally, are liable *pro rata* only, each being preſumed to have drawn his own Share: Yet the Delivery of a Bargain of Victual to One of Two, or more Buyers, purifies the Contract, tho' it mention not what Quantity each was to receive; and in this Caſe the Wood being bought by both *pro indiviſo*, each of the Buyers is liable *in ſolidum* for the Price.

The Lords found the Suſpender liable *in ſolidum* for the whole Price: In Reſpect the Wood was ſold to them *pro indiviſo.*

Eodem Die. *Sir* James Elphinſton of Logie, *againſt* Anna Paton *Relict of* Andrew Logie *of* Loanhead.

IN the Proceſs at the Inſtance of Sir *James Elphinſton*, againſt *Anna Paton*, as Executrix to her Huſband, for Payment of certain Sums due by him to the Purſuer; the Defender having alledged, That the Inventory of the Defunct's Teſtament was exhauſted: The Lords found in the general, That an Executrix, having an Office, could only ſtate, in Order to exhauſt the Defunct's Teſtament, what was actually paid of his Debts, and not the Sums contained in the Grounds of Debt; and ought to communicate the Benefit of any Eaſes got from ſome Creditors to the reſt.

December 19, 1710. *The Magiſtrates of* Edinburgh *and the Tackſman of their Mills*, *againſt* Jean Alexander *Relict of Baillie* Adam Cleghorn *Brewer in* Edinburgh.

IN the Action at the Inſtance of the Magiſtrates of *Edinburgh* and the Tackſman of their Mills, againſt *Jean Alexander*, for abſtracted Multures of Malt brewed within the Liberties of the Town; The Purſuers founded upon an ancient Charter granted by King *Robert* the *Bruce* to the Town of *Edinburgh*, bearing, *Sciatis nos dediſſe et ad feudifirmam dimiſiſſe, et hac Præſenti Carta noſtra confirmaſſe Burgenſibus Burgi noſtri de* Edinburgh, *prædictum Burgum noſtrum de* Edinburgh, *una cum Portu de* Leith, *molendinis et cæteris Pertinentiis ſuis, tenend. et habend. eiſdem Burgenſibus et eorum Succeſſoribus de nobis et Hæredibus noſtris libere, quiete, plenarie et honorifice per omnes rectas metas et diviſas ſuas cum omnibus Commoditatibus, Libertatibus et Aſiamentis quæ ad dictum Burgum juſte ſpectare ſolebant tempore bonæ Memoriæ Regis* Alexandri *Predeceſſoris noſtri ultimo Defuncti, reddendo inde*

inde nobis et Hæredibus noſtris annuatim dicti Burgenſes et eorum Succeſſores 52 *Mercas* Sterling, *ad Terminos Pentecoſtes, ſancti Martini in Hieme pro equali Portione.* Whereby they contended, That a Right of Thirlage was clearly conſtituted in Favours of the Town, confirmed and cleared by ſubſequent Charters from the Sovereign in the Years 1603, and 1636, containing *Novodamus's*, Mills and Multures, and alſo by many Acts of Town Council from the Year 1655 *incluſive*, till the Year 1660, diſcharging any Indweller within the Freedom of the Burgh, to paſs from the common Mills with their Malt to grind at any other Mill.

Anſwered for the Defender. A ſimple Charter *cum Molendinis*, without ſo much as the uſual Words *cum Multuris*, can never infer a new Thirlage: Eſpecially conſidering, That this Charter appears not to be the original Erection-Charter of the Burgh, from its confirming to the Burgeſſes all their Privileges as poſſeſt in the Reign of King *Alexander*; and therefore could not, if the Thirlage was conſtituted before, impoſe a Burden upon the Burgeſſes without their Conſent. Seing *Jus meum auferri nequit ſine Facto meo*, or the Methods of Law. For tho' the Diſpoſition of a Mill conveys a Thirlage conſtituted before, as an Acceſſory, tho not expreſt; it never conſtitutes a Thirlage. It is indeed eſſential to a Mill, to take Hire for grinding, to which all who grind ſubject themſelves; but an Obligement not to withdraw from the Mill is not eſſential, but requires to be conſtituted as other adventitious Rights. Mills are mentioned in this Charter, not from a View to conſtitute a new Thirlage, but only to convey the Property, and in Conſequence, any former Aſtriction. Becauſe, they are conſidered as *ſeparata Tenementa*, which don't paſs as Part and Pertinent, except where united in a Barony; and *non conſtat* that the Town's Common Good lying without the Royalty was erected into a Barony. Yea further, a Clauſe even *cum Molendinis et aſtrictis Multuris*, in the ordinary Acceptation doth not conſtitute a new Aſtriction, but only Multures formerly conſtituted; unleſs the Proprietar of Lands diſpone his Mill *cum aſtrictis Multuris*, who is preſumed to thirl thereby his own Lands: But the King was not Proprietor of the Burger-tenements. Nor is there any implied Servitude upon the Burgeſſes of *Edinburgh* to the Mill of the Burgh, more than upon any other Heretors thro' the Country. Their being united in a Community, is ſo far from rendring their Condition worſe in this Matter; that the granting of the Mills with the other Common-good to be ſubſervient to the Community, argues for their Freedom, and that they are in a Manner the Maſters; the Erection of a Town Council being for Order's ſake: Conſequently, their Property is not preſumed to be ſubjected by ſuch a general Charter; whatever Effect it might have againſt the Lands, and Poſſeſſors of the Common-good, which the Community, as Maſters, may thirl.

Replyed for the Purſuers. King *Robert Bruce*'s Charter runs in the expreſs Terms of an original Charter, giving, granting, diſponing and perpetually confirming, *&c.* And the Clauſe with all the Commodities and Liberties pertaining to the Town in King *Alexander*'s Time, doth not hinder it to be an Original, eſpecially as to the Mills. Nor doth it import, That the Charter bears not *cum Multuris*: For a Diſpoſition of Mills, carries the Multures, eſpecially where Mills are diſponed, as here, *cum ſuis Pertinentiis* in a ſhort Charter, when the Simplicity of the Age did not uſe many Words to expreſs the ſame; Multures being the proper Pertinents of Mills. So that the Purſuers are under no Neceſſity to inſtruct that the Thirlage was conſtituted before the ſaid Charter. 2. It's a Miſtake, That a Diſpoſition of Mills doth not carry the Servitude of Multures not conſtituted before: For the whole Lands of a Barony are naturally aſtricted to the Mill thereof, without any Thirlage in Writ, and nothing but an Infeſtment of any Land thereof *cum Molendinis & Multuris* can ſecure againſt ſuch a Thirlage, *July* 17, 1629, the Laird of

Newliſtoun contra *Inglis*. And the Erection of a Burgh Royal, with a Diſpoſition of Mills as a Part of the common Good thereof, hath as great a Privilege, as any Erection of a Barony. Beſides, the Town's Mills, being a Part of the Royalty of the Burgh, are in the Caſe of the King's Mills, to which Thirlage is ſufficiently inſtructed by ſimple coming to the Mill, without any Adminicle in Writ: And here the Conſtitution of Thirlage by the foreſaid Charter, is cleared and fortified by Acts of the Town Council, and a continual Acquieſcence of the Brewers, till of late that the Defender began to abſtract.

Duplyed for the Defender. The Parallel doth not hold betwixt a Barony and a Burgh: For it is upon the Baron's Right of Property of the Lands, and his preſumed Inclination to have his own Tenants go to his own Mill, that the Preſumption of Thirlage is founded; ſince greater Juriſdictions as a Lordſhip, County, or Stewartry afford no ſuch Preſumption. As the Magiſtrates and Town Council of a Burgh (who are not Proprietars of the Burgher Tenements, but only Adminiſtrators of the common Good) could not conſtitute a Servitude by their Deed: So no Preſumption can ariſe from it. Beſides, it ſeems unnatural for a Burgh to be thirled, it being deſigned for Habitation and Trade, and liable to no Burdens but what are impoſed by Parliament. Again, tho' the Diſpoſition of a Barony will carry Mills, if any be, as a Pertinent, and Seaſin taken on the Lands will include a Mill, without any diſtinct ſpecifick Symbol: Yet it cannot be conceived that a Baron is under a Neceſſity to thirl his Lands to his Mill. On the contrary, it was found not ſufficient to thirl Lands, that they were Part of a Barony, whereof the Mill belonged to the Pretender to the Thirlage, *July* 12, 1621, *Douglaſs* contra Earl of *Murray*, and *July* 13, 1632, Earl of *Mortoun* contra Feuars of *Muckart*; Tho' indeed leſs Proof in ſuch a Caſe will be ſuſtained to infer a Thirlage. As to the Caſe of *Newliſtoun* and *Inglis*, as it is a very ſingular Deciſion; ſo my Lord *Stair*, *Tit. Servitudes real*, §. 17. ſuppoſeth plainly that this Thirlage had been conſtituted before, and that diſponing a Part of the Lands of the Barony did not infer a Liberation, unleſs there had been Clauſes to that Purpoſe. 2. There can be no reaſoning from the Parallel of the King's Mills, without proving immemorial Poſſeſſion. Beſides, that Privilege being reſtricted to the King's Property, can never be extended to Burghs.

The Lords found, That by the Charter granted by King *Robert* the *Bruce* to the Good Town of *Edinburgh*, a Thirlage within the Royalty to the Town-mills is conſtituted: By which the Good Town is enabled to reſtrain and hinder the Brewers to make Uſe of Hand-mills, or other Ingines, or do any other Thing whereby the ſaid Thirlage may be prejudiced and diverted.

Eodem Die. *Colonel* Erskin, *againſt Sir* George Hamilton.

AN Appriſing being led of the Lands of *Tulliallan*, at the Inſtance of *James Henderſon* Son to *John Henderſon* of *Fordel*, againſt Sir *John Blackadder in Anno* 1633, upon which Infeſtment followed in the 1634: In the Year 1670 *Alexander* Earl of *Kincardin* (who acquired Right to this Appriſing without taking Infeſtment) did in the 1673 grant an Infeſtment of Annualrent out of theſe Lands to the Lord *Cardroſs* for 50000 Merks, and in the Year 1676 granted an heretable Bond of Relief to him of ſeveral Debts and Ingagements, upon which the Lord *Cardroſs* was infeſt. In the Year 1678 the Earl diſponed the Lands in Favours of Sir *Robert Miln* Sir *George Hamilton*'s Author, who was publickly infeſt in the Year 1680. Colonel *Erskin* having the Lord *Cardroſs*'s Right in his Perſon, craved to be preferred to the Lands of *Tulliallan*, upon the Diſpoſition of *Henderſon*'s Appriſing in Favours of the Earl of *Kincardin*.

Anſwered for Sir George Hamilton. He had beſt Right to the Diſpoſition of the Appriſing made to the Earl of *Kincardin*; in Reſpect it was directly conveyed to Sir *Robert Miln* by the foreſaid Diſpoſition from the Earl, containing a general Aſſignation to all Diſpoſitions and other Rights he had to the Lands: And the Infeftments of Annualrent and Relief in Favours of the Lord *Cardroſs* were void and null as to the Lands of *Tulliallan*; The Earl having no real Right thereof in his Perſon, but a ſimple Diſpoſition never completed by Infeftment, which could not intitle him to paſs a real Right to the Lord *Cardroſs*.

Replyed for Colonel Erskin. Sir *George Hamilton*, by Virtue of the Diſpoſition made by the Earl to Sir *Robert Miln* of the Lands, Writs and Evidents, cannot exclude *Cardroſs*'s anterior Infeftment of Relief: For the Aſſignation to Mails and Duties in *Cardroſs*'s Bond of Relief, upon which a Decreet of Mails and Duties followed, did effectually denude the Earl of the Diſpoſition to *Henderſon*'s Appriſing, which hath no further Effect in Law than an Aſſignation to Mails and Duties; as a Tranſlation denudes an Aſſigny in any other Caſe. 2. A Right to the Property of Lands doth tacitly convey any leſſer Right that ſtood in the Granter's Perſon, according to the Rule, *Majori ineſt Minus*: Therefore the Obligement to infeft, with the Procuratory of Reſignation contained in *Cardroſs*'s Bond, which was a qualified Right of Property, did certainly convey to him any inferior Right to theſe Lands, and conſequently the Diſpoſition to *Henderſon*'s Appriſing; and a Procuratory of Reſignation, as my Lord *Stair*, *Inſtit. Pag.* 184 ſays, hath the Effect of a Diſpoſition. So the common Way of tailzieing Eſtates, is not by a formal Diſpoſition, but by a Bond obliging to infeft the Heirs of Tailzie, containing Procuratory of Reſignation, or by a Procuratory of Reſignation in their Favours without either Bond or Diſpoſition: Which Tailzies could not be diſappointed by a Creditor of the Maker adjudging ſome old Appriſing to which his Debtor had acquired Right without Infeftment. For otherwiſe the Rights of many of the beſt Eſtates in *Scotland* might be called in Queſtion, and laid open: It being ordinary for Perſons once infeft, to acquire other Rights without expeding Infeftment thereon, or being nicely cautious to infeft upon the moſt preferable. 3. An Appriſing diſponed to one already infeft, is ſo far extinguiſhed and renounced, that it cannot thereafter be made uſe of againſt the Acquirer or his Succeſſors: Tho' they may uſe it as a ſtanding Right againſt any Third Party, pretending a better Right to the Lands upon which they were infeft.

Duplyed for Sir George Hamilton. Any pretended implied Diſpoſition in the Obligement to infeft, did not inable the Lord *Cardroſs* to reſign by Virtue of the Procuratory, or take Infeftment by Virtue of the Precept in the Diſpoſition granted by Sir *John Henderſon* to the Earl: And albeit a ſubſequent Infeftment in the Earl's Perſon might have accrewed to the Lord *Cardroſs*; yet the Earl's Right having continued ever in the Terms of a ſimple Diſpoſition, *Cardroſs*'s Infeftment from him is null, as flowing *a non habente Poteſtatem*. 2. As the foreſaid Obligement to infeft, could convey no real Right; neither could it hinder the Earl to grant a direct Diſpoſition and Aſſignation to Sir *Robert Miln*: For even a ſecond Diſpoſition completed by Infeftment, would have carried the Earl's Right away in Prejudice of the Receiver of a prior Diſpoſition, as was decided *June* 20, 1676, *Brown* contra *Smith*.

Triplyed for Colonel Erskin. The Deciſion betwixt *Brown* and *Smith* makes nothing for Sir *George*. Becauſe, 1. The Queſtion there was with an Infeftment of Annualrent, which is not a Right of Property, and could not be underſtood a Conveyance of the Property that ſtood in *Brown*'s Perſon:

Whereas the Infeſtment of Relief given to *Cardroſs*, was a Right of the ſame Nature with that which ſtood in the Earl's Perſon, and might be transferred by any Writ *inter Vivos* ſhewing his Intention ſo to do. 2. *Brown* the Annualrenter's Infeſtment was never clothed with Poſſeſſion, and therefore it ſeem'd juſt to prefer *Smith* a ſingular Succeſſor, who firſt perfected his Right.

The Lords found, That *Cardroſs*'s Right of Relief containing a Procuratory of Reſignation and Aſſignation to the Mails and Duties, conveyed all Rights perſonal as well as real that were in the Earl's Perſon, for Security and Relief of the Debts therein contained; and therefore found, That the Colonel's Right being prior to Sir *Robert Miln*'s Right, is preferable.

Eodem Die. ACT *of* SEDERUNT *Anent ſubſcribing Informations, Petitions and Anſwers.*

THE Lords of Council and Seſſion, for the ſpeedier Diſpatch of Proceſſes that come before them, Ordain the *Act* of *Sederunt February* 6, 1692, for regulating the Order of Informations and Petitions, to be duly obſerved; and wherein it is declared, That the Lords will take no Notice of, nor give any Anſwer to Matters of Fact in Bills and Informations, except to ſuch as ſhall be diſtinctly propoſed, as either inſtructed by particular Writs produced, and the Articles thereof marked on the Margin, and ſo related, or which bear, That the Alledgers offer to prove their Alledgeances which they propoſe to be proven, and that in either Caſe, they ſet down the ſaid Alledgeances inſtructed or to be proven in large Characters, that they may receive diſtinct Anſwers, and that every Alledgeance bear the Point for, or againſt which they are propoſed: Likeas, The Lords prohibite any Thing to be inſert in the Informations, but in Relation to the Points contained in the Minute of Debate, and that the Informations keep the ſame Order in the Anſwers to Alledgeances, in which the Alledgeances are ſet down in the Minutes. And further, They Ordain, That all Petitions, Anſwers and Informations, given in to their Boxes, whether in Print or Writ, have the Advocate's Name ſubjoined thereto, who ſhall be looked upon as the Drawers thereof, and anſwerable for what they may contain, and likeways liable to the Cenſures in the Twenty third Article of the Regulations 1695. And that all reclaiming Bills have the Date when given in, and bear the Date of the Interlocutor reclaimed againſt, whether of the Inner, or Outer Houſe: As alſo, They diſcharge all Printers to print any Petition, Anſwer, or Information, without an ſigned Warrant from an Advocate, whoſe Name they ſhall print at the Bottom thereof. And its hereby declared, That the Lords will pronounce no Interlocutor nor Deliverance, upon any Information, Petition or Anſwer given in, otherways than as above ordained: And Ordain theſe Preſents to be printed, and affixed on the Wall of the Outer Houſe, and other Places needful.

December 20, 1710. William Baillie *Wright in* Edinburgh, *againſt* Janet Cuningham *Relict of* Thomas Porteous *Merchant there.*

IN the Proceſs of Declarator of Expiration of the Legal of an Appriſing of ſome Houſes in *Edinburgh*, belonging to the deceas'd *Thomas Porteous*, at the Inſtance of *William Baillie*, againſt *Janet Cuningham* Relict of *Porteous*: The Lords ſuſtained this Objection againſt the Appriſing, that it did not bear a Copy to have been affixed upon the Market-croſs, but only that a

Copy was left there, relevant to hinder the Legal to expire, and take off the Accumulations, and reſtrict the Appriſing to the principal Sum and Annualrents due to the Appriſer.

Eodem Die. William Henderſon *Merchant in* London *and* Elizabeth Innes *his Spouſe, againſt* Thomas Morton *in* Ruchlays, *and* John Smith *Writer in* Cowper.

IN the Action at the Inſtance of *William Henderſon* and his Spouſe, againſt *Thomas Morton* and *John Smith*, as Havers of the Effects of *Thomas Gourlay* Mariner, who had legated and aſſigned to the Purſuers 150 lib. *Sterling* in Caſe he died in his intended Voyage to the *Eaſt-Indies*, in the Ship the *Cæſar*, *John Clerk* Commander, which departed from *England* in *March* 1704; the Purſuers produced two *Affidavits* by *Ambroſe Fox* Carpenter, and *Nathaniel Cooper* Chaplain in the Ship the *Howland*, made at Kaneſeſſions in *London*, that one Captain *Thomas Gourlay* died on Board the ſaid Ship lying in *Belliſore* Road near *Bengall* in *September* 1707, for inſtructing *Thomas Gourlay*'s Death, and purifying the Condition of the Legacy.

Alledged for the Defenders. *Affidavits* taken abroad without Warrant or Commiſſion from the Lords, and without calling any Perſon intereſſed to object againſt their Hability, or croſs interrogate them, are not probative in our Law. 2. The *Affidavits* do not ſpecifie or deſcribe Captain *Gourlay* who died aboard the *Howland*, to have been the ſame Perſon that went to the *Eaſt-Indies* in the *Cæſar*. 3. *Eſto*, he died aboard the *Howland* in the 1707, yet the Condition of the Legacy cannot be underſtood to be purified, ſeing it is not proved that he died in his Voyage to the *Indies* aboard the *Cæſar*; but ſeveral Years after he had ſettled and was trading there.

Replyed for the Purſuer. The Death of *Thomas Gourlay* is as fully made out as the Nature of the Thing will bear: And ſuch *Affidavits* are generally ſuſtained as probative in all trading Nations, in Caſes extraordinary, *Jul* 25, 1677, *French* contra the Earl of *Weems*, a Souldier's Death was preſumed from his not appearing ſeveral Years in Time of War, unleſs the contrary were proved. 2. The Condition, in Caſe he died in his Voyage to th *Eaſt-Indies*, is a general comprehending the whole Space from his entring upon that Voyage till he ſhould return. And as the *Cæſar* was mentione only *deſignative* as the Ship he was then deſigned to proſecute the Voyag in: So his being called Captain *Gourlay* in the *Affidavits* doth not alter th Caſe; that being only an additional Character acquired by him during hi Stay in the *Indies*. And ſufficiently *conſtat de Perſona*, ſo long as the Defenders cannot condeſcend upon another Captain *Gourlay*, who died aboar the *Howland* at that Time.

The Lords ſuſtained the *Affidavits* as a preſumptive Probation, That was the ſame *Thomas Gourlay* who went aboard in the Ship the *Cæſar*, an left the Legacy, and repelled the Defences and decerned: The Purſuers fin ing Caution before extracting to refound the principal Sum, and Annua rents thereof, in Caſe the ſaid *Thomas Gourlay* ſhould ever appear.

December 21, 1710. Jean Pitcairn *Relict of Mr.* John Ainſworth *Merchan in* Edinburgh, *againſt* Thomas Haliday *Baillie of* Selkirk.

IN the poinding of the Ground at the Inſtance of *Jean Pitcairn*, as havin Right to an Infeſtment of Annualrent effeiring to 1000 Merks of Pri cipa cipal, granted by *James Mitchelhill* in his Lands of *Kingſcroft*, dated and regiſtred in the Year 1704; *Thomas Haliday*, who had an Infeſtment of Annualrent out of the ſame Lands in *Anno* 1701, and alſo out of *James Mitchelhill*'s Burrow-lands in *Selkirk* in the Year 1700, for the principal Sum of 1280 *lib.* and another Infeſtment of Annualrent out of the foreſaid Lands of *Kingſcroft*, and Burrow-lands in the Year 1707, for the accumulate Sum of 2000 *lib.* compeared and claimed the whole Annualrent of his 1280 *lib.* out of the Lands of *Kingſcroft* by Virtue of his firſt and preferable Infeſtment.

Alledged for Jean Pitcairn. Seing *Haliday* ſtands infeſt both in the *Kingſcroft* and Burrow-lands, if he take his whole Annualrent out of *Kingſcroft*, he muſt aſſign her to his Infeſtment out of the Burrow-lands, to the End ſhe may get Payment of her Annualrent.

Replyed for Thomas Haliday. Seing he hath another Infeſtment furth of both Lands for the accumulate Sum of 2000 *lib.* poſterior to *Pitcairn*'s Infeſtment in *Kingſcroft*, he may make his firſt Infeſtment ſubſervient to the other, and cannot be obliged to aſſign it to her to affect the Burrow-lands till he get Payment of both. For albeit a preferable Creditor who having Right to poind the Ground of ſeveral Lands for one and the ſame Annualrent, maliciouſly, without any Benefit ariſing to himſelf, exacts the whole out of one, to the Prejudice of a poſterior Creditor infeſt therein, may be ordain'd to aſſign the poſterior Creditor to his Right upon the reſt, in ſo far as may extend to the Proportion of Annualrent that fell to be taken furth thereof, had he poinded all equally; *cum Jus civile non indulgeat Malitiis.* Yet when a Perſon can ſhew any Prejudice he may ſuſtain by doing ſuch a neighbourly Office, he may very well ſay, *Egomet mihi Proximus*, Charity begins at home, and he cannot be obliged to aſſign to his own Loſs, *Nemini enim Fraudem facit, qui Jure ſuo utitur, L.* 55. *ff. de Reg. Jur.* And it was ſo decided in a parallel Caſe, *February* 11, 1674, *Bruce* contra *Mitchell.*

Duplyed for Jean Pitcairn. One is not indeed obliged to aſſign a prior perſonal Right, in Prejudice of a poſterior competent to him; there being no Record of perſonal Rights to certiorate Creditors thereof: But ſince the real Burdens upon Heretage are patent upon Record, a Perſon having an univerſal Infeſtment cannot *bona Fide* acquire any new Right in Prejudice of an anterior particular Infeſtment competent to another, and therefore if he draw his Payment by Virtue of the tranſcendent Infeſtment out of the particular Subject affected by that other, *in Æmulationem Vicini*, he muſt aſſign to the Party ſo excluded. Otherwiſe, a Debtor granting a general Infeſtment to one Creditor, would be obliged to grant general Infeſtments to all; Whereas Law hath rather incouraged the taking ſpecial Rights, and therefore introduced ſpecial Adjudications of Lands equivalent to the Sums.

The Lords were all clear that an Annualrenter might take his Payment out of any Tenement in which he hath got Infeſtment from the Debtor, and that if he get Payment out of the Debtor's Effects, it extinguiſheth the Security; ſo as it cannot be aſſigned to another Creditor. But found, That if *Haliday* receive Payment from *Pitcairn* out of her own Means, he is obliged to aſſign to *Pitcairn* for a proportionable Relief, with this Quality, That the ſame ſhould not be made Uſe of againſt *Haliday*'s other Infeſtment.

Eodem Die. *Sir* William Craigie *of* Gairſey, *againſt* James Graham *of* Grahamſhall *and the other Heretors of* Orkney.

IN an Action at the Inſtance of Sir *William Craigie*, againſt *Grahamſhall*, and other Heretors of *Orkney*, for Payment of 1000 Merks with Annualrent thereof, and Penalty contained in a Bond, granted by the Purſuers and Defenders conjunctly and ſeverally, to Sir *Archibald Stuart* of *Burrow* in *Anno* 1684; which Sir *William* paid upon Diſtreſs, and took a Diſcharge, *January* 23, 1703, to himſelf and the other Co-obligants, againſt each of whom he inſiſted for Relief and Re-payment *in ſolidum* deducing his own Proportion.

Alledged for the Defenders. Tho' every one of them was liable *in ſolidum* to Sir *Archibald Stuart* the principal Creditor; yet that Obligement being extinguiſhed by his receiving Payment and giving a Diſcharge, they are liable to the Purſuer only *pro rata* of what he paid, more than his own Share of the whole, and his Proportion of the Shares of ſuch of the *Correi* as were inſolvent at the Time of the Payment. Becauſe, *Correi debendi* do not ingage ſo much upon the Deſire of one another, as of the Creditor, upon which Account by the civil Law, no mutual Relief was competent, *niſi ex Pacto*, *L.* 39. *ff. de Fidejuſ. L.* 11. *C. Eod.* And whatever the Purſuer might have pleaded *ſuper Jure Authoris*, as coming in Place of the principal Creditor, had he got an Aſſignation to himſelf; he having taken a ſimple Diſcharge of the Debt, can only ſeek Relief as ariſing *ex Natura Rei et Negotii*.

Replyed for the Purſuer. If there be any Action competent to him upon the Bond, it muſt be competent in the ſame Manner and as fully, as it would have been to the original Creditor in whoſe Place by the Conſtruction of Law the Purſuer is ſubſtituted. There is no Reaſon why the Purſuer ſhould be in a worſe Caſe than any third Party, who by paying the Debt upon a Diſcharge without taking an Aſſignation, would have had Recourſe *Actione Negotiorum geſtorum* againſt the Co-obligants *in ſolidum*. And *Voet. Comment. in Pandect. Tit. de Fidejuſ.* §. *ult.* is of Opinion, That one of the *Correi* paying the whole, may, without any Aſſignment from the original Creditor, have Recourſe *in ſolidum* againſt the reſt.

The Lords found the Defenders liable only *pro rata* of what the Purſuer paid more than his own Share, and for their Proportions of the Shares o thoſe Co-obligants who were inſolvent at the Time of the Payment.

Eodem Die. Sir William Menzies *of* Gladſtains, *againſt Doctor* Andrew Brown *of* Dolphintoun.

JAmes Clerk having in the Year 1680, diſponed his Lands of *Wrightſhouſe* to Sir *John Clerk* of *Pennycook* his Brother, upon his granting him Back-bond, obliging himſelf to denude in Favours of the Diſponer, whe paid of the Sums therein-contained: There aroſe a Competition betwix Sir *William Menzies*, as having Right to an Adjudication in *Anno* 168 whereby the Lands and Eſtate of *Wrightſhouſes* are ſpecially adjudged *fron* *James Clerk* with all Right, Title, Intereſt, Reverſion, *&c.* that he had o could pretend thereto; And Doctor *Brown*, who in the Year 1709, adjudged ſpecially the Back-bond granted by Sir *John Clerk* to the common Debtor Sir *William* craved to be preferred to the Mails and Duties of the Lands becauſe his Adjudication is prior to the Doctor's.

Anſwered for Doctor Brown. No Reſpect can be had to Sir *William*'s Adjudication of the Lands, with all Right and Intereſt that the common Debto had therein: Becauſe he being denuded before by Diſpoſition and Infeſtment in Favours of Sir *John Clerk*, had no real Right in the Lands tha could be adjudged, but only Sir *John*'s Back-bond, which is only affecte by the Doctor's ſpecial Adjudication thereof, and could not be carried b the general Clauſe in Sir *William*'s Adjudication; more than Sir *John*'s perſona ſonal Bond, obliging himſelf to diſpone his own Lands of *Loanhead* to his Brother *James* in a certain Event, could be affected at the Inſtance of *James*'s Creditors, by an Adjudication of *Loanhead* with all Title, Intereſt, *&c.* tho' it might be affected by their adjudging ſpecially the perſonal Obligement, or *Jus ad Rem* that ſtood in *James*'s Perſon. At leaſt ſuch a ſpecial Adjudication would be preferred to the Adjudication of the Lands with ſuch a general Clauſe, *November* 21, 1673, *Fairholm* contra *Rentoun*, *January* 23, 1674, *Niſbet* contra *Mein*. 2. An Adjudger of a ſpecial Diſpoſition of Lands from his Debtor who never was infeſt, would be preferred to another Creditor who had adjudged from him the Lands with all Diſpoſitions concerning them. *James Clerk* had no more Right by the Back-bond to the Lands of *Wrightſhouſes*, than one hath by a ſimple Diſpoſition without Infeſtment: Becauſe, tho' the Back-bond did qualifie Sir *John* in the Diſpoſal of the Right, it did not qualifie the Right it ſelf; ſo that Sir *John* might have diſponed the Lands to another, without the Burden of the Back-bond. 3. Sir *William* having adjudged only all Rights in general concerning the Lands of *Wrightſhouſes*, that ſtood in the common Debtor's Perſon, and the Doctor having ſpecially adjudged the Back-bond, he muſt be preferred to Sir *William*: As an Adjudication of particular Lands, would be preferred to an Adjudication of Lands in general; or as a general Adjudication of Lands with all Right thereto belonging to the common Debtor, would not comprehend an Obligement to conſtitute a Servitude in his Favours, tho' a ſpecial Adjudication would. For *in toto Jure Generi per Speciem derogatur, & illud potiſſimum habetur quod ad Speciem directum eſt*, *L.* 80. *ff. de Reg Jur.* So ſpecial Legacies are preferred to ſuch as are general; Diſpoſitions or Adjudications of all Lands, with Houſes, Biggings, *&c.* according to the Legal, in Oppoſition to the grammatical Senſe, do not carry Mills, unleſs mentioned *per expreſſum*; And general Diſcharges extend not to Obligements to infeſt in Lands; nor do general Diſcharges containing ſome Particulars, extend further than to Things of the ſame Kind with the Speciality expreſs'd.

Replyed for Sir William Menzies. One who adjudgeth ſpecial Lands from his Debtor, with all Right thereto belonging to him, hath Right thereby to any Intereſt he hath upon the Subject as *eminenter* therein contained, *January* 23, 1674, *Niſbet* contra *Mein*. 2. The Back-bond of the ſame Date with the Diſpoſition, did qualifie Sir *John Clerk*'s Right, in the ſame Manner as if it had been ingroſſed in the Body of the Diſpoſition: Conſequently, *Clerk* was not abſolutely denuded, ſo long as that Reverſion was competent to him. As to the Prattick betwixt *Fairholm* and *Rentoun*, there is a great Difference betwixt appriſing ſome Lands in ſpecial, with all other Lands in general belonging to the Debtor; and an Appriſing of particular Lands with all Right competent to the Debtor therein. For 'tis true, that if in the firſt Caſe any appriſe theſe Lands in ſpecial, that another had formerly appriſed by the general Clauſe, the laſt Appriſer will be preferred; in Reſpect the Lands ſpecially appriſed by the one, and generally by the other, are different Subjects: Whereas in the laſt Caſe, the firſt Appriſer of Lands ſpecially deſigned, with a general Clauſe of all Right competent to the Debtor, is preferable to one Appriſing afterwards ſpecially ſome Reverſion or other Right competent to the Debtor; The Controverſie being *de eodem Subjecto*, viz. Lands ſpecially deſigned. Nor is it a whit more neceſſary to appriſe a Reverſion or Back-bond ſpecially, than to appriſe the Diſpoſition or other Rights and Infeſtments of the Eſtate: Seing all theſe are but the Debtor's Title and Intereſt in the Eſtate ſpecially appriſed. So that *L.* 80. *ff. de Reg. Juris*, is not to the Purpoſe; Sir *William*'s Adjudication being as much *ad Speciem* directed, as was neceſſary. 2. In the ſuppoſed Caſe of Sir *John Clerk*'s Obligement to diſpone the Lands of *Loanhead* in a certain Event, ſuch an Obligement behoved to be ſpecially adjudged, becauſe *James Clerk* hath no Manner of Right to the *Loanhead*, and was only to have Right in the Event expreſt in the Obligement; juſt as it would hold in the Caſe of adjudging a Diſpoſition or Minute of Sale, where the Purchaſer had no anterior Right to the Subject: Whereas here *James Clerk* was undoubted Proprietar of *Wrightſhouſes* at his granting the Diſpoſition, and receiving the Back-bond, which ſo qualified the Diſpoſition, that he might have redeemed it *quovis Tempore*. 3. There is no Parity betwixt the Back-bond, and a Servitude acquired by the common Debtor: Becauſe, the former relates to the Subject ſpecially adjudged, and the latter comes out of ſome other Subject, ſince *Res ſua nemini ſervit*; and therefore ought to be ſpecially appriſed.

The Lords found, That the general Clauſe in Sir *William*'s Adjudication, did convey the Right of the Back-bond granted by Sir *John Clerk* to his Brother, and all other Right which the common Debtor had of the Subject adjudged: And therefore preferred Sir *William*'s firſt Adjudication to Doctor *Brown*'s ſpecial Adjudication.

Eodem Die. *The Earl of* Levin *againſt* Theodore Moriſon *of* Bognie.

IN the Compt and Reckoning at the Earl of *Levin*'s Inſtance, againſt *Theodore Moriſon* of *Bognie*, mentioned *ſupra February* 10, 1710, for extinguiſhing the Wadſet Right of *Bognie*: The Lords found, That *Robert Dumbar* of *Burgie* the Earl's Cedent, having adjudged the Reverſion, had a ſufficient Title to offer Security to *Bognie* in the Year 1683, conſorm to the *Act* 62. *Parl.* 1. *Ch.* 2.

The Defender now objected againſt the Legality of the Offer; 1. The Inſtrument of Offer bears not, That *Burgie*'s Adjudication was read in *Bognie*'s Preſence, but only that it was produced: And, without hearing it read, he was not bound to know that it carried the Reverſion of his Wadſet Lands, nor obliged to notice the Offer. 2. The Inſtrument being only the Aſſertion of a Notary, is not ſufficient to prove, That the Bond of Cautionry therein-mentioned was offered: Unleſs the Bond were now produced for inſtructing thereof. As in all Caſes where an Offer of Mony or Writs is made, theſe ought to be produced in the Declarator to follow thereupon, that the Lords may determine upon any Defects therein. 3. *Bognie*, being in the natural Poſſeſſion of the Wadſet Lands, was neither obliged to cede his Poſſeſſion, nor to compt for the Rents; in Reſpect he was not, after Offer of Security, legally warned fourty Days before the Term to remove, conſorm to a Clauſe in the End of the Act 1661, and the Deciſion *February* 20, 1679, *Brace* contra *Bogie*.

Anſwered for the Purſuer. 1. There was no Neceſſity to read the Adjudication, unleſs *Bognie* had deſired it to be read, which is not pretended. 2. Seing it appears from the Inſtrument, That the Security offered by *Burgie* was refuſed, not upon the Account of Inſufficiency, but upon ſome other Pretences, he was not obliged to keep the Bond of Cautionry, nor is he bound to produce it now. For the Act of Parliament making it optional to the Wadſetter to take Security and quit Poſſeſſion, or to retain Poſſeſſion, and be comptable, and *Bognie* having determined his Election by refuſing Security, and retaining Poſſeſſion; the Bond was not to be kept as a Security for his Annualrent, who had choſen rather to poſſeſs for his Security: Whereas Mony conſigned in Order to Redemption, coming in Place of the Right redeemed, muſt be effectual to the Creditor. Inſtruments of Seaſin, Premonition, and Intimation, being required by Law as eſſential Documents to make ſuch Deeds publick, are probative of the Facts therein contained: Tho' Inſtruments taken by Perſons according to their Arbitrement upon Matters of Fact, or

Occurrences, do ſometimes require an aſtructing Probation. 3. The Meaning of the Clauſe in the Act of Parliament is only this, That when the Wadſetter in the natural Poſſeſſion, is willing to accept the offered Security and to remove, (in which Caſe only the Reverſer can inſiſt to remove him) he cannot be removed unleſs he be legally warned after the Offer of Security. But the Defender cannot ſubſume, in the Terms of that Clauſe, That he was willing to accept the Security offered, and remove: For he flatly refuſed to remove, pretending he poſſeſſed by a better Right. Nor is the Deciſion betwixt *Bruce* and *Bogie* to the Purpoſe: Seing there the Lords found both Defences relevant, not *ſeparatim*, but jointly.

The Lords found, That the Inſtrument of Offer bearing, That *Burgie*'s Decreet of Adjudication was produced, needed not to bear, That it was read, unleſs it had been required to be read; And therefore repelled the firſt Objection. 2. Found, That the Inſtrument of Offer narrating, That *Burgie* had offered Bond and Caution to the Wadſetter, bearing the Tenure of the Bond, and the Perſons bound therein, and *Bognie* not having accepted thereof, but continued in Poſſeſſion of the Wadſet Lands, the ſaid Inſtrument doth ſufficiently inſtruct the ſame, albeit the Bond offered be not now produced, and ſo repelled the ſecond Objection. 3. Found, That the Clauſe in the Act of Parliament 1661, *Viz. Where the Wadſetter is in the natural Poſſeſſion of the Wadſet Lands by dwelling thereon, or labouring the ſame with his own Pleugh and Goods, or otherways having the ſame pleniſhed with his Goods, in that Caſe, he ſhall not be holden to remove from his Poſſeſſion, but at the ordinary Term of removing, and that he be lawfully warned fourty Days before, and after ſufficient Security ſhall be made to him in Manner above ſpecified, before the ſaid Warning*, is only to be underſtood in the Caſe, when after the Offer is made and accepted by the Wadſetter, he, the Wadſetter, who is in the natural Poſſeſſion, becomes a Tenant, and cannot be removed till legally warned; And therefore repelled alſo the third Objection.

December 22, 1710. *The Creditors of the deceas'd Mr.* David *and* James Dewars *of* Reidhouſe, *Competing.*

IN the Competition of the Creditors of the deceas'd Mr. *David* and *James Dewars*, Mr. *John Blair* Miniſter at *Scoonie*, and Mr. *Henry Scrimzeor*, and other onerous Creditors, craved to be preferred to *Anna Dewar* the common Debtor's Siſter, upon this Ground; That her Debt of Three thouſand Merks was only a Bond granted to her for Love and Favour, and other onerous Cauſes and Conſiderations, payable at his Deceaſe, and not then, unleſs ſhe ſurvived him, and reſerved Power to him to revoke or alter the ſame; And Mr. *David*'s contracting Debts after his granting the Bond, was a virtual Revocation thereof.

Alledged for Anna Dewar. She muſt be preferred to any Creditors whoſe Debts were contracted after the Date of her Bond, which not being revoked by the Granter, became a valid and effectual Debt at his Death; Eſpecially conſidering, that it rendred him not inſolvent, but he had at his Death an Eſtate unaffected by legal Diligence exceeding all his Debts. And if thro' the Addition of *James Dewar*'s Debts, who was Heir to Mr. *David* his Brother, and the Negligence of Mr. *David*'s Creditors in not uſing timely Diligence for their Payment, Mr. *David*'s Eſtate be now inſufficient to pay all, they have themſelves to blame. For *Actio Pauliana* in the civil Law, and the Act of Parliament 1621, do reduce gratuitous Rights at the Inſtance of anterior Creditors only, where the Granter hath not at the Date or Delivery thereof, an Eſtate ſufficient for theſe and his other Debts, *Stair*, *Inſtit. Lib.* 1. *Tit.* 9. §.

15.

15. And if it were otherwiſe, no Man, after contracting Debt, could provide Children, or make Donations, tho' he be never ſo opulent at the Time; If many Years after, thro' ſupervening Accidents he ſhould turn inſolvent.

Replyed for Blair and Scrimzeor. The gratuitous revocable Bond in Favours of *Anna Dewar*, was no better than a Legacy, which takes only Effect *deductis Debitis*. And the ſimple contracting Debts by one who reſerved a Faculty to burden the Subject, or bequeath any Sum, is in the Conſtruction of Law a Burdening or Bequeathing, tho' it refer not expreſly to the Faculty, *January* 26, 1675 and 1676, *Lawrie* contra *Drummond*, *February* 13, 1705, *Cochran* againſt the Lady *Balmile*. So that it is needleſs to inquire whether Mr. *David Dewar* was inſolvent or not. Beſides, the Lords are in Uſe to prefer Creditors to Children competing on Bonds of Proviſion, tho' their Diligence be even more timely, without inquiring into the Debtor's Condition when he granted ſuch Bonds, *February* 10, 1688, Creditors of *William Robertſon* againſt his Children, *December* 23, 1709, Creditors of *Marſhal* againſt his Children. And *Dirleton* upon the Deciſion *June* 30, 1675, *Clerk* againſt *Williamſon*, is of Opinion, (and gives very ſolid Reaſons for it) That the Receiver of a gratuitous Right, ſhould never be allowed to compete with an anterior Creditor, if the Granter's Eſtate *ex Eventu* be found inſolvent. Sir *George Mackenzie* alſo, in his Commentary upon the Act of Parliament 1621, is of the ſame Perſwaſion.

Duplyed for Anna Dewar. True, the Diſpoſition of a particular Subject, containing Power to alter, is ſufficiently revoked by a poſterior Diſpoſition of the ſame Subject to another, tho' making no Mention of the Power to revoke: Becauſe, the latter Deed is plainly inconſiſtent with the former*:* And, for the ſame Reaſon, a Man contracting Debt to the Value of his Eſtate, after his granting a revocable Bond, is juſtly preſumed to revoke it. But there is no Ground to preſume, That a Man of intire Credit contracting a Debt after his granting a revocable Bond, when his Eſtate is more than ſufficient to ſatisfie both, doth revoke the firſt. Nor can this Bond granted in *Liege Pouſtie* to *Anna Dewar*, be compared to a Legacy, which only affects the Dead's Part of the Executory, and doth not oblige the Heir; But it hath the ſame Effect as a Bond obliging one to pay if he do not revoke, which Condition is purified by the Granter's Death without Revocation.

The Lords, in Reſpect the Bond granted by Mr. *David* to *Anna Dewar*, bears to be for Love and Favour, and contains a Power to revoke, found, That both his prior and poſterior Creditors are preferable to her, unleſs ſhe prove that he left, at his Deceaſe, an Eſtate ſufficient to ſatisfie the Bond and all his other Debts.

Eodem Die. William Baillie *of* Lamingtoun, *againſt Mr.* Alexander Menzies *of* Culterallers.

IN the Proceſs of Compt and Reckoning at the Inſtance of *Lamingtoun* againſt Mr. *Alexander Menzies*, as repreſenting his Grandfather, who was one of the Purſuer's Curators.

Alledged for the Defender. No Proceſs can be ſuſtained againſt him, in Reſpect he was neither perſonally cited, nor at his Dwelling-houſe; But the Execution bears only, *That a Copy was left to him at the Dwelling-houſe of Sir* William Menzies *of* Gladſtains *in* Culter, *his ſpecial Reſidence for the Time*; And the Defender or his Family had no other Reſidence in *Culter* then (which was Sir *William Menzies* his Houſe) than by Way of Viſit.

Replyed for the Purſuer. Theſe Words, *His ſpecial Reſidence*, can only reſpect the Defender's Reſidence*:* Since Sir *William Menzies* was not the Perſon

ſon to be cited, but only mentioned caſually, becauſe of the Defender's reſiding with him at the Time. And the Execution bearing the Defender to have been cited at his Dwelling-houſe ſpecially deſigned, *habetur pro Veritate*, unleſs he redargue it by proving that he had then his Reſidence or *Larem & Focum* elſe-where.

Duplyed for the Defender. Whatever might be pretended for the Faith of the Execution, unleſs diſproved by a poſitive contrary Probation, had it born that the Defender was cited at his own ordinary Dwelling-place; Yet when it bears only, That the Copy was left for him at the Dwelling-houſe of Sir *William Menzies* (who uſed to have his Reſidence ſometimes at another Houſe called *Gladſtanes*) the Purſuer muſt ſupport it by proving that the Defender or his Family had reſided at *Culter* fourty Days at leaſt before the Date of the Citation.

The Lords ſuſtained the Execution; the Purſuer proving that the Defender had his Reſidence 40 Days before the Execution at Sir *William Menzies's* Houſe in *Culter*.

Eodem Die. Alexander Irving *of* Drum, *againſt* Thomas Gordon *Son and Heir to Mr.* Thomas Gordon.

THe deceas'd *Alexander Irving* of *Drum* having aſſigned to Mr. *Thomas Gordon* his Creditor in 2600 Merks, for his more ready Payment, wo Bonds granted to the Cedent for 2716 Merks, bearing Annualrent, by *Walter Robertſon* and *William Souper*; upon the Aſſigny's obliging himſelf by Back-bond to retroceſs the Cedent in Caſe he paid the 2600 Merks, or to order *Souper* and *Robertſon* to pay to him the Superplus 116 Merks, in Caſe the Aſſigny got Payment of what was due to him by Virtue of the Aſſignation: *Alexander Irving* now of *Drum* purſued *Thomas Gordon* as repreſenting Mr. *Thomas* his Father (who uplifted the whole Sums aſſigned) for Repetition of the 116 Merks, with the Annualrent thereof ſince uplifting. The Defender was content to pay the Principal, but alledged, That no Annualrent could be required: Seing Mr. *Thomas Gordon* doth not oblige himſelf in the Back-bond for Annualrent of the 116 Merks, in the Caſe of his uplifting the whole Sum aſſigned, and Annualrent is only due *ex Pacto, vel Lege*. So an ordinary Factor uplifting Mony by Commiſſion, would not be liable for Annualrent of the Sums uplifted, tho' the ſame bore Intereſt formerly to the Conſtituent; Becauſe he is obliged to have it ready by him, when called for.

Replyed for the Laird of Drum. Mr. *Thomas Gordon*'s Back-bond doth not indeed oblige him expreſly to pay Annualrent for the 116 Merks, but it obliged him to leave it in *Souper* and *Robertſon*'s Hand, and to order them to pay the ſame to *Drum*; which if he had done, that Ballance would have born Annualrent, it being a part of the principal Sum in their Bond: Conſequently Mr. *Gordon*, who had the Uſe of the 116 Merks ever ſince *Souper* and *Robertſon* paid it, muſt be liable for the Intereſt thereof to *Drum*, as they would have been, had it remained in their Hands till now; And Annualrent is ſometimes found due without expreſs Paction, *December* 2, 1628, *Blair* contra *Ramſay*, *January* 13, 1669, *Hume* contra *Seaton*.

The Lords found Mr. *Gordon* liable for the 116 Merks, and the Annualrents thereof from the Time the ſame was paid to Mr. *Thomas* his Father.

Eodem Die. Elizabeth Dickſon *and* Patrick Heriot *Merchant in* Fiſher-raw *her Husband, againſt Miſtreſs* Iſobel Logan *Relict of Mr.* John Dickſon *Secretary to the Marqueſs of* Tweddale.

IN the Action at the Inſtance of *Elizabeth Dickſon*, as Executrix *qua* neareſt of Kin to Mr. *John Dickſon* her Brother, and her Huſband for his Intereſt, againſt the Marqueſs of *Tweddale* and others, for Payment of certain Sum they were owing to Mr. *John* by Bond: Compearance was made for *Iſobe Logan* his Relict, who produced a Contract of Marriage betwixt Mr. *Joh Dickſon* and her, written by himſelf, containing a Diſpoſition of the foreſai Sums to himſelf and her, the longeſt Liver in Liferent, and the Children o the Marriage in Fie, which failing to her Heirs, Executors, or Aſſignies.

The Purſuer repeted a Reduction of the Contract, alledging it to be null in ſo far as, albeit of a Date ſince the Act of Parliament 1681, it doth not de ſign the Writer, but bears only to have been *written by the ſaid Mr. Joh Dickſon*, who is not deſigned in the Body of the Writ.

Anſwered for Miſtreſs Iſobel Logan. The Deſignations of Perſons in Writ being introduced only *ad evitandam Perſonarum Incertitudinem, et ad diſ criminandas ejuſdem Nominis Perſonas*; Where *conſtat de Perſona*, by his ſingular Name or otherways, no farther Deſignation is neceſſary. And ſo it is that Mr. *John Dickſon* was deſigned ſufficiently, the Contract mentioning tha he and Miſtreſs *Iſobel Logan* did accept each other as their lawful future Spouſes who were afterwards married, and the Purſuers cannot condeſcend upon another Mr. *John Dickſon* and Miſtreſs *Iſobel Logan*, who were contracted and married. 2. By the Contract Mr. *John Dickſon* aſſigns the Bonds purſued for to his Wife, in which Bonds he is ſpecially deſigned, and the relative Word *ſaid* in the latter Clauſe, *Viz.* Written by the ſaid Mr. Mr. *John Dickſon* ſubſequent to the Aſſignment, refers to the Creditor mentioned and deſigned in the Bonds aſſigned. 3. Contracts of Marriage are favourable and often ſuſtained, tho' wanting ſome of the Formalities neceſſary in other Writs: As one Notary is ſufficient to ſign a Contract of Marriage, and a Miniſter may perform the Part of a Notary in ſuch a Contract; neither of which would be allowe in other Writs.

Replyed for the Purſuers. The Act 179. *Par.* 13. *J.* 6. requires the Write of a Paper to be deſigned particularly by his Dwelling-place, or his Imployment, or other Denomination. And the Lords are ſo nice in obſerving th Deſignation of Perſons in Writs, that in the Caſe betwixt *Walter Abercromb* and *Innes* of *Dunkinty*, they annulled a Writ upon the Account of a Miſtake i the Chriſtian Name, and would not allow the Error to be helped, albeit *con ſtabat de Perſona*, and the Deſignation was full and ample. Now that o *future Spouſes*, cannot paſs for a certain Deſignation; becauſe many might b contracted and not married. 2. Seing the Contract doth not mention that th Bonds were granted to Mr. *John Dickſon*, *non conſtat* the Bonds purſued fo are thoſe aſſigned; For Mr. *John Dickſon* might have been Creditor to th Marqueſs of *Tweddale* and Lord *Teſter* by Aſſignation to their Bonds.

The Lords found, That Mr. *John Dickſon* was ſufficiently deſigned, and there fore repelled the Reaſon of Reduction.

Eodem Die. George Gordon *of* Buckie, *againſt* William M'intoſh *of* Bo lam.

GEorge *Gordon* of *Buckie* as repreſenting *John Gordon* of *Buckie* his Father having charged *William M'intoſh* of *Borlam*, for Payment of 900 Merk of principal, and Annualrents thereof, contained in a Bond granted by him i the Year 1677, to the ſaid *John Gordon*; He ſuſpended upon this Reaſo That the Bond was paid, and offered to inſtruct Payment by a miſſive Lette ſubſcribed by the Charger's Father, and directed to the Suſpender in *Novembe* 1675. The Lords found, That the miſſive Letter not being holograph, no

i

in Re mercatoria, inſtructed not Payment of the Bond charged on, and therefore decerned.

December 29, 1710. George Hume *younger of* Wedderbrun, *againſt Mr.* Joſeph Hume *of* Ninewells *Advocate.*

MR. *Joſeph Hume* being obliged by the *Reddendo* in the Charter, of great part of his Lands holden of *George Hume* of *Wedderburn*, to appear at *Wedderburn*'s Courts to be held upon the Barony of *Hornden* (within which the ſaid Lands ly) or upon any other of *Wedderburn*'s Lands within the Shire of *Berwick*; and there to do every Thing before *Wedderburn* and his Baillies, that he ought in Law to do; and to ſerve him *Tempore Regiarum Proclamationum*, upon Mr. *Joſeph*'s own Expences; and *Wedderburn* having advertiſed him by a Letter, to attend and accompany him to the circuit Court of Juſticiary to be held at *Jedburgh* 10 *May* 1709, conform to Her Majeſty's Proclamation: Upon Mr. *Joſeph*'s Failure in that Piece of Duty, *Wedderburn* cauſed *Alexander Niſbet* his Baron-Officer cite him perſonally at his Dwelling-houſe of *Ninewells*, to compear the 28 of the ſaid Month, at a Court to be held by *Wedderburn*'s Baillie at *Hutton*, who decerned him in Abſence to pay 50 *Lib. Scots* of Fine. *Ninewells* ſuſpended upon this Ground, That he was not lawfully cited, the Copy being given to him at his Houſe of *Ninewells*, which is not within the Barony of *Hornden*: And the Baron-Officer could execute no Summons without the Barony.

Replyed for Wedderburn. Albeit the Suſpender was not cited within the Barony of *Hornden*, the Citation is valid; becauſe he is by his Charter obliged to appear at all the Charger's Courts, when required, whether he dwell within the Barony or not, which implies, That he may be cited for that Effect at any Place.

Duplyed for the Suſpender. By Attendance at Courts in the Charter, perſonal Suit and Preſence only is meant; and Payment of Feu-duties is meant by the doing every Thing that the Vaſſal ought in Law to do: But he is not bound to anſwer to any Action at the Superior's Inſtance, unleſs cited duly within the Barony; for *extra Territorium, Jus dicenti impune non paretur.*

The Lords ſuſtained the Reaſon of Suſpenſion, That the Baron-Officer did execute the Libel whereupon the Decreet charged on proceeded *extra Territorium*, and found the Decreet to be null.

Eodem Die. Margaret Hay *and* William Carruthers *her Huſband, againſt* John Hay *Doctor of Medicine.*

DOctor *John Hay* in his Contract of Marriage with *Jean Law* his firſt Wife, being bound to beſtow and imploy 8000 Merks upon Bond, Land, Annualrent, or other Security that he ſhould think ſufficient for the Time, and to take the Rights to himſelf and her, the longeſt Liver in Liferent, and to the Bairns of the Marriage in Fie; which failing to his own Heirs and Aſſignies whatſoever, and to re-imploy the Mony, if uplifted, in the ſame Terms: *Jean Hay* only Child of that Marriage, with the Concourſe of her Huſband, purſued the Doctor for Implement of the Contract. The Defender offered in Implement to reſign a Tenement or Lodging in the high Street of *Edinburgh*, belonging to him, for new Infeftment to himſelf in Liferent, and to the ſaid *Jean Hay* his Daughter in Fie, for Security to her of ſo much of the 8000 Merks as knowing Perſons ſhould eſtimate the Lodging to be worth.

Alledged for the Purſuers. A Houſe in *Edinburgh*, which before the Doctor's Death, that the Purſuer could come to enjoy it, might happen thro' Decay for not repairing (which Liferenters are very guilty of) or thro' ſome fatal Accident of Fire, to be worth little or nothing, is no ſuch Security as can ſatisfie the Terms of the Contract.

Anſwered for the Defender. It being rational for him a reſiding Burgeſs in *Edinburgh*, exercing his Imployment there at the Time of the Contract, to acquire a Dwelling-houſe for his own Uſe, his Child may very well be ſatisfied with a Security of that Nature, which is not affected with any real Incumbrance. Accidents never come under Conſideration: For even Country Land hath been loſt by Inundation, or Overblowing; And it is not poſſible to be abſolutely ſecure in the lending of Mony.

The Lords found, That the Tenement in *Edinburgh* ought not to be received as a Part of the Security to be given by the Doctor in Implement of his Contract of Marriage with the Purſuer's Mother.

But thereafter 18 *January* 1711, The Lords upon adviſing a reclaiming Bill preſented by Doctor *Hay*, and Anſwers made thereto by the Purſuers, found the Tenement to be a ſufficient Security, the Doctor diſponing the ſame: In Reſpect the Contract obligeth him to *imploy the Mony upon Bond, Annualrent, or other Security that he ſhould think ſufficient at the Time*, which allows him to be *Arbiter* in the Matter. And it could not be thought but that, when he bought the Tenement, he looked on it as a ſufficient Security for what Mony it coſt him.

Eodem Die. Margaret Leſlie *and* Andrew Johnſton *of* Knockhill *her Husband, againſt* William Dick *of* Grange *and Captain* Robert Leſlie.

THE deceas'd Colonel *James Leſlie*, for Love and Favour, diſponed his Eſtate of *Grange* and other Fortune, with and under the Conditions and Proviſions after-ſpecified, failing Heirs of his own Body, *in Favours of* James Dick *Son to the deceas'd* William Dick *of* Grange, *his Nephew, and the Heirs-male of his Body, which failing to his Heirs-female (the eldeſt ſucceeding always without Diviſion, which failing which failing to Sir* James, *his Heirs and Aſſignies whatſoever: Providing and declaring, That the ſaid* James Dick *and other Heirs of Tailzie and Proviſion above-mentioned ſhould be obliged to aſſume the Sirname of* Leſlie, *and bear Sir* James's *Coat of Arms, and to purchaſe Land with his Mony, taking the Rights to themſelves in the Terms above-mentioned.* Which Diſpoſition contained the uſual Clauſes and Exceptions *de non alienando, & non contrahendo Debitum*; And *that in Caſe the ſaid* James Dick, *or any other Heir of Tailzie and Proviſion above-mentioned failed to perform any of the foreſaid Conditions or Proviſions, the Contravener ſhould loſe his Right, and the Eſtate accreſce and belong to the next immediate Heir in Order as above.* Sir *James* in the ſaid Diſpoſition *obliged himſelf, his Heirs of Line and others whatſoever, to ſerve Heirs and confirm themſelves Executors to him if needful, to ratify the ſame, and denude in Favours of the ſaid* James Dick, *and the other Heirs of Tailzie and Proviſion above-written, with the Burden of the foreſaid Proviſions, and Conditions*; and Sir *James* reſerved to himſelf a Power to alter. Upon whoſe Deceaſe, Captain *Robert Leſlie* his Brother, ſerved himſelf Heir of Line, and without Regard to the Tailzie, diſponed the Eſtate to *James Dick* and his Heirs whatſoever, to whom dying without Heirs of his Body, *William Dick* his Brother ſucceeded.

Margaret Leſlie Captain *Robert*'s only Child, and *Andrew Johnſton* her Huſband for his Intereſt, raiſed a Reduction, Improbation and Declarator againſt *William*

William Dick and the Captain to have it found and declared, That by *James Dick*'s Death and the Captain's Contravention of the Tailzie by altering the Succeſſion, he the Captain forfeited his Right to the Eſtate, and it devolved upon *Margaret Leſlie* his Daughter, as next Heir of Tailzie and Proviſion to Sir *James*.

Anſwered for the Defender. *Margaret Leſlie* hath no Title to reduce, ſeeing ſhe is neither Heir of Tailzie *nominatim* ſubſtitute, nor can be Heir of Line ſo long as the Captain her Father liveth, who is ſerved Heir of Line to his Brother, and may have a Son that would exclude his Daughter. The Eſtate being once eſtabliſhed in the Perſon of the Captain the immediate Heir of Line, his Daughter can never pretend to it, but as Heir to her Father, whoſe Deeds ſhe is bound to warrand: And if he hath forfeited his Right, then all Deſcendants that can take under him, and have only Right by and thro' him, forfeit their Expectation alſo. 2. No Deed of Captain *Robert*'s before the Succeſſion devolved on him, can give his Daughter Acceſs to purſue this Declarator of Irritancy againſt him: For how can a Perſon forfeit a Right, before he have it? Beſides, Captain *Leſlie* was not obliged to enter Heir of Tailzie, nor could he; ſo that his entering Heir of Line could be no Ground of Irritancy. Again, tho' the Heirs of Line were bound to diſpone in Favours of the Heirs of Tailzie, the Heirs of Tailzie did not require them to do it; and its impoſſible now that *James Dick* and his Line have failed. Nor did *James Dick* ever accept of the Tailzie, as he was under no Obligation to accept it, but acquired from Captain *Robert Leſlie tanquam quilibet*: And an Irritancy can only affect him who poſſeſſeth by Virtue of the Right containing the Clauſe irritant. 3. The Heirs of Tailzie having failed, and the Right returned to Sir *James Leſlie*, the Maker, his Heirs and Aſſignies whatſoever, the prohibitory and irritant Clauſes have no longer Effect, and cannot affect theſe Heirs and Aſſignies. For the Termination in Favours of Sir *James* himſelf and his Heirs and Aſſignies whatſoever, was not a Subſtitution, but a Return whereby the Fie that before was tailzied becomes ſimple, *Craig, de Succeſſione Talliata, Spotſwood, Title Tailzies, Stair, Inſtit. Lib.* 2. *Tit.* 3. §. 43, & 58. And as the Adjection of Aſſignies imports always a free Power of Diſpoſal and Alienation: So theſe Words, *Which failing, to Sir* James *himſelf, his Heirs and Aſſignies*, naturally import a Return of the Eſtate to the lineal Succeſſion, with the ſame Power and Right of Dominion, as the Granter himſelf could have had, had *James Dick* and the Heirs called in Order under him failed in his own Lifetime. As it were Nonſenſe to pretend, That the Colonel could be Heir of Proviſion: So theſe who ſucceed in his Place, do not ſucceed as Heirs of Proviſion, but as Heirs deſigned by Law in the Right of Blood. It was allennerly to prevent an *ultimus Hæres*, that the Colonel called his Heirs whatſoever to the Succeſſion, failing all the Members of the Tailzie, without any Dream of Irritancy.

Replyed for the Purſuers. 1. The Right in the Perſon of *James Dick* having become void by the Contravention of the Terms of the Tailzie, it falls to the Purſuer as next Heir of Tailzie, who hath Intereſt to declare the Irritancy, and Right to ſucceed as if her Father the Contravener were dead: Not as if ſhe pretended to ſucceed as Heir to her Father, but as Heir of Proviſion to Sir *James* her Uncle. The Purſuer is not indeed next Heir of Line, while her Father is alive, who may have Sons; but a remoter Heir of Tailzie may declare an Irritancy, when there are nearer Heirs in Being who have not forfeited: And ſhe muſt be allowed to declare in the ſame Manner as the neareſt Heir in Being is admitted to ſerve tho' there be a nearer *in Spe*. If a remoter Heir were not allowed to quarrel Deeds of Contravention, it were in the Power of the Inſtitute by Colluſion with ſome of the interjected Subſtitutes, to evacuate the Tailzie, and alienate at their Pleaſure. 2. Tho' *James Dick*, not being *alioqui ſucceſſurus*, might have rejected the Benefit of the Tailzie; yet he could never make any legal Title to his Uncle's Eſtate without the Tailzie: Nor could Captain *Robert* devolve any Right upon *James Dick*, but in the Terms of the Tailzie, ſeing by being ſerved Heir of Line he became immediately liable to perform the Obligements in the Tailzie. The Purſuer is ſtated in a Condition to oblige her Father, either to ſubject himſelf to the Irritancies, or to diſpone to her, if he had not been formerly denuded: For it's inconſiſtent that the Colonel could oblige an Heir of Line to diſpone to an Heir of Tailzie, and yet that this Heir of Line ſhould be free from the Irritancies. Tho' a Perſon cannot properly be ſaid to loſe what he hath not, yet the Captain had *Spem ſuccedendi*, which he forfeited by incurring the Irritancies: And an Heir ſubſtitute in a Tailzie may do many Deeds before he ſucceed, which will effectually ſeclude him when the Heretage devolves upon him. Nay further, Sir *James Leſlie*'s obliging his Heir of Line to denude in Favours of his Heirs of Tailzie and Proviſion reſolves in a *Fidei-commiſſum*, by the civil Law to be religiouſly obſerved, *L.* 5. 8. 14, 21. *Cod. de Fidei-commiſſ.* And the Party tranſgreſſing the Defunct's Will therein, was deprived of any Benefit he could claim as Heir or Legatary. So that the Captain, having acted contrary to the Truſt repoſed in him, ſhould, as *Hæres Fiduciarius*, loſe the Benefit of Succeſſion *tanquam indignus*, which ſhould devolve on the Purſuer, as ſubſtituted by the Tailzie. 3. The Colonel deſigning the Perpetuity of his Family, in the Way and Manner projected by himſelf, and having ſubſtituted but one Perſon, *Viz. James Dick* and his Line, did certainly intend to bind and tie up his own Heirs of Line under the ſame Irritancies; as the only probable Method to anſwer his Deſign of preſerving his Family; ſeing a tailzied Settlement cannot be inſtanced where there is but one ſingle Heir of Tailzie. It's a begging the Queſtion to ſay, That theſ Words, *Which failing, to me, my Heirs and Aſſignies*, were added only t exclude the Fisk: For they import that Sir *James* deſigned not only his own Heirs of Blood to ſucceed him, as Heirs of Tailzie, but alſo ſuch as he ſhoul appoint by an Addition to his former Nomination, without making any new Diſpoſition. Which is the Reaſon he left himſelf a Power by the Blank in th Tailzie, ſeing the Perſons ſo named would be Aſſignies to him, and liable t all the Conditions in the Nomination. *James Dick*'s Death before the Colonel could not return any new Power of Diſpoſal, which was inherent in th Colonel during his Life. So that there is no Parity betwixt the Colonel' ſurviving *James Dick*, and the Colonel's Heirs whatſoever ſurviving him Again, it cannot be thought, That the Colonel deſigned to clog *James Dic* his Nephew and his Heirs deſcendant (whom he preferred to his Brother with Irritancies, and to leave his Brother to a free and unconditional Diſpoſa Eſpecially conſidering, That the Colonel names *James Dick* and the Heir after-mentioned, with and under the Proviſions after-mentioned: And Heir whatſoever are the Heirs after-mentioned, conſequently affected with *th* Proviſions. The Word *Aſſignies* in the Termination of the Tailzie can't b applied to the Aſſignies of Sir *James Leſlie*'s Heirs, but to his own Aſſignies As theſe Words, *To me, my Heirs and Executors*, could never be underſtoo to relate to the Executors of my Heirs.

Duplyed for the Defender. 1. The Forfeiture of an Heir of Tailzie, exclude his Heirs of Line, as well as himſelf, unleſs it be expreſly provided againſt Therefore it is provided in Sir *John Nisbet*'s Tailzie, That if any of the Heir of Tailzie deſcending of the Granter's own Body, ſhall irritate his Right, h ſhould forfeit for himſelf only. *Nuda Spes* in a remote Heir of Tailzie can' be a Title of Action to diſturb Property and Succeſſions: And tho' the neareſt Heirs in Being are admitted to ſerve, while there is a Poſſibility of a nearer, *ne Dominia ſint in pendenti*, Declarators of Irritancy which are penal, and no ſo neceſſary, are not ſo favourable in Law. 2. *Eſto* the Captain had denuded in Favours of *James Dick* in the Terms of the Tailzie, yet by the Failure of *James Dick* and his Heirs, the Eſtate returned to the Captain as Heir whatſoever, free of Irritancies: And by the Nature and Stile of Tailzies, Irritancies are only conceived againſt actual Heirs contravening. The Purſuer adduceth the Authority of the civil Law to prove a Matter not in Queſtion, *Viz.* That Heirs are bound to fulfil the Conditions made by the Defunct: But there the very Condition required by the Defunct to be fulfilled, *Viz.* To denude to *James Dick*, hath failed, and the Eſtate hath returned to the legal Channel. 3. Its inconceivable how the Word *Aſſignies* can be applied to the Blank; ſeing if theſe left Blank had been filled up, they could not be called Aſſignies, but would have ſucceeded as Heirs of Tailzie; and the Word *Aſſignies* is not inſerted immediately after the Blank, but after the Return to Sir *James* and his Heirs, failing of the Heirs of Tailzie. Again, The Colonel had very good Reaſon to affect only the Heirs of Tailzie and Proviſion, with theſe Proviſions and Irritancies: Seing all his Care was to preſerve his Eſtate in the Line of his Subſtitution, ſo long as it laſted, which might have continued for many Generations, tho' it hath now failed *ex Accidenti.* But after theſe choſen Subſtitutes ſhould fail, when it was uncertain what Perſon might ſucceed to him, or in what Degree of Propinquity, he had no further Concern than to exclude an *ultimus Hæres.* Where Heirs and Aſſignies are expreſt in the laſt Termination of a Tailzie, the precedent naming of Heirs under Burdens, muſt be reſtricted to the ſpecial Heirs of Tailzie. Again, To underſtand by the Word *Aſſignies*, Sir *James*'s own Aſſignies, is againſt the Rules both of Senſe and Grammar: Becauſe, he had formerly provided for his Aſſignies by his reſerved Power to alter, and the Blank in his Nomination. And it were ridiculous to ſuppoſe that Sir *James* would have poſtponed his own Aſſignies to the Heirs ſubſtitute: So that the Word *Aſſignies* being a Relative, muſt properly be conſtrued with the Perſons immediately before named.

Triplyed for the Purſuer. To conclude that the Forfeiture of a Subſtitute in a Tailzie debars his Heirs when both are called, is to alledge that the Forfeiture of one Heir of Tailzie ſhall exclude another, which is abſurd: For as Irritancies are penal, ſo they are perſonal. The Citation out of *Dirletoun*'s Tailzie is miſapplied, for he knowing that the Forfeiture of any Heir of Tailzie had only a perſonal Effect, except it were otherways expreſt: Provided, *ob majorem Pœnam.* that if any one of his Heirs of Tailzie not deſcended of his own Body, ſhall incur the Irritancy, the Forfeiture ſhall exclude himſelf and his Heirs, but allowed the Law to take Place as to Deſcendants of his own Body, ſo as theſe ſhould only forfeit for themſelves. 3. It doth not alter the Caſe, whether the Subſtitutes be called *nominatim*, or only *deſignative*: For albeit the Perſon on whom the Subſtitution terminates, may be uncertain, it muſt certainly be one that is neareſt of Kin to the Maker of the Tailzie. And the Irritancies in Tailzies muſt affect all the Members, who by Virtue thereof have Right to ſucceed, Heirs whatſoever as well as other Subſtitutes: *Nam ubi Lex non diſtinguit, noſtrum non eſt diſtinguere.*

The Lords found, That the prohibitory and irritant Clauſes of the Tailzie, do not affect the Heirs and Aſſignies of Sir *James Leſlie* the Maker of the Tailzie; and that no Deed done by Captain *Robert* before the Succeſſion devolved on him, can give the Purſuer Acceſs to purſue this Declarator of Irritancy againſt her Father.

Eodem Die. George Gibſon *Skipper in* Borrowſtounneſs *and* Andrew Wilſon *Writer there his Aſſigny, againſt* Robert Leith *Writer in* Edinburgh.

ROBERT *Leith* Writer in *Edinburgh* and others gave a Commiſſion to *George Gibſon* to buy for them a Ship in *Holland*, and accepted Bills for the Price of their reſpective Shares; particularly *Robert Leith* accepted a Bill of 50 Pound *Sterling* payable to *George Gibſon* or Order at *Martinmas* 1709, as the Price of a Twelfth Part of the Ship, upon his delivering a Vendition thereof to Mr. *Leith*. Sometime after the Ship was bought, and brought home to *Scotland*, and had there ſuffered a Diſaſter in breaking of her Back, *George Gibſon* offered a Vendition of the Twelfth Part to *Robert Leith*, upon Payment of the 50 Pound his Share of the Price, and upon his Refuſal proteſted the Bill, and charged him to pay. *Robert Leith* ſuſpended upon this Ground, That the Vendition not being offered *debito Tempore*, while *Res* was *integra*, he is not obliged to accept of a damnified Ship in Place of a ſound one for his Mony. And *Gibſon* being *Dominus* by buying the Ship, and taking the Right thereof in his own Name, the *Periculum* was his till he denuded by a Vendition. For the Commiſſion gave not the Suſpender *Jus in Re*, but only *Jus ad Rem* to claim a Vendition by an ordinary Action; notwithſtanding whereof *Gibſon*, having a complete Right to the Ship in his Perſon, might have ſold her effectually to another: And *Res perit ſuo Domino*.

Replyed for the Charger. Mr. *Gibſon* having bought the Ship by the Suſpender's Order, the latter was properly *Dominus*: For *Mandatarius* may take the Right to be acquired either in his own, or the Conſtituent's Name. It was not reaſonable for Mr. *Gibſon* to take the original Right to the Ship in the Suſpender's Name, who had not paid the Price: Nor was he obliged to tranſmit the Vendition, till he got Payment. However the ſame was in his Name only as *Fiduciarius* for the Suſpender: Conſequently any Damage the Ship ſuſtained muſt fall upon him.

The Lords repelled the Reaſon of Suſpenſion, and found the Letters orderly proceeded.

Eodem Die. *Mr.* James Daes *of* Coldingknows, *againſt* Jean Scougal *and* Robert Semple *of* Fulwood *her Husband*.

MR. *James Hume* Merchant in *Edinburgh*, *Archibald Hume*, *Alexander Daes* and others in *Anno* 1672 took a Nineteen Years Tack of *Dalrymills* from *Suſanna Lockhart*, Relict of *Gabriel Weir*, for a certain Tack-duty to carry on a Paper Manufacture: And in the Year 1682 *Alexander Daes* and *Archibald Hume*, by Contract aſſigned their Intereſt in the Tack, and in the Inſtruments, Materials and trading Stock, to Mr. *James Hume*, for which he obliged himſelf not only to relieve them of the Tack-duty payable to *Suſanna Lockhart*, but alſo to pay to each of them 333 Merks yearly for their Shares of Profit, and to leave the Inſtruments, Materials and trading Stock in the ſame Condition. Mr. *James Daes*, as Donatar of the ſingle and liferent Eſcheats of *Alexander Daes* his Brother, purſued the Lady *Fulwood*, as repreſenting Mr. *James Hume* her firſt Husband, for Payment of the 333 Merks of *Superplus* Tack-duty for ſeveral Years preceeding the 1688.

Alledged for the Defender. The Action is preſcribed *quoad Modum probandi* by the Act of Parliament 1669, not being purſued within Five Years after the Tackſman's Removal.

Replyed for the Purſuer. The Preſtations due by Mr. *James Hume* to his Co-partners, fall not either under the Letter or Reaſon of the ſaid Statute, which was introduced only to favour the Ruſticity of Tenants and Labourer of the Ground. And tho' it may be extended to Mills ſet with and ſubſervient to Lands, and to Coal-houſes or Mines which are *Partes Fundi:* It can never be extended to this Caſe, where the additional Duty was not payable for the Mill (ſeing the Proprietar got the Tack-duty thereof) but only for the Uſe of the Inſtruments, Materials and trading Stock, provided for the Paper Manufacture ; the Aſſignment whereof was not properly a Tack or Subtack, but only a Method taken by the Society, for the better expeding their Deſign by the original Contract entred into for making Paper. 2. *Eſto* this Communication of Profits for a yearly Price were a formal Subtack, as it is not, it being neither a Subtack of Land or any Thing annexed to Land; the Act of Preſcription, which ſpeaks only of Tenants in Lands, cannot be applied thereto, more than a Tack of brewing Looms ſet together with a Stock of Victual for a yearly Duty, could fall under the Quinquennial Preſcription.

Duplyed for the Defender. By *Archibald Hume* and *Alexander Daes* tranſferring their Intereſt in the Tack to Mr. *James Hume*, any former Co-partnery betwixt them was diſſolved ; ſince the Cedents did no longer run any Hazard of Loſs and Gain. 2. The Pretence, that it is *Locatio Mobilium*, is of no Moment; for theſe *Mobilia* being only *Inſtrumenta Fundi*, acceſſory to the Mill, which is a *Fundus* or *Prædium ruſticum*, muſt be reckoned of the Nature of the principal Subject ſet, and regulated accordingly. For otherwiſe, it might be pleaded, That the ſubſetting Lands with Steelbow, Nolt, Sheep, or Straw, for a high Tackduty, that were firſt ſet without Steelbow, *&c.* for a leſſer Duty, would alter the Rule of Preſcription, which is not to be thought.

Triplyed for the Purſuer. The Manufacture Materials, which are of far greater Value than the Mill, can be no more reckoned Acceſſories thereof, than a Picture can be reckoned *Acceſſorium Tabulæ*; the Mill being ſet only as ſubſervient to carry on the Work. 2. Steelbow ſet for a ſeparate Rent from Lands, could not fall under the Act of Parliament, and we are not in the Caſe of a Tack of Lands with Steelbow for a joint Duty: The Rent of the Mill being payable to the Proprietar, and the additional Duty to the Puſuer. Beſides, Steelbow being *Inſtrumenta Fundi* ſubſervient to Tenants as Labourers of the Ground, for whoſe ſake the Act of Preſcription was made, no Conſequence can be drawn thence to the Utenſils and Materials of a Paper-work.

The Lords found, That the annual Preſtations due by Mr. *James Hume*, to *Archibald Hume* and *Alexander Daes* his other Co-partners, fall under the Act of Parliament 1669, anent the Quinquennial Preſcription.

January 5, 1711. George Pyper *Merchant in* Montroſe, *Supplicant.*

George Pyper a Minor about Eleven Years of Age, being purſued as Heir to his Father, at the Inſtance of *James Innes* Merchant in *Aberdeen*, for Payment of Two hundred and ninety ſix Pound *Scots*, and a Day taken for the Defender to renounce to be Heir: The Lords, upon a Petition offered for the Minor, authoriz'd *William Smith* Merchant in *Montroſe* the Petitioner's Uncle, to be Curator *ad Litem*, to ſign and give in for him a Renunciation to be Heir to his Father.

January 9, 1711. John Ruſſel *of* Braidſhaw *Writer in* Edinburgh, *againſt* James Miller *Copper-Smith in the* Cannongate.

James Miller being charged at the Inſtance of *John Ruſſel*, to make Payment of One hundred and fourty nine Pound Sixteen Shilling *Scots*, contained in a *Decreet* obtained at the Charger's Inſtance againſt him, before the Commiſſaries of *Edinburgh*, dated the 21 of *March* laſt: He ſuſpended and raiſed Reduction of the Decreet, upon this Ground, That it was *ipſo Jure null*, for being pronounced in cloſe Time of Vacation, when no inferior Court could ſit. Seing by Act of *Sederunt July* 21, 1696, the Lords diſcharged the Clerks of the Bills to write upon any Bills for Diſpenſations to inferior Courts beyond the Twentieth of *March* in all Time coming. And Acts of *Sederunt* have the Force of Acts of Parliament in regulating the Adminiſtration of Juſtice, and are Directories to the whole Lieges to walk by.

Replyed for the Charger. The Reaſon ought to be repelled, becauſe the Decreet bears a Diſpenſation granted by the Lords licenſing, and diſpenſing with the Commiſſaries to ſit, hold Courts, and adminiſter Juſtice to the Lieges to the Twenty ſecond of *March incluſive*, as the Licence produced bears, and the Decreet was pronounced on the Twenty firſt.

Duplyed for the Suſpender. No Deed of the Clerks of the Bills can be more prevalent than the Act of *Sederunt*: Eſpecially conſidering, that Diſpenſations are granted and paſt of Courſe upon a common Bill without reading.

Triplyed for the Charger. The Lords frequently grant Diſpenſations to the Twenty ſecond of *March*, and ſuch a Diſpenſation muſt be held a ſufficient Warrant to the inferior Judge to ſit. Who is to preſume that the Lords Deliverance was orderly given; And if their Decreets ſhould be annulled or reduced on this Pretence, Decreets of the greateſt Importance might be laid open to the great Prejudice of the Lieges, who might have contracted *bona Fide* thereupon. 2. Tho the Act diſchargeth Clerks to write upon ſuch Bills, it doth not declare ſuch Diſpenſations null: And if the Clerks of the Bills have malverſed, the Suſpender might ſeek Redreſs againſt them. 3. The Lords being able to alter their Acts of *Sederunt* at Pleaſure, a Warrant of Diſpenſation ſigned by a Lord, gives full Security, notwithſtanding it be not preciſely in the Terms of the Act of *Sederunt*.

Quadruplyed for the Suſpender. The Act of *Sederunt* doth not only regulate the Clerks, but the Adminiſtration of Juſtice: And what is done contrary to Regulations is void and null. 2. Albeit the Lords may alter their Acts of *Sederunt*, yet this Act ſtands unaltered. And it were abſurd to allow more Force to a ſingle Lord's Deliverance upon a Bill of Diſpenſation of Courſe, than to expreſs Acts of *Sederunt* made by the whole Lords *in Præſentia*, after mature Deliberation.

The Lords having found upon Trial, That it hath been the conſtant Cuſtom ſince the Act of *Sederunt*, for the Commiſſaries of *Edinburgh* to ſit and judge by Virtue of Diſpenſations to the Twenty ſecond of *March*; They refuſed to repone the Suſpender againſt the Decreet charged upon, in Reſpect of the Diſpenſation produced, and bygone Cuſtom; And therefore found the Letters orderly proceeded. But the Lords called the Clerks of the Bills before them, and required them to beware of ſuch a Practice in Time coming.

January 12, 1711. *The Inhabitants and Burgeſſes of* Perth, *againſt the Shoomakers of the ſaid Burgh.*

THE Inhabitants and Burgeſſes of *Perth*, having raiſed a Proceſs againſt the Incorporation of Shoomakers there, for declaring it lawful to all Perſons upon Market and Fair Days, to import and vend Shooes, Boots and Slippers of all Kinds, without Diſtinction: It was alledged for the Defenders, That no ſuch Declarator could be ſuſtained, becauſe all Crafts within that Burgh were anciently erected into Deaconries and Incorporations, with Freedoms, Liberties and Powers, to make neceſſary Regulations for the Good of the reſpective Incorporations; and particularly the Defenders have been in immemorial Uſe and Cuſtom of debarring all Strangers from importing high Heeld Shoes, Boots and Slippers upon Fairs or Weekly Markets; and of ſeizing all Shoes ſo imported or vended, except thoſe that were ſingle Soled or Pumps; and of committing the Shoemakers or Importers to Priſon.

Replyed for the Purſuers. The general Powers in the Defenders Charters, allowing to make Laws and Regulations concerning their Trade, do only reſpect the Members of their own Incorporation; and cannot be extended to take away the Rights and Privileges which the Town and Inhabitants have by their other Grants of Fairs and weekly Markets. 2. Did the Defenders Charters expreſly carry ſuch an excluſive Privilege as they plead, it could not be regarded: Becauſe, that were a plain Monopoly, inconſiſtent with Law, Trade, and the Freedom of Fairs and Markets: And our Law hath juſtly taken Notice of, and diſcharged ſuch Abuſes, under the Pain of Oppreſſion, *Act* 42. *Parl.* 4. *Ja.* 4. Again, Fairs and weekly Markets are valuable Privileges of the Town, not liable to Preſcription, *L.* 9. *ff. de Uſurp. & Uſucap. Et ubi Lex inhibet Uſucapionem, bona Fides poſſidenti nihil prodeſt.* And tho' Preſcription might be objected to private Perſons who for fourty Years have been debarred by the Defenders from coming to the publick Markets and Fairs: Yet, as to all others 'tis *meræ Facultatis*, who cannot be prejudiced thereby. 2. Since the Union, Commerce is free throughout the united Iſland; and if any Trader from *England* cannot be hindred to import and ſell within any Part of *Scotland*, far leſs can a Burgeſs or Inhabitant there be tied up.

Duplyed for the Defenders. Their excluſive Privilege is no Monopoly, being granted by the Sovereign conform to Law; whereas a Monopoly is entred into by private Parties without Authority. So both in *Scotland* and *England*, certain trading Societies and Companies enjoy Privileges excluſive of all others, which are not reckoned Monopolies. Crafts were erected into Deaconries and Incorporations for the Improvement of their Manufactures, and that the Members thereof might be the more inabled to pay their Proportion of Taxes laid on the Burgh. And tho' a Right or Thing deſtined to publick Uſe, cannot be acquired *Uſucapione*, and Markets belong to the publick Policy, yet they differ in their Rules and Privileges in different Places, which may be regulated by long Cuſtom. 2. There is indeed an equal Communication of Trade by the Union thro' all the united Kingdom, all the Subjects thereof are brought upon an equal Foot: That is, an *Engliſh* Man may import into a Royal Burgh in *Scotland*, whatever a *Scots* Man could import, but that doth not derogate to the Privileges of Royal Burghs, and Incorporations: So that where the *Scots* are under a Reſtraint by the ſpecial Regulation of a Market, introduced by Preſcription; the *Engliſh* cannot plead Immunity from it. Thus the Grant of Two Penies upon the Pint of Ale in Favours of the Town of *Edinburgh*, lyeth equally upon all the Lieges *Scots* and *Engliſh*, notwithſtanding the Union: Whereas the Twelve Pence impoſed in Favours of the Good Town, upon the Pint of Ale or Beer imported from abroad, doth not now ſince the Union affect *Engliſh* Ale or Beer, tho' it did before.

The Lords repelled the Defence founded upon Preſcription, and ſuſtained the Declarator.

January 13, 1711: James Forreſter, *Son to the deceas'd* William Forreſter *Writer to the Signet and his Tutor, againſt* Robert Forreſter *late Baillie of* Edinburgh.

IN the Action at the Inſtance of *James Forreſter* and his Tutor, againſt *Robert Forreſter*, for Payment of Seventy three Pound owing by him *per*

Ticket to the deceas'd *William Forreſter James*'s Father: The Purſuer offered to prove by the Defender's Oath, That the Ticket was in *William Forreſter*'s Hands at his Death, which the Defender unwarrantably got up and retired. The Defender having deponed, That he paid the Mony to one of the Purſuer's Tutors, in Preſence of, and with Conſent of the reſt, who thereupon delivered him up his Ticket: The Purſuer alledged, That it were dangerous to ſuſtain a Debtor's Oath, That he retired his Bond from his Creditor's Tutors, upon Payment made to them, as a ſufficient Exoneration to the Debtor; Law having fix'd a Rule, That the Debtors of Minors ſhall pay to their Tutors only upon getting a Diſcharge, which is neceſſary, not only to exoner the Debtor, but alſo to conſtitute a Charge againſt the Tutors for what they upliſt.

Anſwered for the Defender. That he having retired his Ticket, is free by the Brocard, *Inſtrumentum penes Debitorem repertum præſumitur ſolutum*: Altho' it were never ſo clearly made out that the Debt was once reſting. And the Purſuer having no other Mean of Probation but the Defender's Oath, it doth ſufficiently prove the Payment.

The Lords found, That the Ticket being in the Defender's Hand, the Oath proves, That the Sum contained in the Ticket was paid to one of the Purſuer's Tutors in Preſence of, and with Conſent of the reſt, and the Ticket retired; and therefore found the Defender not liable, and aſſoilzied.

January 16, 1711. *Mr.* Hugh Gray, *Son to the deceas'd Mr.* Hugh Gray *of* Dalduff, *againſt* Hugh Cairncroſs *of* Hilſlop.

IN the Action at the Inſtance of Mr. *Hugh Gray*, againſt *Hugh Cairncroſs*, for Payment of the bygone Annualrents of Two thouſand Merks contained in a Bond granted by *Walter Cairncroſs* the Defender's Father, payable to Mr. *Hugh Gray* of *Dalduff* the Purſuer's Father, and failing of him by Deceaſe, to   Subſtitute, his Heirs, Executors, or Aſſignies; Upon which Bond, tho' it bore a Precept of Seaſin, old Mr. *Hugh* did never take Infeſtment, but by his Teſtament ordered his third Son *Thomas*'s Name to be inſerted in the blank, and aſſigned the bygone Annualrents to him: The Lords found, That the Bond is heretably conceived, and that the Nature thereof was not altered by the Teſtament. Albeit it was alledged for the Defender, That *utcunque* Bonds with a Precept of Seaſin payable to Heirs or Aſſignies, or ſecluding Executors, are conſidered as Heretable, tho' no Infeſtment follow thereon, from the Creditor's preſumed Intention to have his Mony ſecured by Infeſtment; Yet that Preſumption ceaſeth in this Caſe, where he hath teſtified his Inclination to the contrary, 1. By taking the Bond payable to Heirs, Executors, and Aſſignies. 2. By neglecting to take Seaſin. 3. By diſpoſing upon the principal Sum by a teſtamentary Deed, which is a more direct Indication of the Teſtator's Mind to have the Bond moveable, than if he had cauſed charge for Payment. Again, tho' a Bond containing a Precept of Seaſin is preſumed to be heretable, from the ſuppoſed Will of the Creditor, which doth not appear in this Caſe, it is not ſimply ſo: In ſo far as, albeit Inhibition ſecures againſt the Alienation of any heretable Subject, to the Prejudice of the Debt for which it was uſed; it doth not hinder the Creditor in a Bond containing Precept of Seaſin, to diſpoſe thereof at any Time before taking Infeſtment, *December* 31, 1703, *Oliphant* contra *Irving*.

Eodem Die. James Watſon *of* Saughtoun *and his Curators, againſt* Alexander Brown *Merchant in* Edinburgh.

IN the Action at the Inſtance of *James Watſon* of *Saughtoun*, againſt *Alexander Brown*, as repreſenting his Father, for Payment of Two thouſand

Merks owing by the Father to the Purſuer: He the Purſuer repeted the common paſſive Titles, and particularly inſiſted againſt the Defender upon the Act of Parliament 1695, as liable for intrometting with his Predeceſſor's Eſtate without bringing the ſame to a Roup, and the Lords 7 *June* laſt having ſuſtained his Intromiſſions ſubſequent to his Father's Death relevant to make him liable *paſſive*: The Purſuer extracted an Act upon that Point, but finding it hard to prove the Intromiſſion, did put up the Cauſe in the Hand Roll of my Lord *Cullen* who pronounced the Act, and at calling inſiſted upon the other paſſive Titles libelled which he referred to the Defender's Oath.

Alledged for the Defender. There being an Act already extracted upon one paſſive Title, the Purſuer could not now recur to the reſt, tho' libelled. Becauſe, in ordinary Actions there is but one Act of Litis-conteſtation: And if the Purſuer were now ſuffered to recur to other paſſive Titles, there might be Multiplicity of Acts of Litis-conteſtation, and no *Terminus Litis*. After an Act of Litis-conteſtation, the Ordinary is *functus*, and cannot review or return to the Libel, conform to *L.* 25. *ff. de Rei Vindicatione*, *L.* 52. *ff. de Judiciis. L.* 3. §. 11. *ff. de Pecal. L.* 57. *ff. de Solut. L.* 20. *ff. de Petit. Hæred. Hopes Pratt. Min. Tit.* 1. *Stair*, *Inſtit. Lib.* 4. *Tit.* 40. §. 16.

Replyed for the Purſuer. 1. The inſiſting in one of ſeveral *Medium*'s in a Libel, did not exclude the Purſuer from inſiſting afterwards upon the reſt. For the Act of Litis-conteſtation doth circumſcribe the Parties only in ſo far as Litis-conteſtate: Whereas here the Act of Litis-conteſtation is only concerning the Clauſe in the foreſaid Act of Parliament, which the Purſuer deſires no Review of. Yea, there is nothing more ordinary than to libel not only ſeveral Concluſions in one Summons, but alſo ſeparate Actions: And as inſiſting in one of ſuch accumulative Actions, cannot hinder to inſiſt in the other; far leſs can the inſiſting particularly upon one of ſeveral *Media concludendi* in one Summons, cut off the reſt. 2. It's unneceſſary to anſwer the Defender's Citations out of the civil Law, ſince the Form of Proceſs among the *Romans* differs from ours. And the Citations out of *Hope* and my Lord *Stair* about the Effect of Litis-conteſtation, doth only concern what is Litiſconteſtate, which the Purſuer doth not quarrel.

The Lords found, That the Purſuer may yet inſiſt upon the other paſſive Titles, and remitted to the Ordinary to hear Parties thereon.

January 17, 1711. Thomas Dundas *Merchant and one of the Baillies of* Edinburgh, *againſt* John Allan *Writer there.*

BAillie *Dundas* having obtained a Decreet before the Baillies of *Edinburgh*, againſt *John Allan*, for 34 ℔. 12 ſh. as the Remains of 47 ℔. 5 ſh. 6 d. *Scots* contained in a Bill accepted by him payable to the Baillie, *John Allan* ſuſpended and raiſed Reduction upon Minority and Leſion: In ſo far as, the Bill was accepted by him when Minor without Conſent of his Father his Adminiſtrator of Law, as a cautionary Security for the Price of Goods furniſhed not to himſelf, but to the Lady *Cowſland*.

Anſwered for the Charger. The Reaſon of Suſpenſion and Reduction ought to be repelled. Becauſe, 1. The Subject of this Debate is ſo very ſmall, that no ſuch Leſion could thence ariſe, as deſerves the extraordinary Remedy of Reſtitution *ex Capite Minorennitatis*, which muſt be enorm, *February* 14, 1677, the Dutcheſs of *Buccleugh* contra Earl of *Tweddale*. For *Prætor non curat minima*, and ſuch an extraordinary Cure is not to be applied to every trifling Caſe. 2. The Suſpender was a Writer verſant in Buſineſs, and ſo preſumed more capable to deceive, than to be deceived. 3. The Suſpender entred in Payment after he was Foris-familiate by being married, and living ſeparately from his Father; which, by the civil Law, was ſuch an Homologation as obliged one to pay Debt contracted by him while *in Familia paterna*, notwithſtanding of *Senatusconſultum Macedonianum, L. 6. §. 13. & ult. ff. ad Senatus. Maced.*

Duplyed for the Suſpender. 1. The Smalneſs of the Debt can't influence the Deciſion: Seing Quality, and not the Quantity, of the Debt is to be conſidered; and what may ſeem a ſmall Matter to one, may be conſiderable to another. 2. Whatever might be pretended, had the Suſpender's Ingagement been in the Buſineſs of his Imployment as a Writer, yet his undertaking a Cautionry for the Price of Merchandiſe ſold to another, was palpable Leſion. And ſo anxious have the Lords been to ſecure Minors from Prejudice by raſh Cautionry, that a Bond ſigned by a Minor as Cautioner, and his Father as Principal, was found null *quoad* the Minor, tho' he was therein deſigned Student of Law, and afterwards prov'd an eminent Lawyer, *December* 7, 1666, *Mackenzie* contra *Fairholm*, *July* 25, 1667, *inter eoſdem*. Nor 3. Can the Suſpender's paying Part of the Sum charged for, be any Homologation to fix him; ſince the partial Payment was made during his Minority; and he is entitled to Repetition *Condictione indebiti*. Law doth not diſtinguiſh betwixt Minors married and unmarried, ſeeing Marriage doth not always bring Prudence along. And if the Suſpender be Foris-familiate, he is ſo without a Portion, having got nothing to this Day from his Father as a ſeparate Mean of Subſiſtence by himſelf.

The Lords ſuſtained the Reaſon of Reduction upon Minority and Leſion.

Eodem Die. *The Lord and Lady* Ormiſtoun, *againſt* John Hamilton of Bangour *and his Tutrix*.

THE Lords 15 *December* laſt having found, That the extraordinary Expence neceſſarly disburſed by the Fault and Means of the deceas'd *Bangour*, apparent Heir to the Lord *Whitelaw*, cannot procure to the Executrix Allowance thereof out of the Executry in Prejudice of the Defender the Heir ſerved, the Purſuers reclaimed: Whereupon the Parties were allowed a Hearing.

Alledged for the Defender. He being called in this Proceſs as Heir to the Lord *Whitelaw*, and not as Heir to his Father, he is not bound to anſwer as Heir to his Father. 2. A Proceſs againſt him for ſuch a penal Concluſion, as repreſenting his Father, would appear to be extraordinary. Actions *ex Delicto* not being competent againſt the Delinquent's Heirs, *niſi in quantum locupletiores, L. 5. ff. de Calumniator. §. 1. Inſtit. de perpet. Vinnii Comment. ibid. §. 3, 4. Grot. de Jure Belli & Pacis, Lib. 2. Cap. 21. §. 13, 19, 20.* And vitious Intromiſſion, which is never competent againſt the Intrometter's Heir, unleſs the paſſive Title had been conſtituted againſt the Intrometter himſelf, is a ſufficient Inſtance of the Genius and Opinion of our Law in the Matter. Again, *Eſto* the Purſuers were Creditors to the Defender's Father by Bond, they behoved to apply *Whitelaw*'s Executry to extinguiſh his own Debts before the Debts of his apparent Heir.

Replyed for the Purſuer. 1. The Defender being ſerved Heir univerſally to his Father, any Objection that might have been made to his Father, may be made to him: And *ita eſt*, that the Father would have been obliged to allow Deduction of the extraordinary Expences occaſion'd thro' his Default. 2. The Laws concerning penal Actions, cannot be extended to this Caſe of a Purſuit for the neceſſary Expence of a Proceſs, which is as much a civil Intereſt, as the Subject of the Plea it ſelf. *Actio pœnalis Rei perſecutoria* lies againſt the Heir, as well as any Action *ex Contractu, Les Loix civiles, Tom. 3. Sect.* 10

Des Engagemens del. Heretier a Cauſe de Crimes, &c. *Spotſwood, Pratt. Tit. Spuilzie, Pag.* 88. and the Heirs of one that committed a Spuilzie or was a vitious Intrometter, may be convened for ſimple Reſtitution, *etſi nihil ad eos pervenit*. Again, Penalties in Contracts incurred by any Perſon, are effectual againſt his Heirs. 3. Suppoſe the Defender could not be purſued by Way of Action for ſuch Expences, yet the Executrix may retain in her own Hand out of the Executry, what was neceſſarily expended in Defence of it: As many Things in Law will afford the Benefit of Exception and Retention, that are not ſufficient to found Action. And this *Jus Retentionis* was equal to *Litiſconteſtation*: Seing ſhe having Effects in her own Hand, was under no Neceſſity to purſue.

Duplyed for the Defender. It's *ſine Lege loqui*, to ſay, That this imaginary Retention is as effectual to make the Heir liable, as Litiſconteſtation with the Defunct. 2. The Authority of the civil Law, and of *Grotius*, far outweighs that of *Mr. Domat* the Author of *Les Loix civiles.* The Citation out of *Spotſwood*'s Pratticks is of no great Weight, ſeing no Deciſion is cited as Voucher, and that Book never received the Author's laſt Hand. Beſides, in that Caſe, the Defunct had Intromiſſion, whereas the late *Bangour* intrometted with nothing. 3. Heirs are liable to Penalties in Contracts incurred by their Predeceſſors, becauſe theſe are not due *ex Delicto*, but *ex Contractu*.

The Lords adhered to their former Interlocutor, finding that the Lady *Ormiſtoun* hath no Right to retain the Expences.

Eodem Die, Inter Eoſdem.

THE Lords, *December* 14, 1709, In the Compt and Reckoning aforeſaid, at the Inſtance of the Lady *Ormiſtoun*, and her Husband then Lord Juſtice-clerk, againſt *John Hamilton* of *Bangour*, having found that *Actio Funeraria* is only competent for Expences that were neceſſary and decent with Regard to the Defunct's Quality, and the free Eſtate deſcending to his Heirs and Executors: The Defender now alledged, That the Purſuers can get no Allowance of theſe Expences. Becauſe, 1. Law preſumes they were advanced by the Lady *Ormiſtoun Animo donandi, L.* 14. §. 7, 8, 9. *ff. de Religioſ. et Sumpt. Fun. L.* 47. *ff. de Donat. inter. Vir. et Ux. L.* 33. §. 2. *ff. de Leg.* 3. *L.* 44. *ff. de Negot. geſt. L.* 12. §. 8. *ff. Mandati, L.* 53. *ff. de Reg. Jur.* In ſo far as, 1. She having got a Donative from the Defunct ſo extraordinary in this Place of the World, and diſproportioned to his Condition and Fortune: It had been high Ingratitude and Injuſtice in her to have ſuffered ſo great Expences to be laid out upon the Funeral to the exhauſting the Eſtate, and Prejudice of the Heir of ſo well deſerving a Husband. 2. The Manner of the Expence had the Appearance of Liberality: For ſhe paid it without the uſual Cognition of the Commiſſaries *nullo Jure cogente.* Yea, ſeveral Payments were made before Confirmation of *Whitelaw*'s Teſtament, and in many Caſes ſhe took Diſcharges to the Heirs and Executors of the Lord *Whitelaw*, which clears that it was *conſulto datum.* Nay, further, ſhe paid the Accompts ultroneouſly, without any Proteſtation, whereof ſome were ſtated and given up to her as her own Debt. And it's hoped upon ſerious Reflection, ſhe will not repent the Good ſhe once intended to her Husband's Memory. And if ſhe ſhould, her Repentance will not avail her, to aſcribe what was done by Way of Donation, to any other Cauſe, *L.* 31. §. 1. *ff. de Donat. L.* 75. *ff. de Reg. Jur.* 2. The Executrix cannot have Allowance of the extraordinary Expence of the Funeral. For that, if occaſioned by the Fact and Deed of the apparent Heir, can be no more privileged than a Debt of the apparent Heir, which is not deducible out of the Lord *Whitelaw*'s Executry, but only reſerved as accords to be purſued by Way of Action againſ the Defender as Heir to his Father.

Replyed for the Purſuer. Can it be in any Senſe inferred, That the Lady *Ormiſtoun* was to have been at the Charge of her laſt Husband's Funerals from his giving her a conſiderable Addition to the Proviſion in her Contract of Marriage? And the Argument drawn from her paying the Furniſhers i no better: Eſpecially conſidering, That the Payment was not made immediately, but ſome Months after *Whitelaw*'s Death, to ſtop their cravings who grudg'd to ly out of their Mony. This any Perſon might have ſafely done, the Executry being ſufficient, and the Funeral Expences a privileged Debt, *December* 16, 1674, *Kelhead* contra *Irving* and *Borthwick*. 2. The *L* 14. §.7. in Fin. *de Relig. et Sumptib. Fun.* requires not that one ſhould always neceſſarily proteſt to take away the Preſumption of expending *donandi Animo*, but only adviſeth to do it in ſome dubious Caſes, *ne poſtea patiatur Quæſtionem.*

The Lords found, That the Purſuer hath no Right to retain the extraordinary Expence of the Funeral in this Proceſs, ſuppoſe the ſame were furniſhed by Order of the deceaſed *Bangour* apparent Heir to the Lord *Whitelaw*, in Prejudice of the Defender Heir ſerved to him *cum Beneficio Inventarii*; and univerſal Heir to his Father.

January 19, 1711. Robert Watſon *of* Muirhouſe *and* Thomas Gibſon *Writer in* Edinburgh *his Factor, againſt* Alexander M'kenzie *of* Applecroſs.

THe Maſters of two Veſſels ſent with Salt and other Materials for Fiſhing to the *Lewes* in *Anno* 1706, finding that the Fiſhing proved unſucceſsful that Year, depoſited their Loading in the Hands of *Alexander M'kenzie* of *Applecroſs* living there, who granted two Receipts thereof In one of which, *He obliged himſelf to preſerve and reſtore the Goods to the Skipper and his Fraughters, or their Order (incident Hazards excepted) or t deliver to them, upon Demand, Goods of the ſame Quantity and Quality at the Port of* Leith; And by the other Receipt, *obliged himſelf to keep the Goods as he would do his own, to be diſpoſed of by the Owners Order.* *Robert Watſon* and his Partners (to whom the conſigned Salt and other Goods belong'd) failing to call for them the next fiſhing Seaſon, *Applecroſs* imployed the Salt in curing Fiſhes. Theſe Owners in *November* 1709, required Redelivery, and purſued him either to reſtore or deliver in the Terms of the Obligement, or to pay the current Prices at the Time of Requiſition, when, by the Accident of the Union, Salt was at the higheſt Value.

Anſwered for the Defender. He having undertaken the Care and Cuſtody of the Purſuer's Salt and other Goods merely to do them a good Office, ought not to be charged for any higher Price or Value for the Salt, than what it could have been ſold for at the Time it was depoſited; or when it was made Uſe of; or what Profit was made of it: And it were a bad Return of his Kindneſs to require from him extraordinary Prices, that could not be foreſeen or thought of at the Time of the Tranſaction. His undertaking the Cuſtody of the Salt, could not oblige him to keep it perpetually uſeleſs, till it ſhould conſume and melt away; but only till the enſuing Year's Fiſhing; And ſince the Purſuers did not call for it then, it being a periſhable Commodity, the Defender acted profitably for them by imploying it in curing Fiſhes.

Replyed for the Purſuer. By the firſt Ticket, the Defender, had he reſtored the ſame individual Goods, was only to be liable as a Depoſitar, but his making Uſe of them made him liable as *in mutuo*, for the like Goods n Quantity and Quality, L. 1. §. 34. *ff. Depoſiti*: And he being obliged to deliver them on Demand, the Value is to be conſidered at the Time of the Demand, L. 22. *ff. de Rebus creditis*. Again, the Defender having no Power to diſpoſe of the Salt by the ſecond Receipt, the counteracting his Truſt by mploying it to his own Uſe, made him certainly liable for the current Prices at the Time he was required to perform his Obligement. The Pur- ſuers cannot be ſaid to have been *in Mora* to demand the Salt before it was t the higheſt Value: Seing no Time was prefix'd for his requiring it; And he Defender might have obliged him to receive it, by offering when it was t the loweſt Rate; And his converting the Salt to his own Uſe, hinders him to be look'd upon as *Negotiorum Geſtor*.

Duplyed for the Defender. Perſons bargain indeed with the Hazard of the iſing or falling of the Value of Goods, ariſing from the uſual Occurrences by the Difference of Seaſons or Trade, which they are ſuppoſed to have in View: But *Caſus incogitatus* happening by ſupervening Laws, or a Change of Go- ernment, is always excepted, L. 23. §. 1. *ff. de Actione Empti*. *Huber. Comment. in Pandect. de Condict. trit.* §. 11. *Les Loix civiles Sect.* 2. §. 18. of he ſaid Title. Yea, ſuppoſe the Defender had truly borrowed ſome Buſhels f foreign Salt before the Union to be reſtored on Demand; It's doubted if e would have been obliged to reſtore at the extraordinary Value it was aiſed to by the ſupervening Act of Parliament: This not being like the aiſing or lowering of Mony, whereof the entire Value depends upon the Re- ulation of Law, and any Alteration ſo made therein is not *Caſus improvi- us*, but *circa Rem ipſam conſiſtit*.

Triplyed for the Purſuer. The Alteration in the Value of Goods is more wing to the Parliament's impoſing higher and lower Duties, than to any ther accidental Difference in the Method of Commerce. *Huber*'s Authority miſapplyed: For he in the Place cited means only, That in ſtating he Eſtimation of Goods, a ſingle Inſtance is not to be the Rule, but a middle Eſtimation to be made, by comparing all the ſeveral Prices thro' the Coun- ry; as the Fiars of ſeveral Shires uſe to be ſettled with us. And here the Price of Salt is not claim'd according as it ſells in one ſingle Place, but ac- ording to the general Eſtimation of it. It's well known that Debtors in Mony are liable to perform their Obligements in the preciſe Terms thereof, tho' Mony be hightned at the Term of Payment: And albeit our Coin, in Conſequence of the Union, was brought up to the *Engliſh* Standart, Debtors are obliged to pay according to the reformed Value, which is 8 *per Cent.* more as they were liable to before.

The Lords found, That by the firſt Obligement the Defender is bound to make the like Quantity and Quality of Salt furthcoming to the Purſuer, at the Time of the Requiſition, or the Queen's Price, conform to the Act of Parlia- ment 1709; and found the Salt being depoſited by the ſecond Obligement, the Defender's Intromiſſion therewith without a Warrant, is relevant to make him liable for the ſaid Price.

Eodem Die. *Mr.* Charles Eyers *Sollicitor of Her Majeſties Cuſtoms, Captain* John Muir *late general Surveyor, and Provoſt* John Ballantine *Collector at* Air, *againſt* Mungo Hunter *Skipper of the* Hopewell, *and* Alexander Camp- bell *one of the Owners thereof*.

JOhn Muir and Provoſt *Ballantine* having conveened *Alexander Campbell* and *Mungo Hunter*, (the one for running a certain Quantity of Tobacco and Brandy aſhore without owning the Cuſtom-houſe, and the other for receiving and concealing thereof) before the Juſtices of Peace of the Shire of *Air*; The Purſuers with the Concourſe of the Sollicitor of the Cuſtoms, after Witneſſes were examined, raiſed an Advocation of their own Proceſs upon this Ground, That the Juſtices of Peace could only take a Precognition againſt Tranſgreſſors in the Matter of the Cuſtoms, the final Trial whereof, in Order to condemn or clear Ships and Goods, belongs properly to the Courts of Exchequer.

Anſwered. *Ballantine* and *Muir* having owned the Juriſdiction of the Juſtices of Peace by purſuing before them, could not thereafter diſown it, and remove the Cauſe, otherwiſe nothing but Confuſion would inſue, and Proceſſes would be endleſly toſs'd from Court to Court, to the unſpeakable Vexation and Oppreſſion of the Lieges.

Replyed. The publick Law, and the Intereſt of the Queen's Revenue cannot be prejudiced by Her inferior Officers (who are but Informers and not *Domini Litis*) going thro' Ignorance with Her Cauſes before an incompetent Court.

The Lords Advocated the Cauſe from the Juſtices of Peace, and remitted it to the Barons of Exchequer.

Eodem Die. *Sir* David Dalrymple *of* Hailes *Baronet Her Majeſty's Advocate, againſt Sir* George Hume *of* Kello, *and* William Blackwood *Merchants in* Edinburgh.

THE deceas'd Sir *James Stamfield* having, for onerous Cauſes, aſſigned to the deceas'd *James Scot* of *Briſto*, the Stock and bygone Profits of his Share in the *Newmills-manufacture*: *James Scot* transferred the Stock (which was heretable by Deſtination to Heirs ſecluding Executors) in Favours of Sir *George Hume* and *William Blackwood* for onerous Cauſes, reſerving the Profits to himſelf. After Sir *James*'s Death, two of his Executors Creditors purſued the Managers of the Manufacture before the Commiſſaries of *Edinburgh*, in *Anno* 1689, for Payment of theſe Profits. *James Scot* compearing for his Intereſt, craved to be preferred upon his Aſſignation. The Purſuers Replyed, That no Regard could be had to the Aſſignation in Competition with them; becauſe they offered to prove by his Oath, that it was never delivered, but lying by Sir *James* at his Death, and the Cauſe happening to be advocated, in the Year 1691 *James Scot* deponed that the Aſſignation was not delivered before Sir *James*'s Death. Thereafter my Lord Advocate, as having Right by Progreſs to an Adjudication of the Stock of Sir *James Stamfield*'s Share in the Manufacture aforeſaid, purſued Sir *George Hume* and *William Blackwood*, as Intrometters therewith, who defended themſelves with the anterior Tranſlation made to them by *James Scot*.

Alledged by the Purſuer. It being proved by *James Scot*'s Oath, That the Aſſignation to him was never a delivered Evident, and ſo null, the Tranſlation to the Defenders falls in Conſequence: Which Oath doth militate againſt them, in Reſpect their Authors Rights was rendred litigious by the Proceſs before the Commiſſaries advocated to the Lords, wherein the Oath was craved two Years before the Tranſlation, and emitted before Intimation thereof.

Anſwered for the Defenders. Nothing is litigious but what is *deductum in Judicium*, and the Proceſs before the Commiſſaries concerned only what fell under Sir *James Stamfield*'s Executry, in Relation to which only they could judge upon the Validity of the Aſſignation, and could not conſider it with Reſpect to the Stock, and heretable Part of the Subject aſſigned belonging

longing to the Defenders, which, not being then under Debate, cannot be understood to have been rendred litigious by a judicial Competition for the Profits; conſequently, the Cedent's Oath therein emitted cannot prejudic them.

Replyed for the Purſuer. 'Tis a manifeſt Abſurdity to pretend, That the ſame individual *Corpus* of an Aſſignation comprehending Moveables and Heretage, may be delivered as to the one, and not delivered as to the other, and conſequently, as to the individual Alledgeance of not Delivery, be delivered and not delivered.

Duplyed for the Defenders. Tho' in Fact, a Writ cannot be delivered in Part, and undelivered in Part; yet where it concerns different Subjects, it may in a legal Senſe admit this Separation, That it may be cognoſced and determined as to one and not as to another. The Queſtion here is not whether the Aſſignation to *Scot* was truly delivered or not, but whether his Oath be ſufficient Proof againſt his Aſſignies, That the ſame was not delivered, which it is not. Many Inſtances of this could be given: As the Nullities or Objections againſt an heretable Bond, ſuſtained in a Purſuit at the Inſtance of the Creditors of an Executor for the bygone Annualrents, would not be *Res judicata* againſt the Heir not called nor purſuing; And Diſcharges or Receipts were not found good againſt an onerous Aſſigny, tho' ſuſtained againſt the Cedent, by whoſe Oath the Verity of the Subſcriptions were inſtructed, in the Caſe of *David Hume* and the Lord *Saline*.

Triplyed for the Purſuer. Tho' Sentence againſt an Executor would not be *Res judicata* againſt the Heir, *Quia inter alios acta aliis non nocent*: Yet if the ſame Perſon, being both Heir and Executor, purſue as Executor for the Annualrents of an heretable Bond, which happens to be improved in that Proceſs, and thereafter aſſign the principal Sum and Annualrents ſubſequent to his Predeceſſor's Death for onerous Cauſes; the Aſſigny inſiſting and competing upon that Right, would be excluded by the Improbation in the firſt Proceſs. So here the whole Subject aſſigned both heretable and moveable ſtanding in the Perſon of *James Scot*, when the Alledgeance of not Delivery was proponed, and no other Perſon then intereſſed to be called, the Alledgeance proved by his Oath, muſt militate againſt all deriving Right from him afterwards.

The Lords found, That Sir *James Stamfield*'s Aſſignation to *James Scot*, was rendred litigious by the Proceſs firſt intented before the Commiſſaries of *Edinburgh*, and thereafter advocated before the Date of the Tranſlation in Favours of the Defenders, wherein the Aſſignation to *James Scot* was quarrelled as not a delivered Evident, and his Oath craved thereupon, which was given before the Intimation of the Tranſlation in Favours of the Defenders. And therefore found, That *James Scot*'s Oath muſt militate againſt the Defenders, and doth ſufficiently prove, That the Aſſignation by Sir *James Stamfield* to *James Scot*, was not a delivered Evident; and therefore preferred my Lord Advocate.

January 23, 1711. William Roſs *of* Aldie, *againſt* Charles Roſs *of* Ey.

IN the Removing at the Inſtance of *William Roſs*, againſt *Charles Roſs*: The Lords found the Precept of Warning null, for that the Writer tho' named therein, was not deſigned in the Terms of the Act of Parliament 1681. Albeit the Purſuer alledged, That Statute did not extend to ſuch Writs as by former Cuſtom, required not the Writer's Deſignation, *Viz.* Bills of Exchange, holograph Writs, Receipts by Maſters to Tenants, and Precepts of Warning: But hindred only to ſupply by a Condeſcendance the Deſignation of a Writer, that Law and former Cuſtom required to be deſigned. In Reſpect it was anſwered for the Defender, That the Act is general and comprehending all Writs: And Cuſtom hath introduced no Exception of Precepts of Warning; tho' Bills of Exchange, Receipts to Tenants, and holograph Writs are excepted by the general Cuſtom.

Eodem Die. *The Creditors of* Hay *of* Park, *againſt* Alexander Falconer of Blackhill.

IN the Compt and Reckoning at the Inſtance of *Park Hay*'s Creditors, againſt *Alexander Falconer*, as Cautioner for Sir *Hugh Campbell* of Calder their Factor: The Lords found the Factor and his Cautioner liable for the Victual only, either according to the Fiars, or according to the Prices received by the Factor, deducing all Loſſes, in the Option of the Purſuers; And found the Cautioner liable for the Annualrent of Sir *Hugh*'s Intromiſſions, as Factors are liable by the Act of *Sederunt*, 31 *July* 1690. Albeit it was alledged for the Defender, That the Bond of Cautionry bore no Annualrent, and a Cautioner in a Suſpenſion was aſſoilzied from the Expences modified by the Decreet, finding the Letters orderly proceeded, in Regard he was not expreſly bound therefore by his Bond: Notwithſtanding of a prior Act of *Sederunt*, ordaining Cautioners to enact themſelves both for the Sums charged for, and alſo for what Expences ſhould be modified, 17 *December* 1709, *Dumbar* contra *Muirhead*.

January 24, 1711. William King *in* Auchindenan, *againſt* John Ker in Auchinboth.

WIlliam King having charged *John Ker* upon a Bond for 100 *Lib.* with Annualrent and Penalty, granted by him to the Charger, as a *Premium* for the Hazard of his becoming Cautioner for the Granter for the Sum of 800 Merks, then borrowed from *John Simpſon* at *Beithkirk*; He ſuſpended upon theſe Grounds, 1. The Bond is an unlawful uſurary Paction, In ſo far as, Uſury is not only the ſtipulating or exacting more Intereſt than Law allows, but alſo the taking directly or indirectly more Profit for the Loan of Mony than the ordinary Intereſt. *V. G.* It would be Uſury, in the Construction of Law, to take from a neceſſitous Debtor a Bond for 100 *Lib.* for the Loan of 800 Merks, tho' the ordinary Intereſt be pactioned for the Sum borrowed: And what is uſurary in the Creditor, obtains againſt the Cautioner. For *Simpſon* having lent the Mony upon the Faith of the Cautioner, it muſt be underſtood to be lent to him, and *Traditione brevis Manus*, lent by the Cautioner to the Suſpender: So that the Cautioner was in Effect Creditor; Beſides, that he was Creditor by the Clauſe of Relief. The Caſe is the ſame, as if he had pactioned that, in the Event of his paying the Debt, the Suſpender ſhould be obliged to give him the Intereſt of 10 *per Cent.* for it, or a liquid Sum over and above his Relief. Now if Law would reprobate ſuch Pactions in the Event of Payment, much more doth it diſallow ſuch a Paction as this upon the Hazard of Payment: for *qui dicit majus dicit minus.* The Law for reſtraining Uſury would be eaſily eluded, if Cautioners be ſuffered to take what the principal Creditors cannot; which were to allow the Thing, changing the Perſons; and a covetous graſping Creditor, under Pretence of being a Cautioner, might borrow his Mony from a feigned or pretended Hand; and exact from the Debtor at his Pleaſure.

Replyed for the Charger. Uſury can only be where a Creditor takes more than the legal Intereſt from the Debtor: And tho' the Cautioner be Creditor *quoad* the Obligement of Relief, he is not Creditor *ſortis*, but bound jointly and ſeverally with the Suſpender for it. The Bond charged on being given as *Præmium Periculi*, that the Charger as Cautioner run of paying the Debt, became due to him whether he paid the Debt or not; as in the preſent Caſe he did not. Beſides, penal Laws, which are *ſtricti Juris*, cannot be extended *de Caſu in Caſum*. It is no new Thing to obſerve Acts the ſame upon the Matter, to have different Effects in Law. *V. G.* A Creditor lending Mony *Filio Familias*, could not recover the ſame, *quia obſtabat Exceptio Senatuſconſulti Macedoniani*: But that Exception did not hinder Repetition to him, who lent *Filio Familias* any other fungible. And it were hard to allow Rewards to third Perſons, ſimply for procuring the Loan of Mony, and deny the like to Cautioners, who run great Hazard by lending their Credit. Nor will it follow, that Creditors may as well take ſuch *Præmia* for the Hazard they run of loſing their Mony lent, becauſe theſe are doing their own Buſineſs, in managing an ordinary Trade, for which Law hath determined a reaſonable Profit: Whereas Cautioners interpoſing in another's Affair, have no Gain to expect, but are in Danger of much Loſs. And there can be no Danger of eluding the good Laws againſt Uſury: Becauſe if the Suſpender can alledge, That the Mony borrowed was truly the Cautioner's, and that the Creditor's Name was only borrowed to diſguiſe the Matter, the Charger will find this relevant to infer the Pain of Uſury againſt him.

Duplyed for the Suſpender. Tho' this Bond not being founded in the preciſe Letter of the Laws againſt Uſury, can have no penal Conſequence: Yet it may, as *turpe Factum*, and unlawful Extortion, from the common Principles of Equity, and the Parity of Reaſon in the Law diſcharging Uſury, be annulled, *L.* 13. *ff. de Legibus, L.* 11. *ff. de Præſcript. Verb. L.* 7. §. 2. *ff. de Juriſdict.* 2. 'Tis only allowable to take *Pretium Periculi*, where the Hazard doth not ariſe from the Uncertainty of Re-payment thro' the Debtor's Inſolvency, but from ſome extrinſick Hazard, as *in nautico Fœnore, L.* 5. *ff. de nautico Fœnore.* 3. This new deviſed Invention to impoſe upon the Neceſſity of ſtraitned Debtors, ought to be checked in the Bud: Seing Cautionry is not the Subject of Commerce, but a friendly Office which Law hath taken Care to ſecure by a full Relief of all Damages in the Event of Diſtreſs, and to aſk more is plain Extortion.

Triplyed for the Charger. Bonds of this Kind are ſo far from any Turpitude, that they were frequent among the old *Romans*, who never authorized any Deed *contra bonos Mores*. For their Law doth reckon that only to be *turpis & injuſta Cauſa*, when any Thing is taken for the doing or not doing what is unlawful, or for the doing what one is obliged to by Law, *L.* 2. *ff. de Condict. ob turpem Cauſam*: And this Bond falls under neither of theſe Heads, but is one of theſe innominate Contracts *do ut facias*, or *facio ut des*, or *Mandatum*; All which may admit of a Reward, *L.* 19. §. 1. *ff. de Donat. L.* 6. *Pr. ff. Mandati.* So *Gothofred* upon theſe Laws obſerves, That *Fide jubendi Cauſa Pecuniam accipere poſſumus*. And a Woman getting Mony for her becoming Cautioner, was liable as other Cautioners, becauſe thereby a Gainer, *L.* 23. *C. ad Senatuſconſult. Velleian*: Which argues that it was allowed to take Mony for becoming Cautioner. Again, as this Paction being ſo warranted by the civil Law, and hitherto condemned by no Statute or Deciſion, the Charger was *in bona Fide* to make it.

The Lords were clear, That the Charger was not guilty of Uſury: But found, That his taking the One hundred Pound from *John Ker*, as *Præmium* for becoming Cautioner for him, was *contra bonos Mores*, and therefore annulled the Bond.

Eodem Die. *Mr.* Thomas Binning *in* Dalmarnock, *againſt* Chriſtian Cook *and Mr.* Hugh Arnot *her Husband.*

CHriſtian Cook and her Husband ſuſpended a Decreet pronounced againſt them by Mr. *James Leſlie*, as Sheriff-depute of *Fife*, at the Inſtance of Mr. *Thomas Binning*, upon this Ground; That it was null, becauſe Mr. *James Leſlie* the Pronouncer was principal Sheriff-clerk, and it was inconſiſtent and irregular for one Man to be both Judge and Clerk, two diſtinct Offices that ſhould be independent of, and mutual Checks to one another.

Replyed for the Charger. Tho' it be incompatible for the ſame Perſon to ſit both as Judge and Clerk *in eodem Judicio*; why may not the principal Sheriff-clerk, (as it was in this Caſe) ſit in Abſence of the Sheriff-depute, by Virtue of a Commiſſion from the Sheriff-principal, or from his Depute, and the Clerk-depute officiate as Clerk; Which is the general Practice in all inferior Courts; the principal Clerk being moſt capable to judge in Abſence of the Judge-depute? The Cauſe of a principal Sheriff, Stewart, or Baillie, may be judged by their Deputes, *Act* 84. *Parl.* 6. *Ja.* 6. Albeit the former may have as great Influence upon the latter, as a Sheriff-clerk *qua* Judge can have upon his Clerk-depute. And there appears no greater Danger to the Lieges from the Sheriff-clerk's judging as Depute-ſheriff, than from the Sheriff-depute himſelf: Yea a greater Preſumption of Partiality lies againſt the Sheriff-depute, eſpecially in Decreets condemnatory, where he gets Sentence-mony; ſince the Sheriff-clerks dues are the ſame, whether the Sentence condemn or aſſoilzie.

Duplyed for the Suſpender. There being Neceſſity for an Act of Parliament to allow Deputes to judge in the Caſe of their Conſtituents, it ſeems yet unlawful for a Sheriff-clerk and his Depute to officiate as Judge and Clerk *in eodem Judicio.* Yea, a Depute's judging his Conſtituent's Cauſe, is not ſo dangerous: Seing the Clerk of Court who is altogether independent both of the Sheriff and his Depute, is a Check to him; Whereas here Mr. *James Leſlie* had no Check upon him, but what he might remove at the next Turn in Caſe of a Diſobligation.

The Lords repelled the Nullity objected againſt the Decreet.

Eodem Die. John Moir *and* James Moriſon *Merchants in* Stirling, *againſt* John Don *late Baillie, and* Jean Don *Relict of* Alexander Simpſon *Merchant* there.

IN the Reduction of *John* and *Jean Dons* Confirmation as Executors Creditors to *Alexander Simpſon*, at the Inſtance of *John Moir* and *James Moriſon*, who were alſo confirmed Executors *qua* Creditors: The Lords found, That the Edict upon which *John* and *Jean Dons* were confirmed was null, for Want of ſubſcribing Witneſſes. In Reſpect the *Act* 4. *Parl.* 1686. ordains all Citations before any Judges which formerly uſed to be in Writ, to be ſubſcribed by the Executor thereof, and the Witneſſes, otherwiſe to be null. Albeit it was alledged for the Defenders, That the ſaid Statute, chiefly calculated to introduce the Neceſſity of ſubſcribing Witneſſes, in Place of the former Cuſtom of Stamping, doth only relate to perſonal, and not to edictal Citations by the Officers of inferior Courts, who uſed not to ſtamp their Executions: Serving Edicts at the Church Door being kept up more for Form's ſake, than becauſe it is neceſſary to certiorate thoſe intereſſed. 2. Whatever be in the Statute, inferior Commiſſaries generally have not been in Uſe to cauſe adhibite ſubſcribing Witneſſes to the Execution of their Edicts: And *Error communis facit Jus*, *L. 3. ff. de Officio Prætor.* At leaſt, for ſalving the Intereſt of private Parties *bona Fide* perfected according to Uſe. In Reſpect it was anſwered for the Purſuers, 1. The Act 1686 is general as to all Citations, without Diſtinction of perſonal and edictal; and the latter do rather than the former require the Subſcription of Witneſſes, becauſe no Perſon being to receive a Copy, the Officer hath the more Power and Truſt. 2. The Lords do not in their Deciſions regard the Cuſtoms of inferior Courts, when derogatory to Statute, *July* 15, 1708, *Houſtoun* againſt the Lord *Roſs*, *June* 10, 1709, *Moir* againſt *Jack*. Nor can the Maxim, *Communis Error facit Jus*, which is underſtood of a whole People or Country labouring under ſome common Miſtake, be apply'd to this Caſe: Since, whatever be the Practice in *Stirling*, the Commiſſaries of *Edinburgh* obſerve the Act of Parliament in the Execution of their Edicts.

June 13, 1711, The Defenders craved, That whatever Rule the Lords might pleaſe to eſtabliſh in Time coming, they would ſuſtain Deeds paſt that have been perfected according to the common Uſe and Apprehenſion: As was done *February* 15, 1681, and in the Caſe of Sir *Thomas Young* againſt *Calderwood* of *Pittedie*, and in that betwixt *Ruſſel* and *Miller*.

Anſwered for the Purſuers. The Error of an inferior Court-officer, can never be of more Force than the expreſs Act of an inferior Court, which cannot derogate from publick Law, *L.* 3. §. 5. *ff. de Sepulchro violato.* The Pratticks cited for the Defenders, cannot be applied to this Caſe. For in the Year 1681, the Lords did not ſuſtain a Cuſtom contrary to Law, but did regulate in Time coming the Stile of Executions, which in Times paſt had varied. In Sir *Thomas Young*'s Caſe, they were unwilling to annul Inſtruments of Reſignation given according to the Cuſtom for a conſiderable Time paſt, tho' the old Symbol was neglected; Becauſe, theſe Symbols are not founded upon expreſs Statutes, but eſtabliſhed by Cuſtom, and ſo may go in Deſuetude by not Obſervance. And in the Prattick betwixt *Ruſſel* and *Miller*, the Lords who made the Act of *Sederunt* 1696, did derogate from it, by granting a Diſpenſation in other Terms: But no Judge can derogate from an expreſs Act of Parliament.

The Lords adhered to their former Interlocutor.

January 25, 1711. Anna Cameron *Daughter to the deceaſt* William Cameron *of* Auchnaſoul, *againſt Mr.* John Innes *Son to the deceas'd Sir* Alexander Innes *of* Coxtoun.

IN the Proceſs of Aliment at the Inſtance of *Anna Cameron*, againſt Mr. *John Innes*, as being held and reputed her Huſband: The Lords ſtopp'd the Proceſs of Aliment till the Marriage betwixt them be proved before the Commiſſaries of *Edinburgh*. Albeit it was alledged for the Purſuer, That where a Conſequent of Marriage is concluded in a Summons, and the Marriage denied, the Lords are in Uſe to allow ſuch a Proof of the Marriage as the Nature of the Thing admits of, without any previous Conſtitution or prejudicial Proceſs before the Commiſſaries of *Edinburgh*: As in Declarators of Baſtardy, or *ultimus Hæres*, or in a Purſuit for a Terce; and conſequently in this Action of Aliment, where the Purſuer's Marriage is denied by the Defender, the Lords ſhould allow it to be proved even *in prima Inſtantia*, tho' the Queſtion was never tabled before the Commiſſaries. For albeit a direct Declarator of Marriage or Adherence, is more proper before the Commiſſaries: The Lords are moſt competent to judge in this Purſuit, whereof the Concluſion is a civil Intereſt or Effect ariſing from Marriage, and to determine the Proof of Marriage, in ſo far as neceſſary to ſupport either Defence or Reply. In Reſpect it was anſwered for the Defender, That the Commiſſaries of *Edinburgh* being eſtabliſhed Judges competent to cognoſce Marriage in the firſt Inſtance, tho' liable in Subordination, to be regulated by Inſtructions from the Lords: The Purſuer's Libel which imports Marriage to be proved, or inferred from Qualifications, muſt be remitted to the Commiſſaries, proper Judges in the firſt Inſtance of Marriage, which is the Foundation of the Libel, and all the Conſequences thereof. 2. *Non ſequitur*, that becauſe the Purſuer of a Baſtardy, or *ultimus Hæres*, (who needs not to libel Marriage) is not put to prove it in a prejudicial Proceſs before the Commiſſaries, therefore ſuch a previous Trial is not neceſſary to the Purſuer of the preſent Aliment. For Baſtardy, *&c.* is not (as Aliment) the Effect or Conſequence of Marriage; but on the contrary Marriage excludes the Libel of Baſtardy, *&c.* And when Marriage is admitted to be proved before the Lords, by Way of Defence for excluding Baſtardy, that Defence reſpects only held and reputed married *de præterito*, which Proof would not infer an Obligement upon the Parties to adhere, in Order to which an *individua Vitæ Conſuetudo* muſt be tried by the *judices Chriſtianitatis.* Nor is there any Contingency betwixt this, and the Proceſs of a Relict for her Terce, whoſe Cohabitation with the Defunct till his Death without being queſtioned, entitles her to a Terce, *Act* 77. *Parl.* 6. *Ja.* 4. without further Proof of Marriage: Whereas the Purſuer's Marriage is here denied by the Defender in his own Lifetime; and requires to be poſitively proved before the Commiſſaries, in Order to make him liable to aliment her.

Eodem Die. William Baillie *of* Lamingtoun, *againſt Sir* William Menzies of Gladſtains.

IN the Competition of the Creditors of *Bagbie*, betwixt Sir *William Menzies*, as having Right by Progreſs from *Alexander Baillie*, to an Infeftment of Annualrent, and *Lamingtoun*, as having Right to a ſubſequent Appriſing; the former pleaded Preference upon the Priority of his Right: Which *Lamingtoun* alledged was extinguiſhed by Payment, in ſo far as he offer'd to prove by Witneſſes, That *Alexander Baillie* Sir *William*'s Author, did enter to the total Poſſeſſion of the Room of *Hillend* in the Year 1667, and continued therein till the 1680.

Anſwered for Sir William Menzies. By conſtant Practice, in all Proceſſes relating to Extinction of Debts by Payment, Mony-rent is proved *Scripto, vel Juramento*, and the Victual *prout de Jure.* For as our Law doth not allow Witneſſes to be received, where Writ is or ought to be adhibited: So the Payment of Mony, which is ſubſervient to all Uſes, and the common Fungible that ſupplies the Place of every Thing preſtable, is not to be proved by Witneſſes, but only by Writ or Oath of the Receiver, ſince by-ſtanding Witneſſes may be apt to miſtake the Occaſion and Deſign of the Payment.

Replyed for Lamingtoun. Tho' Payment of Mony ſhould *regulariter* be proved by Writ or Oath: Becauſe Obligements to pay Mony are commonly ſo conſtituted; Yet Witneſſes may be allowed to prove that a Creditor entred to a total Poſſeſſion at a certain Time, and continued therein ſo many Years. Eſpecially in this Caſe, where Sir *William* took himſelf (beyond what his Right did carry) to a total Poſſeſſion for the Space of 13 Years: And where he thereafter, in Evidence that he was paid both of his principal Sum and Annualrent, did quietly and voluntarily cede his Poſſeſſion to the common Debtor. Which is confirmed by Sir *Thomas Hope* in his Title *Probation*, and by ſeveral Pratticks, as 15 *December* 1626, Declarator of the Laird of *Foulis* Eſcheat, *December* 16, 1626, *Finlayſon* contra *Executors of*

Lauder, 20 *January* 1627, *Roſs* contra *Fleming*, 11 *July* 1628, *Arbuthnot* contra *Lighton*, *February* 4, 1671, *Wiſhart* contra *Arthur*. 2. There is the ſame Hazard in miſapprehending the Deſign of delivering Victual, as there is of miſtaking the Reaſon of paying Mony. For Perſons who ſee Victual delivered cannot know what was *actum et tractatum* betwixt the Giver and Receiver, more than in the Caſe of Mony: Seing the former, as well as the latter, may be delivered upon many Accounts, as in Payment, in Loan, or for Security of Performance of ſome Deed. So that there is a notable Difference betwixt proving Payment of a Sum contained in a Bond for extinguiſhing the Right, and this Caſe: For tho' the Witneſſes depone that ſuch a Sum was delivered *de Manu in Manum*, it were impoſſible for them to clear upon what Account that was done, as not falling *ſub Senſu*. But here *Lamingtoun* doth not ſo much pretend, to prove Payment of Sir *William Menzies*'s heretable Bond by Witneſſes; as only to prove his Author's Entry to the total Poſſeſſion of a certain Piece of Land, to oblige him to anſwer for the known Rental thereof, which in Conſequence will extinguiſh the Infeftment of Annualrent, unleſs the Poſſeſſion can be aſcribed to another Title, or otherways compted for and ballanced by the Intrometter.

Duplyed for Sir William Menzies. The Prattick *February* 4, 1671, is but a ſingle Deciſion, which is over-ruled by ſubſequent contrary Practice: unleſs we diſtinguiſh betwixt Poſſeſſion within Burgh, which can be no other than Mony-rent; and Poſſeſſion in the Country, which may be either of Mony or Victual. 2. The Reaſon why Mony is not probable by Witneſſes, holds equally in a total, as in partial Poſſeſſion. For tho' the Argument from the total Poſſeſſion, may hold in the Caſe of an Appriſer or Wadſetter, who have a Title to poſſeſs; it cannot be of any Weight againſt an Annualrenter, who had no Title to poſſeſs, and whoſe Poſſeſſion can never be preſumed to exceed his Annualrent.

Triplyed for Lamingtoun. He is not arguing from Preſumptions, but from a clear Proof, That Sir *William* and his Authors have uplifted the Rents, and therefore muſt compt for the ſame: And it's wild to think, That an Intruder without a Title, ſhould be in a better Caſe than thoſe who by Law are authorized to poſſeſs.

The Lords found Probation by Witneſſes of a total Intromiſſion of 12 or 13 Years Poſſeſſion of Victual and Mony-rent, where there is no Intromiſſion by the common Debtor, or Co-creditor; and the Intrometter ceding Poſſeſſion to the common Debtor, relevant to make the Intrometter comptable for the Rental both of Mony and Victual.

Thereafter *February* 20, 1711, It was alledged for Sir *William Menzies*, That his Author's Intromiſſion and ceding the Poſſeſſion to the common Debtor, cannot be extended to extinguiſh the principal Sum for which the Infeftment of Annualrent was granted, in Prejudice of Sir *William* a ſingular Succeſſor thereto by Adjudication, but only to extinguiſh the bygone Annualrents: The Annualrenter having *paratam Executionem* by poinding to recover theſe, but no Execution for recovering his principal Sum. If latent Receipts and Diſcharges, or, which is worſe, Intromiſſion with Rents ſhould extinguiſh Infeftments, *quorſum* did the *Act* 16 *Parl.* 1617, appoint Renunciations of Wadſets and Grants of Redemption to be null, if not regiſtred. True, an Annualrenter having uplifted his Debtor's Effects to the Value of his principal Sum, will be excluded *perſonali Objectione* from ſeeking twice Payment; but a ſingular Succeſſor can only be debarred from the principal Sum by a regiſtred Renunciation, *January* 7, 1680, *Mclelland* contra *Muſhet*; And in the Caſe of *Mr. Mark Lermonth*'s *Children* contra *William Gordon*.

Anſwered for Lamingtoun. 1. No Law requires a Renunciation of an Infeftment of Annualrent to be regiſtred, and tho' Regiſtration were neceſſary, an Infeſtment of Annualrent may be extinguiſhed, without a Renunciation, by the Creditor's Intromiſſion, 4 *February* 1671, *Wiſhart* contra *Arthur*: As Adjudications and Appriſings, tho' recorded, may be ſo extinguiſhed. Beſides, the Intromiſſion here was fully as publick a Mean of Extinction as a regiſtred Renunciation. The Deciſion betwixt *M'lellan* and *Mitchel* doth not meet; for there the Lords decided *Secundum ea quæ proponebantur.* And the other Deciſion betwixt *Lermonth* and *Gordon* ſhall be anſwered particularly when Sir *William* doth more particularly demonſtrate the Deciſion by its Date, and where to be found.

The Lords found, That *Alexander Baillie* the Annualrenter's Intromiſſions are not only to be applyed for ſatisfying the Annualrents of the principal Sum in the Infeſtment, but even for extinguiſhing the ſaid principal Sum; notwitſtanding that Infeſtment be now in the Perſon of a ſingular Succeſſor.

Eodem Die. Robert Menzies *in* Tegermauch, *againſt* James Graham *Merchant in* Anſtruther.

Robert Menzies *April* 29, 1707, as Creditor to *Alexander Menzies* now of *Shian*, arreſted in the Hands of the Commiſſioners of the Equivalent, a Sum due by them to the deceaſt *James Menzies* of *Shian*, as belonging to the Arreſter's Debtor, as Executor dative *qua* neareſt of Kin decerned and confirmed to *James Menzies June* 19, 1707, and inſiſted in a Furthcoming. Compearance was made for *James Graham*, who craved to be preferred upon an Aſſignation from *Alexander Menzies* to the ſaid Debt, of the ſame Date with the Cedent's Confirmation. Becauſe, 1. At the Date of the Arreſtment (tho' prior to the Aſſignation) no Debt was eſtabliſhed by Confirmation in the Perſon of *Alexander Menzies*, and Arreſtments affect not *acquirenda.* 2. The Benefit of the Confirmation which was expede in the Perſon of the common Debtor by Mr. *Graham*, for ſupporting his Aſſignation, cannot accrew to the Arreſter: Seing *Actus Agentium non operantur ultra eorum Intentionem*, *January* 16, 1663, Tenants of *Kilchattan contra* the Lady and Major *Campbell*, *June* 20, 1676, *Brown* contra *Smith.*

Alledged for the Purſuer. His Arreſtment being prior to the others Aſſignation, he ought to be preferred, tho' no Confirmation had been expede in the Perſon of *Alexander Menzies* till ſome Months after. Becauſe, *Alexander* had the Time of the Arreſtment a natural and radical Right to the Mony *Jure Sanguinis* as neareſt of Kin, *Act* 120. *Parl.* 7. *J.* 5. *Act* 14. *Parl.* 22. *J.* 6. Which being affected by the Arreſtment, the ſupervening Confirmation as acceſſory thereto, muſt accrew to the Arreſter, and be drawn back *Fictione Juri* to the Date of the Arreſtment: As a Creditor arreſting a conditional Debt, would be preferred to another arreſting the ſame after the Condition is purified, *Dirletoun's Doubts and Queſt.* *Pag.* 8. 2. Albeit the Confirmation might have accrewed to him, had he confirmed in the Terms of the Act of Parliament 1695; It muſt have its full Effect in Favours of all the Creditors, the common Debtor being ſimply decerned dative *qua* neareſt of Kin, without any Relation to the Aſſignation, *June* 21, 1671, *Neilſon* contra *Menzies.* And it can hardly be ſuppoſed that the Confirmation was expede to ſupport the Aſſignation, ſince both are of the ſame Date, and the ſerving an Edict on ſo many Days, behoved to precede the Confirmation.

Anſwered for the Defender. Whatever Right the neareſt of Kin may have *Jure Sanguinis*, they could not by virtue thereof intromet with the Goods. Nor doth this *Jus Sanguinis* in our Law afford Action or Exception without Confirmation: Since if the neareſt of Kin die before confirming, they tranſmit nothing of the Executry to their neareſt of Kin. It might as well be pleaded, That a Creditor of a Defunct's Creditor having arreſted, would upon his Debtor's being afterwards confirmed Executor Creditor to the Defunct, be preferred to the Executor Creditor's poſterior Aſſigny, which is abſurd: As to pretend, That one's confirming Executor dative *qua* neareſt of Kin, ſhould be a Ground to prefer his Creditor who arreſted the Subject before the Confirmation, to a Perſon deriving Right from the neareſt of Kin after the Confirmation. The Method to affect a Defunct's Moveables for his neareſt of Kin's Debt is not by Arreſtment, but by requiring the Procurator Fiſcal to confirm and aſſign; or by obtaining themſelves decerned Executors dative to the Defunct, as if they were neareſt of Kin to him, *Act* 41. *Seſſ.* 5. *Parl. K. W.* Which *Robert Menzies* could not do, *Alexander* his Debtor not being neareſt of Kin to *James Menzies*, who hath a Siſter alive. So that *Robert* cannot pretend, That *James Menzies*'s Gear could be arreſted for *Alexander*'s Debt before the Confirmation.

Replyed for the Purſuer. It doth not follow that an Aſſignation granted by an Executor dative *qua* neareſt of Kin, ſhould be preferred to a prior Arreſtment uſed by his Creditor; becauſe an Executor Creditor confirming, would exclude another Creditor of the Defnnct's who arreſted before. Seeing an Executor Creditor confirms chiefly for Security and Payment of his own Debt, which muſt be ſatisfied before the neareſt of Kin have any Intereſt: Whereas an Executor dative is *Hæres fiduciarius*, and confirms for the Behoof of all intereſſed; and if he be neareſt of Kin, hath a proper Intereſt in the Executry affectable by his Creditors according to their Diligence. 2. The Defender cannot object any Nullity in *Alexander Menzies*'s Right, on Pretence of his not being neareſt of Kin: Becauſe, he derives Right from the ſame Author; And tho' *Alexander* had not been neareſt of Kin, his Confirmation while a nearer did not appear, entitled him to the Office.

The Lords found, That the Arreſtment being uſed at *Robert Menzies*'s Inſtance, as Greditor to *Alexander Menzies*, before *Alexander*'s Confirmation as Executor to *James*, the Confirmation doth not accrew, and the Subject confirmed is not affected by the Arreſtment: And therefore preferred *James Graham* the Aſſigny.

January 26, 1711. *The Lord* Elibank, *againſt* Alexander Mackenzie *of* Frazerdale.

THe Lord *Preſtounhall* having by his Bond obliged himſelf to pay the Annualrent of 10000 Merks Yearly and Termly to *Alexander* Archbiſhop of St. *Andrews* his Father in Law, he being on Life, and failing of him by Deceaſe, to *Mary Burnet* his ſecond Daughter, the Lady *Preſtounhall* during all the Days of her Lifetime, and after her Deceaſe to *George Mackenzie* her Son: In the Action of Compt and Reckoning at the Inſtance of the Lord *Elibank* againſt *Alexander Mackenzie* of *Frazerdale* mentioned *ſupra* 23 *July* 1708, the Purſuer craved to add to his Charge, the Annualrents of the ſaid 10000 Merks due before the Biſhop's Deceaſe, as in *Bonis ejus*.

Alledged for the Defender. The Lady *Preſtounhall* his Mother, who was *nominatim* ſubſtituted in the Bond *quoad* the Annualrents, had as good Right to thoſe reſting before the Archbiſhop's Death unuplifted by him, as to what fell due thereafter; the former being tranſmitted to her without Neceſſity of a Service, *February* 4, 1680, *Robertſon* contra *Preſton*, *July* 13, 1681.

Anſwered for the Purſuer. Tho' Perſons *nominatim* ſubſtituted in Bonds, need no Service or Confirmation to tranſmit the Bonds to them: Yet all Subſtitutions take Place only from the Inſtitute's Deceaſe, and carry the Stock and

Profits thereafter. For the precedent Profits, being *in Bonis Defuncti*, who was ſole Proprietar thereof, go by Succeſſion to him.

The Lords found, That the Annualrents which did precede the Biſhop's Deceaſe, were *in Bonis ejus*.

February 2, 1711. *Mr.* Patrick Strachan *Writer in* Edinburgh, *againſt the Town of* Aberdeen.

IN the Action of Extinction of an Infeftment in the Lands and Fiſhing of *Rutherſtane* granted to the Town of *Aberdeen* in *Anno* 1672, for Security of 2800 *Lib.* at the Inſtance of Mr. *Patrick Strachan*, who was infeft in the Year 1674: The Lords found it inſtructed by Documents produced, That the Salmond Fiſhing poſſeſſed by the Town, was under Tack for Payment of Ten Barrels of Salmond of Tack-duty for the Year 1679, and therefore preſumed the Rent of the Fiſhing for the following Years to be conform to the ſaid Tack, and found the Town liable to compt accordingly, unleſs they can elide the Preſumption by a contrary Proof and Documents. Albeit it was alledged for the Town, That tho' the Rental of Lands (whereof the natural Growth and Product is more fixed and determined) is preſumed to continue the ſame: Yet in compting for caſual Rent, as that of a Salmond Fiſhing, a preciſe Rule cannot be laid down, nor ſo much as a preſumptive Rule, for ſubſequent Years; but every Year's Product ought to be poſitively proved. In Reſpect it was anſwered for the Purſuer, That this pretended Difference of caſual and fixed Rent, as to the Manner of compting, hath no Manner of Foundation: For no Rent is ſo fixed as not to be ſubject to Alteration, and to Riſing and Falling by different Seaſons and Accidents, tho ſome be liable to more Hazards than others; And therefore the Rule of compting muſt be uniformly the ſame, till an Alteration of the Rent be made appear.

Eodem Die. *Mr.* David Guthrie *and* Alexander Williamſon, *againſt Mr.* William Gordon *Advocate.*

IN the Proceſs at the Inſtance of Mr. *David Guthrie* and *Alexander Williamſon*, who ſtand infeſt in Annualrents out of the Teinds of *Balcomy*, againſt Sir *William Hope* the Purchaſer, for Payment of the Price: Mr. *William Gordon* craved to be preferred upon a Diſpoſition of theſe Teinds granted by Sir *James Lermonth* in *Anno* 1654 to Sir *William Gordon* of *Leſmore* his Son in Law, bearing, *For Security of* 4000 *Merks owing by Sir* James *to Sir* William; and alſo upon two expired Appriſings of theſe Teinds in the ſame Year 1654; to which Diſpoſition and Appriſings Mr. *William Gordon* hath Right by Progreſs. Mr. *David Guthrie* and *Alexander Williamſon* alledged, by Way of Reduction upon the Act of Parliament 1621, That the Diſpoſition, being *inter conjunctas Perſonas*, could not prejudice them anterior onerous Creditors, unleſs the onerous Cauſe thereof were inſtructed *aliunde* than by Writ it ſelf. 2. Albei that were inſtructed, the Purſuers offer to prove that Mr. *William Gordon* an his Authors were more than ſatisfied of the 4000 Merks, by their Intromiſſion with the Teinds.

Anſwered for Mr. William Gordon. Eſto the Diſpoſition had been gratuitous, it cannot be quarrelled, becauſe Sir *James Lermonth* was ſolvent in the 1654 when he diſponed, and had an Eſtate ſufficient to pay the 4000 Merks and all his anterior Debts; nay, his Affairs turned not in Diſorder till after his Death, when he could not be ſaid to defraud his Creditors, *Stair, Inſtit. Lib.* 1. *Tit.* 9. *Page* 82. And the Diſpoſition not being called in Queſtion for Fifty eight Years, the Narrative of it muſt be ſuſtained to inſtruct it's onerous Cauſe, which after ſo long a Time cannot be otherways proved. 2. *Non relevat*, that Mr. *William Gordon* intrometted with as much of the Teinds as would pay the Debt: Becauſe he had Right to two expired Appriſings before any Intromiſſion, to which he aſcribed his Poſſeſſion as the moſt profitable Titles, and ſo is not comptable for his Intromiſſions.

Replyed for the Purſuers. They need not ſay that Sir *James Lermonth* at the Date of the Diſpoſition to his Son in Law was Bankrupt; but it is ſufficient to annul that Right, that the Granter's Eſtate was then incumbred by many Infeſtments of Annualrent and Appriſings, whereby *in Eventu* he became inſolvent, *February* 6, 1663, *Lour* contra *Dundee*, *February* 10, 1665, *Craig* contra *Lour*. *Dirletoun*, *Deciſ. June* 30, 1665, *Clerk* contra *Stuart*, *Stair*, *Inſtit. Page* 82, and *Mackenzie upon the Act* 1621. For when an Eſtate is incumbred with Debts and Diligences, it's more reaſonable that a conjunct and confident Perſon ſhould want a Donation, than an anterior Creditor be fruſtrated of his juſt Debt. Upon which Account, the Lords are in Uſe to rank Children for their Bonds of Proviſion *ultimo Loco*, tho' equal in Diligence with other Creditors, *February* 10, 1688, *The Creditors of William Robertſon*, the Caſe of the *Creditors of Cardon*, *Anno* 1700, and the late Competition of the *Creditors and Children of George Marſhal*: Albeit Infeſtments granted to Children foris-familiate, when the Granter's Credit was intire and unqueſtionable, have been ſometimes ſuſtained according to their Dates. 2. Mr. *William Gordon* and his Author having once entred to poſſeſs the Teinds by Virtue of the Diſpoſition a redeemable Right, they could not invert the Cauſe of their Poſſeſſion, and liberate themſelves from compting by purchaſing expired Appriſings. Beſides, the Appriſings founded on cannot defend him from compting, becauſe they were reduced or opened in the Ranking of the Creditors of *Balcomy*.

Duplyed for Mr. William Gordon. Albeit his Appriſings were opened and turned to Securities for the true Debt, becauſe of ſome nice Informality; yet any prior Intromiſſion thereby was *bona Fide*, and the Sentences reducing or opening had no Retroſpect to make the Intrometter liable for Bygones, *July* 19, 1664, *Douglaſs and Sinclair of Longformacus contra Laird of Wedderburn*, *February* 17, 1624, *Thomſon contra Law*, *January* 18, 1677, *Dick of Grange contra Oliphant*. For voluntary Rights, as well as Appriſings may chance to be reduced upon Nullities or prior Diligences: And if Appriſers be holden to compt for Fruits *bona Fide* uplifted and ſpent, Purchaſers by Conſent would run the ſame Fate, which would mightily unſettle all Manner of Property.

The Lords found, That Sir *James Lermonth* having been ſolvent in the 1654, the Time of granting the Diſpoſition, and the ſame never having been quarrelled for ſo many Years; Mr. *William Gordon* cannot now be obliged to prove the onerous Cauſe thereof. And found, That Mr. *William Gordon* inſtructing that he had the Rights of Appriſing (then unquarrelled) in his Perſon, the Time of his entring to Poſſeſſion of the Teinds, as well as the voluntary Right by Diſpoſition; he can aſcribe his Intromiſſions wholly to the Appriſing *medio Tempore* till the ſame were found to be only a Security for the Sums therein-contained; and preferred Mr. *William Gordon*'s Diſpoſition to the Infeſtment of Annualrent.

February 7, 1711. *Dam* Elizabeth Nicolſon, *againſt* William Moriſon of Preſtoungrange.

IN the Action of Recourſe at the Inſtance of the Lady *Nicolſon*, againſt *Preſtoungrange*, for 2500 Merks contained in a Bill of Exchange, drawn by him on Mr. *William Rolland* and Mr. *Robert Gordon*, payable to her, which was accepted, and thereafter proteſted for not Payment: The Lords found it relevant to infer Recourſe againſt the Drawer of the Bill, that it was timely proteſted for not Payment againſt the Accepters, and the proteſting intimated to the Drawer. Albeit the Poſſeſſor did not intent any Proceſs of Recourſe againſt him till Two or Three Years after her proteſting the Bill, and alſo took Aſſignations from the Accepters in Security of the Sums contained in the Bill.

Eodem Die. Margaret Carnegy *Relict of Mr.* John Ramſay *Doctor of Medicine, againſt* James Cowper *of* Lochblair.

J*Ames Cowper* of *Lochblair* being decerned in *July* 1697 as Cautioner for Mr. *John Ramſay* School-maſter in *Perth*, Executor confirmed to Doctor *Ramſay*, to pay to *Margaret Carnegy* his Relict an Annuity of 600 Merks conform to her Husband's teſtamentary Proviſion, till 7000 Merks, which *Lochblair* was found to have had of the Defunct's Effects at *Martimas* 1688, and the Annualrents thereof from that Term were exhauſted: *Margaret Carnegy* charged *Lochblair* upon the Decreet for her Annuity from *Whitſunday* 1708 to *Whitſunday* 1709, who ſuſpended upon this Reaſon, That the Fund thereof was exhauſted, and he could be no further liable. For proving exhauſted, the Suſpender produced the Charger's Diſcharge of the 600 Merks from *Whitſunday* 1706 to *Whitſunday* 1707, and for all Years and Terms preceeding.

The Lords found, That the ſaid Diſcharge doth not import a Preſumption that the Annuity was yearly paid when it fell due, but that all was paid at the Date of the Diſcharge, and ordained the Compt and Reckoning to proceed accordingly: Unleſs the Suſpender inſtruct the particular Times when the reſpective Payments were made.

February 9, 1711. *The Earl of* Wintoun's *Caſe.*

THE Lords, upon Report of the Lord *Bowhill*, found that Peers ought to give their Word of Honour only in Stead of an Oath of Calumny: But that they ſhould depone in common Form, where Things are referred to their Oaths of Verity. Becauſe no Probation by Oaths of Verity takes Place in *England*, where a Peer's Word of Honour doth paſs for an Oath.

Eodem Die. *Mr.* James Graham *Advocate, againſt Captains* John M‘queen *and* William Drummond.

IN a Competition betwixt Mr. *James Graham*, as decerned Executor *qu* Creditor to Miſtreſs *Aliſon Fletcher* Relict of *John Graham* general Poſtmaſter, and Captains *M‘queen* and *Drummond* Executors Creditors to Captain *David Graham*, for the Sum of 1000 Merks, which the Earl of *Strathmore* and his Cautioner were obliged by Bond *to pay to Miſtreſs* Aliſon Fletcher, *and failing of her by Deceaſe, to the ſaid Captain* David Graham, *or to Miſtreſs* Aliſon's *Aſſignies whatſoever*. The Lords preferred Mr. *James Graham* to Captains *M‘queen* and *Drummond* Executors Creditors to Captain *David Graham* the Subſtitute; and decerned the Earl and his Cautioner to make Payment to Mr. *James*, he confirming before Extract: Reſerving to Captain *M‘queen* and *Drummond* Action of Recourſe againſt the Repreſentatives of *Aliſon Fletcher* the Inſtitute and Fiar of the Bond, as accords. In Reſpect th the Predeceſſor's Creditors doing Diligence within Three Years are preferable to the Creditors of the apparent Heir, *Act* 24, *Parl.* 1. *Seſſ.* 1. *Ch.* 2. whether in a real or moveable Eſtate, under which Heirs ſubſtitute are comprehended. For albeit Subſtitutes *nominatim* are preferable to the Heirs or Executors of the Inſtitute, *January* 18, 1625, *Wat contra Dobie*, *January* 15, 1630, *Thomſon contra Merkland*, ſuch Subſtitutes may be excluded by the Inſtitute's Creditors. Seing Subſtitution or Succeſſion takes only Place, after Payment of the Debt of the Inſtitute, who was Fiar and Proprietar, as in this Caſe.

Eodem Die. *Sir* Alexander Brand, *againſt* James Anderſon *and other Tenants of* Riccartoun.

IN the Suſpenſion raiſed by the Tenants of *Riccartoun* of a Charge upon their accepted Bill of Exchange at the Inſtance of Sir *Alexander Brand*: The Lords found, That the *Act* 25, *Seſſ.* 6. *Parl.* K. *W.* diſcharging Blank Writs, doth extend to Bills of Exchange, tho' not to the Indorſations of Bills; the latter and not the former being expreſly excepted therein. Albeit it was alledged, There was no Difference betwixt a Bill blank in the Poſſeſſor's Name, and one payable to the Bearer which would not fall under the Statute: And Indorſations, being the Aſſignments or Conveyances of Bills from Hand to Hand, are to be ſuppoſed of the ſame Nature with, and no more privileged than the Bills indorſed; as Aſſignations to Bonds require the ſame Formalities, that the Bonds aſſigned.

February 13, 1711. *The Magiſtrates of* Paiſley, *againſt their Vaſſals.*

IN the Proceſs at the Inſtance of the Town of *Paiſley* againſt their Vaſſals, the Lords, *July* 20, 1710, having found the Defenders liable for their Proportion of the Ceſs in Time coming, did now find them liable alſo for their Proportion of the Ceſs for the Year 1705, and ſince then; and that the Ceſs muſt be ſubdivided and proportioned among the Heretors by the Commiſſioners of Supply of the Shire in Manner following: *Viz.* By leading before them a Probation of the real Rent of the whole Lands in Property and Superiority liable in Ceſs, and impoſing and proportioning the ſaid Ceſs upon the Lands in Property and Superiority according to the real Rent thereof.

Eodem Die. Elizabeth Roſs *and Captain* Donald M'leod *her Huſband*, *againſt the Magiſtrates of* Tayn.

E*Lizabeth Roſs*, as Executrix to *Walter Roſs* Provoſt of *Tayn*, having charged the Magiſtrates of that Burgh for Payment of 602 ℔. 13 ſh. 4 d. *Scots*, contained in a Bond granted *May* 26, 1694 by the then Magiſtrates and major Part of the Town Council of *Tayn* to the ſaid *Walter Roſs* their Provoſt, the Magiſtrates raiſed a Suſpenſion: At the diſcuſſing whereof, the Lords found, That the Bond charged upon being granted without a previous Act of the Town Council, to a Magiſtrate for the Time, doth not by its Narrative, prove the onerous Cauſe thereof; and therefore can be the Ground of a Charge againſt the Town in ſo far only as the onerous Cauſe for granting the ſame to the Utility of the Burgh is inſtructed. Albeit the Certification in the Act 29 of the Parliament 1693 is, That the Magiſtrates and others who ſhould contract Debts and grant Bonds without a previous Act of the Town

Council fully convened, ſhall, and their Heirs be perſonally liable to relieve and diſburden the Town of ſuch Debts, without Prejudice always to the Right and Security of the Party Creditor. For the Lords thought that the Provoſt who (had the Bond been granted to any extraneous Creditor) would have been liable to relieve the Town thereof, could not by taking ſuch a Bond to himſelf, ſubject the Town to pay it, except in ſo far as he or his Repreſentatives did inſtruct an onerous Cauſe, and that the Mony was *in Rem Verſum* to the Community.

Eodem Die. William Short *Wright in* Edinburgh, *againſt* William Hopkin *Beltmaker there.*

IN the Suſpenſion of a Charge upon a Decreet-arbitral at the Inſtance of *William Short*, againſt *William Hopkin*; The Lords found it no Nullity in a Decreet-arbitral, That it wanted the Writer's Name and Deſignation. Albeit it was alledged for the Suſpender, That only Acts of Office as Writs under the Hand of common Clerks or Notaries relating to their reſpective Offices require, not the inſerting the Writer's Name. And a Decreet-arbitral is not a publick Deed of that Nature, but only a private Writ, containing the Opinion and Judgment of ſome knowing Honeſt man in a private Capacity concerning the Differences of Parties referred to him: Nor doth Execution paſs upon Decreets-arbitral, by publick Authority, but by Conſent of the Submitters ſigning a Clauſe of Regiſtration to be ſubjoined to the Arbiters Sentence. In Reſpect it was anſwered for the Charger, That tho' a Decreet-arbitral is not a judicial Act in a ſtrict Senſe; yet Arbiters being veſted by Law, with ſufficient Authority to determine in Matters ſubmitted to them, their Decreets have all the Effects of any judicial Decreet, and may in ſome Senſe be reckoned judicial Acts. Again, Arbiters being authorized to proceed with more Latitude than ordinary Judges, viz. *Secundum Æquum et Bonum*; and their Decreets declared by the Act of Regulation 1695, unquarrellable upon any Cauſe or Reaſon whatſoever, ſave that of Corruption, Bribery or Falſhood: Such Decreets ought to meet with all imaginable Allowances of Favour.

February 15, 1711. Thomas Dick *Merchant in* Edinburgh, *againſt* John Carſtairs *of* Kilconquhar.

THomas Dick purſued *John Carſtairs* of *Kilconquhar*, as repreſenting his Father Captain *William Carſtairs* of *Newgrange*, for Payment of a Sum in his Father's Bond, and inſiſted upon the paſſive Title of Behaviour as Heir, in ſo far as, Mr. *John Wood* Miniſter of Saint *Andrews* having by a Minute of Sale, narrating, That there were in his Perſon ſeveral Adjudications of the Lands of *Newgrange*, wherein the Defender's Father died infeſt, obliged himſelf to diſpone theſe Lands in Favours of Captain *Anſtruther*, with Warrandice from Fact and Deed; and *per Verba de Præſenti*, aſſigned and diſponed for an adequate Price to be paid to him: The Defender by a ſeparate Writ of the ſame Date, ſigned before the ſame Witneſſes with the Minute, and expreſly relative thereto, did for Captain *Anſtruther*'s further Security, oblige himſelf not only to exhibite and deliver to him a valid and ſufficient Progreſs of the Writs of the Lands betwixt and a certain Day; but alſo to warrand Mr. *Wood*'s Diſpoſition at all Hands, and againſt all Deadly; Nay further, particularly bound himſelf to purge the Lands of certain Incumbrances named; and to capacitate him the better to Implement, he as Principal, and Sir *William Bruce* his Father in Law as Cautioner, obliged themſelves, That the Defender ſhould enter, and infeſt himſelf in the Barony of *Kilconquhar* as Heir to *John Carſtairs* his Uncle. Which Procedure was a manifeſt Behaviour in the Defender as Heir to his Father: He being in Effect the true Diſponer of his Father's Heretage, and Mr. *Wood*'s Name uſed but as a Cover to elide the paſſive Title. For tho' the Minute bears the Price payable to, and diſcharged by him, Law and common Senſe preſumes it was not paid at that Time, nor never paid to Mr. *Wood*: Becauſe, there remained a great Deal to be performed on the Diſponer's Part, as the purging Incumbrances, granting a Diſpoſition, delivering of Writs. Now why would the Defender ſo anxiouſly have undertaken an abſolute Warrandice to get Mony for Mr. *Wood*, who did only oblige himſelf to warrand from Fact and Deed? There is nothing more natural to ſuppoſe than that he who receives the Price, ſhould warrand the Purchaſe, and conſequently that he who warrands the Purchaſe, hath received the Price. Beſides, the Defender may be charged to enter Heir upon his Obligement of abſolute Warrandice, and ſo by his Deed only ſucceeding Heirs are debarred.

Alledged for the Defender. Mr. *Wood*'s Adjudications being expired, the abſolute Right without any Reverſion was ſtated in his Perſon: So that none but he could diſpone. And there could be no Behaviour as Heir by the Defender's entring *tanquam quilibet* into theſe acceſſory Obligements to warrand and make good the Progreſs, for incouraging the Purchaſer, out of Kindneſs to the Creditors; which any Stranger might have done as an interpoſing Friend or Cautioner: For nothing but Intromiſſion with the Rents, or Writs, can infer a Behaviour. 2. To evidence how loth the Lords have been to extend this paſſive Title, apparent Heirs renouncing all Claim they had in Favours of Perſons to whom their Predeceſſors had diſponed, was found to be no Behaviour, tho' they got ſome Gratification for ſo doing: Becauſe, they tranſmitted no Right, *July* 5, 1666, *Scot* contra Heirs of *Auchinleck*, *July* 19, 1676, *Nevoy* contra Lord *Balmerino*; and the Defender received no Gratification, nor any Part of the Mony. Again, the taking out Brieves without actually ſerving Heir, is not ſufficient to import behaving, *June* 28, 1670, *Elies* contra *Carſe*, tho' this diſcovers *Animum adeundi*. All which is exactly conform to the common Law, *Voet. Comment. in Pandect. Tit. de acquir. et amit. Poſſ.* §. 6.

Replyed for the Purſuer. Tho' Intromiſſion with Writs and Rents be the moſt open and uſual, they are not the only Acts of Behaviour, in ſo far as the Property is more valuable than the Rents: And if apparent Heirs ſhould be allowed to diſpone ſafely in ſuch a ſubtle affected Way *in Fraudem Legis*, Creditors ſhall be longer ſecure by the Terror of a paſſive Title. And in the Caſe of *Orr* Daughter to *Lawrence Orr* and *Walter Graham*, againſt the Creditors of the ſaid *Lawrence Orr*, an apparent Heir's Renunciation, being upon the Matter a Conveyance, was found to make the Heir liable *paſſive*. Such an Obligement granted by an apparent Heir differs from the like granted by a Stranger, in that the latter doth not operate a Conveyance of the Property, but only ſecures the Purchaſer againſt any Damage ariſing thro' Defect of the Right: Whereas an apparent Heir's Obligement of that Nature turns to a Conveyance of the Property, in ſo far as the Purchaſer might thereupon have adjudged the Lands from him upon a Charge to enter Heir in Implement of the Warrandice, and made them as much his own irredeemably, as if the apparent Heir had diſponed them.

The Lords found the Defender's granting the Bond of the Date of the Minute, imported a Behaviour as Heir to his Father. And thereafter *July* 4, 1712, upon a new Hearing and Report: The Lords again found, That the

the Defender's granting the Bond of the Date of the Minute, with the Delivery of the Writs by one *James Carſtairs*, who received them from *Robert Carſtairs* the Defender's Father's Agent, imported a Behaviour. For the Lords preſumed the Writs were ſo delivered in Conſequence of the Defender's Obligement to deliver them: By doing whereof, *Robert* or *James Carſtairs* as his *Negotium gerens* freed him of his Obligement.

February 16, 1711. Janet Nisbet *and* Patrick Bell *Merchant in* Glaſgow *her Husband, againſt* John Monro *Chirurgion in* Edinburgh *and his Spouſe*.

JOhn *Nisbet* Lieutenant in Colonel *Moncrieff*'s Regiment, having died at *Glaſgow* where the Regiment lay at the Time, there aroſe a Competition for his Share in the Equivalent, betwixt *Janet Nisbet* Executrix Creditrix to him confirmed before the Commiſſary of *Glaſgow*, and *John Monro* confirmed Executor Creditor to him before the Commiſſaries of *Edinburgh*. *John Monro* craved to be preferred, Becauſe, 1. All Teſtaments ought to be confirmed in the Commiſſariot where the Defunct dwelt, *Stair Inſtit. Tit.* Executrie, *§.* 81. *February* 7, 1672, Commiſſaries of *Edinburgh* and *Brechin* contra Earl of *Panmure*. For the Act 1609, eſtabliſhing the Juriſdiction of Commiſſaries, reſtricts it to Perſons dwelling within their reſpective Bounds: And *Domicilium eſt ubi quis Sedes et Tabulas habebat, ſuarumque Rerum Conſtitutionem fecit, L.* 203. *ff. de Verb. Signif.* or *ubi quis Larem Rerumque ſuarum ſummam conſtituit, L.* 7. *Cod. de Incolis*, whence it's clear, That in the Conſtitution of a Dwelling-place, *Animus remanendi* is more conſidered, than the actual Stay, and Fourty Days Reſidence in a Place, makes a Man convenable there; not becauſe his *Domicilium* is preſumed where he hath remained ſo long, but for that he is ſuppoſed to have Leiſure to defend himſelf, *L.* 17. §. 2. *ff. de Judiciis*. But, 2. Lieutenant *Nisbet* cannot be underſtood to have had his Dwelling-place at *Glaſgow*: Seing he was a young unmarried Souldier, ſubject as to his Abode to the arbitrary Orders of others, and ſo could have no fixed Habitation *Animo Remanendi*. For *L.* 23. *ff. ad Municipalem, Miles ibi videtur habere Domicilium, ubi meret*, takes only Place where the Regiment it ſelf hath a certain Place of Reſidence, as *Legio Parthica, Legio Feretenſis, Fretenſis*, &c. had in thoſe Provinces where they were quartered and paid for Defence thereof. So Souldiers in the Caſtle of *Edinburgh*, or any other fixed Gariſon, have the Gariſon for their Habitation, while they continue there: But when ſent elſewhere upon Expeditions, are held as *Peregrini*, under which Denomination all Souldiers fixed to no certain Poſt may be comprehended. 3. The Commiſſaries of *Edinburgh* have an undoubted Right to confirm the Teſtaments of all Perſons wanting a fixed Abode. Seing where no inferior Commiſſarie is competent to confirm, it's neceſſary to recur to the *Judex communis Patriæ*: As the Commiſſaries of *Edinburgh* only, for the ſame Reaſon have the Privilege to confirm the Teſtaments of ſuch as die abroad out of the Kingdom. Eſpecially conſidering, That it was once the Privilege of theſe Commiſſaries to confirm the Teſtaments of all in *Scotland*, where the Dead's Part exceeded 50 *lib. Scots*: As appears from the Inſtructions to them under the Queen's Hand *Anno* 1563, inſerted in *Balfour's Pratticks*.

Replyed for Janet Nisbet. Tho' a Man's caſual Stay at a certain Place for a little Time doth not determine his *Domicilium*, to make him an *Incola*, to infer *Honores, et Onera*, Immunities and Burdens, or to ſubject him to anſwer to Actions laid againſt him, *L.* 7. *Cod. de Incol. L.* 203. *ff. de Verb. Signific. L.* 19. *ff. de Judiciis*: Yet it is ſufficient to conſtitute his *Domici-*

liam for confirming his Teſtament; except he had, as in the Earl of *Panmure*'s Caſe, a principal fixed Reſidence elſewhere. And *L.* 23. §. 1. *ff. ad Municipal*, making a Souldier's Dwelling-place to be *ubi meret* doth determine *John Nisbet*'s at *Glaſgow*, where he reſided at the Time of his Death with the Regiment. For the *Roman* Regiments called *Parthica*, *Feretenſis*, &c. were as much moveable, and under Command as any others: And the Privilege of making a Will *More militari* was not competent to them, becauſe reſiding in ſuch Countries. Seing Souldiers *in Ædibus* or *Sedibus ſuis*, behoved to make their Teſtament *More vulgari*, and the Privilege of a Military Teſtament was indulged only to thoſe *in Procinctu*. 2. Tho' the Commiſſaries of *Edinburgh* confirm the Teſtaments of thoſe who die abroad; they have no Privilege by the Act 1609, as to confirming the Teſtaments of Perſons dying within the Kingdom, which muſt be confirmed by the Commiſſary of the particular Bounds.

The Lords found it Relevant to preſer *John Monro* to the Subject libelled, That *John Nisbet* Souldier had not reſided at *Glaſgow* Fourty Days immediately before his Deceaſe, and had no fixed Domicile there; notwithſtanding that the Regiment in which he was a Souldier had reſided at *Glaſgow* Sixty Days before his Death. For the Lords found, That in that Caſe his Teſtament ought to have been confirmed by the Commiſſaries of *Edinburgh*, *tanquam commune Forum*.

Eodem Die. Andrew Cutler *late Apprentice to the deceaſt* Homer Grierſon *Chirurgion in* Dumfries, *againſt* Margaret Littleton Homer's *Relict*.

IN the Action at the Inſtance of *Andrew Cutler*, againſt *Margaret Littleton*, as repreſenting *Homer Grierſon*, for Repayment of the Half of Twenty *lib. Sterling* paid in Name of Prentice-fee by the Purſuer to *Homer Grierſon*, with Annualrents thereof ſince the Payment; upon the Ground of Law, *Cauſa data non ſecuta*, the Maſter having died while the Half of the Time of the Prenticeſhip was to run, *Stair Inſtit. Tit. Reſtitution* §. 17.

Alledged for the Defender. No Part of the Prentice-fee can be repeted: Becauſe, the Defender after her Husband's Death kept open Shop and a young Man capable to teach the Purſuer all the Time contracted. And *July* 24, 1707, Repreſentatives of *Rule*, contra thoſe of *Reid*, one of three Perſons to whom a Bond for 600 Merks was granted for their overſeeing the Ganter's Interment, and Children during their Minority, having died before he was at any Trouble or Expence in overſeeing the Children, his Repreſentative was found notwithſtanding to have Right to the Third Part of the Sum. Therefore much more ought the Defender to be aſſoilzied in this Caſe, where the Mony was paid, and the Prentice educated more than two Years. The Citations out of my Lord *Stair*'s Inſtitutions come not Home to the Caſe: For Things given *Intuitu Matrimonii*, if Marriage do not follow, or be diſſolved within Year and Day, return to the Giver, becauſe in that Caſe Marriage is reputed not to have been.

Replyed for the Purſuer. Since Indentures, that are mutual Obligements, continue till the Expiration of the Preniceſhip, *eo Momento* that the Maſter died within the Time, the Obligement upon his Part failed, and was not ſuppliable by another, without Conſent of the Apprentice the other Party Contracter; unleſs it had been otherways provided by the Indentures. For the Choice of a Maſter depends upon his perſonal Qualifications, Induſtry, and good Humour, which induceth one to bind himſelf Apprentice to ſuch a Perſon: And the Purſuer's Choice was as free after his Maſter's Death, as it was at firſt, *L.* 31. *ff. de Solution*. By the Cuſtom of this and other Nations, any Apprentice upon the

Death of his Maſter before the Years in the Indentures expire, has his Choice of any Maſter of that Calling; whom his former Maſter's Repreſentatives are bound to ſatisfie and agree with: And if that be not done, the Apprentice may repete a proportionable Part of his Prentice-fee. 2. In all mutual Contracts, the one Party muſt perform his Part, before he can require Performance from the other. So where *Operæ ſunt locatæ*, the Hire is not due, till theſe be performed: And if a Part remain unperformed, *Locator Operarum* can claim Hire only in Proportion to his Work, *L.* 38. *ff. Locati.* 3. The Caſe betwixt *the Repreſentatives of* Rule *and the Repreſentatives of* Reid, differs from this: For there the Proceſs was founded on a gratuitous Bond, containing no Obligement upon the Creditors therein; Whereas here both Parties ſtand obliged by Contract to mutual Performances.

Duplyed for the Defender. The *L.* 31. *ff. de Solutionibus* hath no Relation to this Caſe, ſeeing there it was expreſly pactioned that the Artificer ſhould perfect the Work himſelf. Whereas by a common Indenture it is not underſtood, That the Maſter himſelf ſhould always inſtruct and entertain his Prentice: At which Rate a Maſter could not be abſent two Days together without Breach of Indentures. Do not Maſons or Wrights undertaking to build Houſes, ſatisfy their Obligation by the Service of Journeymen, Prentices, or others, tho' little or no Part of the Work be done by their own Hand? In all Places abroad, the Prentice-fee is due notwithſtanding the Death of Maſter or Prentice within the Time, except where ſo much is to be paid yearly for each Year in Name of Prentice-fee; in which Caſe it is only due conform to the Number of Years it continued, *Annus inceptus* being always held *pro completo*: Whereas here the Term of Payment of the whole Prentice-fee was long elapſed before the Maſter's Death. 2. The *L.* 38. *ff. Locati* doth as little concern the Preſent Caſe, where the Prentice was to ſerve without any Reward from his Maſter, who was to get ſome Honorary or Gratification, for the Apprentice's Entertainment and Inſtruction.

The Lords ſuſtained it relevant, That the Purſuer's Maſter died within the Time of the Prenticeſhip after it was more as half run, to give the Purſuer a Recompence by Repetition of a Third of the whole Prentice-fee for that Loſs. But found it relevant to elide this Recompence, That the Defender kept open Shop after her Huſband's Death, and kept a Perſon in the Shop capable to inſtruct the Purſuer, and alſo offered to keep the Purſuer in the Shop, and at Bed and Board during the reſt of the Time of his Prenticeſhip, as her Huſband had done while he lived, to be proved *prout de Jure.*

Eodem Die, *Sir* Robert Forbes *and his Factor, againſt* George Watſon *Merchant in* Edinburgh.

IN the Competition for Arrears due out of the Equivalent, to ſeveral Captains in Colonel *George Hamilton*'s Regiment of Foot, betwixt Sir *Robert Forbes* who, as Donatar of the Eſcheat of *Alexander Forbes* Merchant in *Edinburgh* Creditor by Bond to theſe Officers, had arreſted their Arrears in the Hands of the Commiſſioners of the Equivalent; and *George Watſon* to whom the Officers Bond was aſſigned by *Alexander Forbes*, and the Aſſignation intimated to the Officers, (they being out of the Country) by Letters of Intimation executed at the Market-croſs of *Edinburgh*, Peer and Shore of *Leith*, before the Donatar's Arreſtment.

Alledged for Sir Robert Forbes. He ought to be preferred to Mr. *Watſon*, tho' the latter's Aſſignation was intimated before the other's Arreſtment; Becauſe the Execution of the Intimation was null, bearing for its Warrant, *Conform to the within written Letters of Intimation of the Aſſignation in Favours* of George Watson *Merchant in* Edinburgh, *raiſed at his Inſtance and made to the ſaid Officers in Colonel* George Hamilton's *Regiment*: But not mentioning the Date of the Letters, tho' the Execution be upon a Paper apart; And Executions relating generally to the Summons are not to be ſuſtained, *Act* 6. *Par.* 2. *Seſſ.* 3. *Ch.* 2 *in Fin.*

Anſwered for Mr. Watſon. Neither Statute nor Cuſtom hath made it neceſſary, for an Execution of Intimation to bear the Date of its Warrant. As to the Act 1672, ordaining Executions to bear the Purſuer and Defender's Deſignations, that is by Practice reſtricted to the Executions of Summons, and never extended to thoſe of Inhibitions, Intimations, or other Letters; and as Sir *George Mackenzie* obſerves upon the Act, tho' the Lords did not ſuſtain an Execution relating in general to the Warrant; yet thereafter upon helping the Execution and the Meſſenger's abiding by it, they allowed the ſame.

The Lords repelled the Objection againſt the Execution of Intimation of Mr. *Watſon*'s Aſſignation, that it being on a Paper a part, did not bear the Date of the Letters which are the Warrant thereof.

Eodem Die. Margaret Bourboun *and her Husband, againſt* James Montgomery *Merchant in* Glaſgow.

M*Argaret Bourboun* having, as Executrix to *Archibald Bourboun*, cauſed charge *James Montgomery* for Payment of 113 *Lib.* 6 *ſh.* 8 *d.* contained in a Bond granted to the Defunct by him as Cautioner for *William Boig*, *John Crawford*, and *John Boig*: *James Montgomery* ſuſpended upon this Ground, That the Bond *quoad* him a Cautioner was preſcribed, no Diligence having been done thereon within ſeven Years after the Date, in the Terms of the Act of Parliament 1695.

Anſwered for the Charger. The ſeven Years Preſcription cannot operate in Favours of the Suſpender: Becauſe, within the ſeven Years Compenſation was competent to him againſt the Creditor in the Bond, which did interrupt the Preſcription during the Competency thereof, *January* 1705, Sir *John Gordon* of *Park* contra *Hay* of *Ranes*. For ſince it was in vain for the Creditor to purſue, while the Debtor had a clear Defence of Compenſation to exclude him; the ſeven Years can only run from the Time that the Ground of Compenſation was taken off.

Replyed for the Suſpender. A Ground of Compenſation is never to be regarded, unleſs where it is applyed; and here the Cautioner never pretended to apply his Ground of Compenſation to the Payment of the Debt charged on, but on the contrary without Regard thereto, took Payment of what was owing to him by the Creditor in the Bond: So that it cannot be pretended that the Creditor was *non valens agere.*

The Lords ſuſtained the Reaſon of Suſpenſion upon the Alledgeance of Preſcription, in Reſpect the Compenſation was not applied.

Eodem Die. Elizabeth Dickſon *and* Patrick Heriot *her Husband, againſt Miſtreſs* Iſobel Logan.

IN the Action at the Inſtance of *Elizabeth Dickſon* and her Husband *contra* Miſtreſs *Iſobel Logan* mentioned *ſupra* 22 *December* 1710, the Defender craved to be preferred to a Bond for 1000 *Lib.* owing by the Marqueſs of *Tweddale* to Mr. *John Dickſon* her Husband dated in *Anno* 1696, and aſſigned by him to her in the Contract of Marriage.

Replyed for the Purſuer. She as Executrix to Mr. *John Dickſon* ought to have the Bond, in Reſpect the Aſſignment in the Defender's Contract of Marriage doth not agree with the Date of the Bond, which aſſigns 1000 *Lib.* due by the Marqueſs of *Tweddale* by Bond in the Year 1606.

Duplyed for the Defender. The Bond aſſigned in the Contract doth exactly agree with that in Queſtion, as to the Sum and Debtor, and the harmleſs obvious Error in the Date, which is not eſſential to a Writ, can never annul the Aſſignation; Which relative Writ would have been good *ubi conſtat de Relato,* as here, tho' the Date was ſtill blank. Seing it cannot be pretended, That there was any other 1000 *Lib.* Bond granted by the Marqueſs of *Tweddale* to the Defender's Huſband, far leſs that he granted a Bond to him, in the Year 1606, when neither of them was born.

Triplyed for the Purſuer. An Error in the Date of a Writ, when the Queſtion concerns the Date as here, is eſſential: And there is a great Difference betwixt a blank Date, and a wrong Date. Nay in the Caſe betwixt *Walter Abercrombie* and *Innes* of *Dunkinty,* the Lords found an Error in the Chriſtian Name of a Witneſs to an Aſſignation, ſufficient to annul it; albeit the Deſignation was right, *conſtabat de Perſona,* and the Miſtake was evident.

The Lords preferred Miſtreſs *Iſobel Logan* the Aſſigny.

February 20, 1711. Andrew Horn *Coalgrieve to the Dutcheſs of* Argyle, *againſt Lord* Edward Murray *and his Lady.*

IN a Proceſs of Furthcoming at the Inſtance of *Andrew Horn,* who, as Creditor to Mr. *David Seton* Brewer in the *Canongate,* had arreſted, in the Hands of Lord *Edward Murray* and his Lady, Mony due by them to Mr. *David* for Ale furniſhed to their Family: The Purſuer offered to prove the furniſhing of the Ale and Price thereof within the Years of Preſcription by Witneſſes, and the Defenders offered to prove Payment by Mr. *David*'s Oath.

The Lords found the Payment relevant to be proved by the Oath of Mr. *David* the Brewer and Furniſher, in prejudice of the Arreſter. Albeit it was alledged for the Arreſter, That he being a legal Aſſigny, Mr. *David Seton*'s Oath could not make againſt him; more than a Cedent's Oath could prejudice an onerous Aſſigny. In Reſpect an Arreſtment, being but an incomplete Diligence, doth not denude the Perſon whoſe Debt is arreſted; as an intimate Aſſignation denudes the Cedent. Seing Goods arreſted may, notwithanding the Arreſtment, be poinded at another Creditor's Inſtance.

February 21, 1711. John Watſon *Maſon in* Broomhill, *againſt the Lord* Preſtounhall.

IN a Suſpenſion at the Inſtance of the Lord *Preſtounhall* of a Charge given to him by *John Watſon,* for Payment of 219 *Lib.* 17 *ſh.* 2 *d.* reſting to the Charger for building ſome Maſon-work, conform to a Contract entred into betwixt the Charger and the Suſpender: The Purſuer offered to prove by Witneſſes, That he had performed the Work. It was alledged for the Suſpender, That the Performance of the Work, not being proved by the Contract, is preſcribed *quoad Modum probandi* by Witneſſes: Since it was not inſiſted upon within three Years, *Act* 83. *Parl.* 6. *J.* 6. But the Lords found, That the ſaid Act of Parliament took no Place here; the Bargain being proved by Writ.

February

February 22, 1711. *Poor* George Terſie, *againſt* Margaret Burnet *Relict of* William Strachan *in* Edindiak, *and* William Forbes *his Grandchild.*

IN the Action at the Inſtance of *George Terſie*, as Aſſigny by *Adam Gordon*, eldeſt Son and apparent Heir to the deceas'd *John Gordon* of *Murrailhouſe*, againſt *Margaret Burnet* and *William Forbes*, as repreſenting *William Strachan*, for the Mails and Duties of the Lands of *Murrailhouſe*, for ſeveral Years that *William Strachan* poſſeſs'd the ſame as Tenant: The Lords ſuſtained the Defence of Payment by the Defender's *bona Fide* to *John Gordon*, ſecond Son to the ſaid deceas'd *John Gordon*, who was held and reputed his apparent Heir, in Reſpect of his eldeſt Brother *Adam Gordon*'s long Abſence off the Kingdom, and his being held to be dead.

Eodem Die. John Henry *Cordiner in* Edinburgh, *againſt* John Glaſſels *Merchant in* London, *and his Factor.*

IN the Competition betwixt *John Henry* and *John Glaſſels*, both Executors Creditors to *Thomas Glaſſels*, who died in the Expedition to *Darien* before he went out of the *Scottiſh* Seas: The Lords preferred *John Henry*, who confirmed in the Commiſſariot of *Glaſgow*, to *John Glaſſels* who had confirmed before the Commiſſaries of *Edinburgh*. In Reſpect the Defunct had left his Wife and Family at *Glaſgow*, where ſhe lived proſecuting his former Trade of a Merchant, till they got notice of his Death. Albeit it was alledged for *John Glaſſels*, That the Defunct having gone Abroad, in Order to be a Planter in *Darien*, either his *Domicilium* behoved to be reputed in *Darien*, where he deſigned to fix and plant, *L* 27. *ff. ad Municipal*; Or, he muſt be underſtood to have had none at all, from his Intention to deſert his former Habitation, and ſet up elſe-where, *Ibid.* §. 2. *in Fin*: In either of which Caſes his Teſtament could only be confirmed in the Commiſſariot of *Edinburgh*, as *commane Forum*; *And* 'tis not the Wife's Reſidence that makes the Husband's Dwelling-place, but ſhe follows his. In Reſpect it was Replyed for *John Henry*, That a Man can't be thought to change his Habitation by changing his Manner of Living; from a cloſe Shopkeeper, to that of a travelling Merchant; or by taking up a Deſign to ſettle Abroad, till he be actually ſettled and reſolve to continue there: For the Definition of *Domicilium, ubi quis Sedes & Tabulas habet, & Rerum ſuarum Conſtitutionem facit*, runs in the preſent, and not in the future Time. And 'tis unreaſonable to aſſert, That a Perſon went abroad (*Animo Remanendi*) to a Place he had never ſeen, and where he knew not what Reception he would meet with.

Eodem Die. *Earl of* Levin *againſt* James Findlay *of* Balchriſtie.

IN the Proceſs of Declarator at the Earl of *Levin*'s Inſtance, againſt *James Findlay*: The Lords ſuſtained it relevant for the Purſuer, to declare the Links of *Balchriſtie* to pertain in Property to him as Heretor of the Lands of *Drummeldrie*, that he prove Fourty Years uninterrupted Poſſeſſion of the ſaid Links, as Part and Pertinent of his Lands of *Drummeldrie*; notwithſtanding that the Defender produced a ſpecial Infeftment of the Lands of *Balchriſtie* and Links thereof, in Favours of his Authors, *in Anno* 1601; unleſs he offer to prove Poſſeſſion, or other Interruption, conform to the Deciſions, *November* 17, 1671, betwixt *Young* and *Carmichael*, and *February* 20, 1675, betwixt the Counteſs of *Murray* and *Weems*, and *Stair*, *Inſtit. Tit. Infeftments of Property*, *Pag.*

Pag. 237, 238. Becauſe, ſeing it is not to be ſuppoſed that any Perſon could be infeſt in every Part of his Lands *per expreſſum*, 'tis ſufficient to inſtruct Fourty Years Poſſeſſion of Lands reputed Part and Pertinent of thoſe ſpecially named in his Infeſtment. For otherways it were eaſie for any Man to procure upon his Reſignation of his own Lands, Infeſtment in a neighbouring Heretor's Lands, under a new or ſpecial Name, which would unſettle all Property.

Eodem Die. *Mr.* Walter Laurie *Miniſter of the Goſpel at* Stranrawer, *againſt Sir* Alexander Maxwell *of* Monreith.

IN the Action at the Inſtance of Mr. *Walter Laurie*, as Aſſigny by the late Lady *Monreith* to a Tack of her Jointure Lands, ſet to the deceas'd Sir *William Maxwell* of *Monreith*, for Eight hundred Merks yearly, to be paid at two Terms of the Year, *Whitſunday* and *Martinmas* by equal Portions, beginning the firſt Term's Payment at *Whitſunday* 1688, and ſo furth yearly, termly, and proportionably during all the Days of her Life, againſt Sir *Alexander Maxwell* as Heir to Sir *William* his Father: The Lords found, That the Purſuer had only Right to the Tackduty, for the Term of *Martinmas* 1709 preceding the Cedent's Deceaſe, and had no Right to a Proportion thereof from *Martinmas* till *March* thereafter when ſhe died.

June 5, 1711. ACT *of* SEDERUNT *Anent the Order of the Service of the Lords upon the Bills in the Outer-houſe, for preparing concluded Cauſes, and on the Oaths and Witneſſes.*

THE Lords of Council and Seſſion, for preventing all Uncertainty in the Rolls, as to the Ordinaries on the Bills, concluded Cauſes, and Oaths and Witneſſes, Do declare the Rule to be as follows; and appoint the ſame to be obſerved in all Time coming: *To wit*, That whoſoever of the Lords is Ordinary in the Outer-houſe during all that Time, the Lord who is next to be in the Outer-houſe ſhall be Ordinary on the Bills; and that the Lord who was Ordinary in the Outer-houſe the Week immediately preceeding, ſhall be upon the concluded Cauſes, and that the two Lords, who in Seniority are next and immediately before the Ordinary on the concluded Cauſes, ſhall be Ordinary on the Oaths and Witneſſes: And the Keeper of the Rolls is hereby appointed and ordained to put up the Rolls accordingly hereafter, and that the appointing of Ordinaries on the Bills, concluded Cauſes, and Oaths and Witneſſes, may be regulated, as the Lords precede, as follow the Ordinar in the Outer-houſe, for the Time, in Manner abovementioned: And it ſhall not be regarded in appointing the ſaid Three Ordinaries, That the Lords to whom theſe three Pieces of Service *reſpective* may fall, were imploy'd in any of them, during the laſt Weeks of the Seſſion immediately preceding.

June 8, 1711. *The Creditors of* William Paton *of* Panholls, *Competing.*

IN the Competition of the Creditors of *William Paton* of *Panholls*, an Aſſignation granted by *John* and *Mary Patons*, to the ſaid *William Paton* their eldeſt Brother, ſubſcribed by both the Cedents, but ſideſcribed at the joining of the Sheets only by *John* before two Witneſſes, being quarrelled by Mr. *John Cuningham* Schoolmaſter in *Edinburgh*, Husband to *Mary Paton*, as null *quoad* her, upon this Ground; That ſhe did not ſideſcribe it. It was anſwered for the other Creditors, that no Act of Parliament or *Sederunt* requires ſideſcribing,

ſcribing, and Contracts of Marriage are ſuſtained probative againſt all the Subſcribers, tho' ſome of them only ſideſcribe. Nor can the Want of ſideſcribing here, be any Nullity: Seing *John*'s ſubſcribing and ſideſcribing before Witneſſes, doth clearly aſcertain the Conjunction of the Sheets.

The Lords repelled the Nullity objected againſt the Aſſignation.

June 11, 1712. *The Creditors of Sir* Robert Forbes *Advocate, againſt* William *and* Robert Blackwoods *Merchants in* Edinburgh.

KING *Charles* the Second as Heir to the laſt Duke of *Lennox* (who was heretable Lord high Admiral of *Scotland*) having conveyed the Office to the Duke of *Lennox*, and *Ritchmond* that now is, reſerving the Liferent thereof to the Duke of *York*, who was afterwards King *James* the Seventh; King *William*, as Succeſſor to King *James*, gave a Commiſſion to Sir *Archibald Sinclair* to be Judge Admiral *durante Beneplacito*; who *in Anno* 1699, reſigned in Favours of Sir *Robert Forbes* Advocate, upon Sir *Robert*'s granting an Aſſignation in Favours of Sir *Robert Sinclair* of *Longformacus*; of the Fie or Penſion of One hundred Pound *Sterling* due to the Judge of Admirality during Sir *Archibald*'s Lifetime, and during Sir *Robert Forbes*'s enjoying the Office jointly; That is, while Sir *Archibald* lived, and Sir *Robert Forbes* enjoyed the Office, Sir *Robert Sinclair* ſhould have Right to the ſaid annual Penſion. In the Year 1702, the Duke of *Lennox* getting full Right to the Office, thro' King *James*'s Deceaſe, gave a Commiſſion to Mr. *James Graham* Advocate to be Judge-Admiral; Whereby Sir *Robert Forbes*'s former Right during Pleaſure ceaſed, and he procured himſelf to be aſſumed as conjunct in the Office with Mr. *Graham*. The whole Salary from Mr. *Graham*'s Admiſſion, till the Union, being unpaid; There aroſe a Competition for the Half thereof betwixt the Creditors of Sir *Robert Forbes*, and *William* and *Robert Blackwoods* Merchants in *Edinburgh*, as having Right by Aſſignation from Sir *Robert Sinclair*.

The Creditors of Sir *Robert Forbes*, would have his Aſſignation to the Salary to be interpreted *civiliter*, according to the Nature of the Thing, *viz.* ſo long as he ſhould enjoy the Office by Virtue of the Gift procured upon Sir *Archibald*'s Demiſſion, and no longer, *L.* 1. §. 2. *ff. de Condict. ob non Cauſ.* That is, ſo long as he enjoyed the Office reſigned, which he was then in Poſſeſſion of. For it can never be imagined, that Sir *Robert* was to give the Salary during his Enjoyment of the Office, which, after Extinction of his former Right *ob Defectum Juris* in the Conſtituent, he *tanquam quilibet* procured from the Duke of *Lennox*; he being under no Obligation to procure the annexed Salary in Favours of Sir *Robert Sinclair*: Conſequently the Aſſigny's Pretenſions once cut off, could not revive by the ſubſequent Gift to the Cedent.

Anſwered for William and Robert Blackwoods. By the expreſs Words of the Aſſignation, the Cedent ws to have the Salary, *While Sir* Archibald *lived and Sir* Robert *enjoyed the Office*, without diſtinguiſhing the Title he enjoyed it by: Sir *Archibald*'s Dimiſſion was the only Cauſe of the Aſſignation, which brought Sir *Robert* into the Office, and intitled him to claim the Favour of a new Gift: And its hard to reduce reſtrictive Interpretations of an abſolutely general Clauſe, where, had the Parties deſigned a Reſtriction, they could not have failed to expreſs it by theſe Words, *During Sir* Archibald'*s Life, and Sir* Robert Forbes'*s enjoying the Commiſſion then procured*: Seing that was obviouſly precarious, and revocable. 2. The Aſſignation to the Salary can no more be affected by Sir *Robert Forbes*'s Creditors, than they could repete Mony given for Sir *Archibald*'s Demiſſion, upon the turning out Sir *Robert Forbes*: *Ubi enim eadem Ratio, idem Jus eſſe debet.* 3. Aſſignations during Life are found ſtill to ſubſiſt, tho' the Cauſe for which they were granted ſhould ceaſe, *July* 16, 1678, *Wier* againſt the Earl of *Callender*, and in the Caſe of the Earl of *Wintoun* againſt the Lord *Pitmedden*.

The Lords found, That Sir *Robert Forbes*'s Aſſignation to Sir *Robert Sinclair*, of the Fee and Penſion libelled, did intitle the Aſſigny to it, not only during the Cedent's Poſſeſſion by Virtue of the Gift on Sir *Archibald Sinclair*'s Demiſſion, but alſo during the Cedent's Enjoyment of the Office by the new Gift from the Duke of *Lennox*. Becauſe the firſt Gift, which Sir *Archibald Sinclair* was not bound to warrand, being only *durante Beneplacito*, and the Aſſignment to the Penſion not expreſly reſtricted to the Time that the Cedent enjoyed the Office by Virtue thereof, it's underſtood to be effectual ſo long as he enjoyed the ſaid Office *quocunque Titulo*.

Eodem Die. William Donaldſon *Taylor in* Torphichen, *againſt* Robert Walker *in* Craſtandie.

IN a Purſuit at the Inſtance of *William Donaldſon*, as having Right from *Agnes Donaldſon* in *Craftandie*, againſt *Robert Walker*, for Payment of Four hundred Merks contained in *John Walker* his Father's Receipt, as follows, *I* John Walker *in* Craftandie, *grant me to have received from* James Boog *in* Boogſtoun, *in Name of* Agnes Donaldſon *in* Craftandie, *the Sum of Four hundred Merks* Scots, *as Witneſs my Hand at* Hollhouſe *the Eleventh of* November, *One thouſand ſeven hundred and four*.

The Lords ſuſtained the Receipt as a Ground of Debt againſt the Defender, the Purſuer proving the ſame to be Holograph. Albeit it was alledged for the Defender, 1. Seing the Receipt bears neither borrowing nor lending, nor any Obligement to pay, it's preſumed that *Agnes Donaldſon* was owing ſo much Mony to *John Walker*, and that he received Payment upon his Receipt from *Boog*, as Truſtee or Debtor to *Agnes Donaldſon*. 2. Tho' the Receipt were in the Terms of an obligatory Ticket, yet it is null, for not mentioning the Writer: For theſe Words, *As Witneſs my Hand*, import only, That *John Walker* ſubſcribed the Paper; Conſequently, the Purſuer cannot now ſince the Act of Parliament 1681, be allowed to ſupply it by proving Holograph. In Reſpect it was replyed for the Purſuer, 1. 'Tis a Jeſt to ſay, That the Receipt infers any Preſumption that *Agnes Donaldſon* was Debtor to *John Walker* in the like Sum; For 'tis only in Bills or Precepts among Merchants, that Value not expreſt is implyed. So that the Preſumption lies *e contra*, That he was but an interpoſed Perſon, receiving her Mony from *Boog*, which was the Reaſon why the Receipt is not conceived in obligatory Terms. 2. Theſe Words, *As Witneſs my Hand*, relate equally to the Body of the Writ, as to the Subſcription; and ſo prove Holograph.

June 13, 1711. *Miſtreſs* Lyon *againſt the Lord and Lady* Kinnaird.

THE Lord and Lady *Kinnaird* having proteſted for Remeid of Law before the Houſe of Peers, againſt a Decreet of the Seſſion, preferring Miſtreſs *Lyon* to them, in a Proceſs of Furthcoming at her Inſtance againſt the Earl of *Aboyn* and his Tenants; and lodged their Proteſt before that honourable Houſe: She obtained Judgment there, ordaining the Appeal to be diſmiſſed the Houſe, and the Appellants to pay or cauſe to be paid to her, the Sum of Fourty Pound *Sterling* for her Coſts and Charges cauſed by the ſaid Appeal; and ordaining the Lords of Seſſion to order theſe Coſts to be levied by the ſame Rules and Methods, as Coſts given by their Lordſhips are to be levied. The Lords, upon Miſtreſs *Lyon*'s Application by Bill, with the Judgment and Order of the Houſe of Peers produced, granted Warrant for Letters of Horning at her Inſtance againſt the ſaid Lord and Lady *Kinnaird*, for levying the Fourty Pound *Sterling* of Coſts and Charges, and ſuch other Diligence as uſually followeth upon their Lordſhips Decreets and Sentences. Albeit it was alledged for the Lord and Lady *Kinnaird*, That no ſuch ſummary Warrant could be granted, but that Miſtreſs *Lyon* behoved to inſiſt *Via ordinaria*, by a Proceſs for her ſaid Coſts.

June 15, 1711. John Ewing *Writer to the Signet*, *againſt* William Rowan *Merchant in* Greenock.

John Ewing Husband to *Margaret Rowan* Heir of Tailzie and Proviſion to *John Rowan* of *Bedland* her Father, having, as Aſſigny to ſeveral moveable Debts owing by *John Rowan*, purſued *William Rowan* for Payment upon the paſſive Title of vitious Intromiſſion with *John Rowan*'s moveable Effects: The Lords found, That *Margaret Rowan* being Heir of Tailzie to the Debtor, the Purſuer could not inſiſt to make the Defender liable *paſſive*, but only *in Valorem* of his Intromiſſion. Albeit an Intrometter with a Defunct's moveable Effects is univerſally liable to his Creditors; and the Purſuer had Action competent to him for Relief out of the Defunct's Executry.

June 19, 1711. Beatrix Linklatter, *Relict of Captain* Boſwell *Skipper in* Kirkaldie, *againſt* John Boſwell *Skipper there.*

Beatrix Linklatter having, in her Contract of Marriage with Captain *Boſwell*, diſponed to him his Heirs and Aſſignies, her whole Goods and Gear, moveable and immoveable, Debts and Sums of Mony, and two Tenements lying in *Kirkaldie*, with this Proviſion and reſerved Faculty, *That in Caſe of her ſurviving him without Children of the Marriage, ſhe ſhould have full Power to diſpoſe upon the Half of the Goods, Gear, Sums of Mony, and others contracted on her Part*: She purſued *John Boſwell* as repreſenting the Captain his Father, to have it found and declared, That ſhe had Power to diſpoſe of the Tenements aforeſaid, as well as of the Moveables diſponed by her to her Husband.

Alledged for the Defender. 1. The general Words in the Clauſe of Diſpoſal, *and others contracted on her Part*, cannot be extended either to others of a greater Value than the Particulars mentioned, or to Lands and Houſes which are of a different Kind from the Particulars expreſs'd in the Clauſe, *November* 19, 1680, *Dalgarno* againſt *Tolquhon*. 2. The Meaning of Parties is to be drawn from the Strain of the Writ: So that the Purſuer having diſponed her Houſes by one Clauſe, and her Goods, Gear, and Sums of Mony by another, and the Clauſe containing the Faculty beginning with the ſame Words, *Goods and Gear*, &c. as the diſpoſitive Clauſe of the Moveables, it can be extended only to Moveables. 3. A Faculty or Power to diſpoſe of Lands is not ordinary, and therefore not to be preſumed.

Replyed for the Purſuer. 1. If theſe Words, *And others contracted on her Part*, did not comprehend all heretable Right diſponed by her to her Husband, they had been ſuperfluous; for all that was moveable came under the foregoing Terms of *Goods and Gear, and Sums of Mony*. Beſides, ſeing *Nemo præſumitur donare*, eſpecially to make an exceſſive Gift; and a general Clauſe ſubjoin'd to ſeveral Particulars in a Diſcharge, can be extended only to others of the ſame Nature or Value, becauſe a Diſcharge, except in ſo far as an onerous Cauſe appears, *ſapit Naturam Donationis*: Therefore the Purſuer's gratuitous Conveyance of her whole Eſtate heretable and moveable to her Husband, reſerving

ſerving to her ſelf but a Faculty, in an uncertain Event of her ſurviving him without Children, to diſpoſe of the Half thereof, muſt be taken in the moſt ample and favourable Senſe the Words can bear and be underſtood to comprehend the Half of all the Particulars diſponed whether heretable or moveable. Again, the Goods, Gear and Sums of Mony diſponed were of greater Value than the Lands, and ſo may naturally, without an extenſive Interpretation, fall under the general of *others whatſoever contracted on her Part.* 2. It's frivolous to pretend that the Faculty ſhould be extended only to Moveables, becauſe it begins with the Words, *Goods and Gear*, &c. in the ſame Manner as the Clauſe diſponing the Moveables. And 3. Its moſt ordinary to grant Faculties and Powers to diſpoſe of Lands and other heretable Rights.

The Lords found, That the Clauſe providing that the Purſuer ſhould have Power to diſpoſe of the Half of the Goods, Gear, Sums of Mony and others contracted on her Part, doth import a Return of the Half of the heretable Subjects diſponed by her to her Husband, as well as Moveables: And therefore found and declared, That ſhe hath Right to the Half of the Houſes diſponed by her in her Contract of Marriage.

Eodem Die. *Mr.* George Liddel *Profeſſor of Mathematicks in the* Mariſhal *College of* Aberdeen, *againſt* George Davidſon *of* Cairnbrogie.

IN the Action at the Inſtance of Mr. *George Liddel* as Executor Creditor to *William Biſſet* Merchant in *Aberdeen*, againſt *George Davidſon* Intrometter with the Defunct's Houſhold-pleniſhing, for Reſtitution, or the Value.

Alledged for the Defender. That he had Right to the ſaid Pleniſhing by Virtue of a Diſpoſition from *William Biſſet*, with an Inſtrument of Poſſeſſion and ſymbolical Delivery in his Lifetime, which completed his Right: As is clear not only from the civil Law, *L.* 1. *C. de Donat. L.* 1. §. 21. *L.* 18. *ff. de acquir. & amitt. Poſſ.* where the very pointing out of a Thing and uſing the Form of a Delivery is equivalent to natural Poſſeſſion, and the Diſponer is underſtood thereafter to poſſeſs in the Name and for the Behoof of the other. Nay further, the Defender attained alſo the natural Poſſeſſion after the Diſponer's Death before the Purſuer's Confirmation, which is a ſufficient Ground to prefer him.

Replyed for the Purſuer. The Diſpoſition with a ſymbolical Delivery to the Defender *retenta Poſſeſſione* by the Defunct, was feigned, and underſtood in Law to have been made for the Granter's Behoof: And being a general Diſpoſition of Pleniſhing, without Relation to an Inventory, it gave but *Jus ad Rem* which required to be completed by Confirmation. So that the Subject diſponed remaining *in bonis Defuncti*; fell plainly under the Purſuer's Confirmation, which gave *Jus in Re.* Nor can the Defender's Poſſeſſion after the Diſponer's Deceaſe be regarded, becauſe it was but acceſſory to the former ſimulate Poſſeſſion, and altogether precarious, which could not hinder Creditors to affect the Goods as *in Hæreditate mobilium jacente*, *Gilmore*, *Deciſ.* 146 and 147, and the Prattick *June* 15, 1624, *Strachan contra Scot.*

The Lords preferred the Executor Creditor.

Here the Defender had allowed *Biſſet*'s Relict to give up the Pleniſhing to the Commiſſary of *Aberdeen*, in Inventory as *in bonis Defuncti*, and became Cautioner that ſhe ſhould confirm the ſame, and make them forthcoming to all Parties having Intereſt.

Eodem Die. *The Creditors of* Roſs *of* Lethinty, *againſt* Elizabeth Gellie *Relict and* John Hall *Son to the deceaſt* John Hall *Merchant in* Aberdeen.

IN the Ranking of the Creditors of *Lethinty*, Miſtreſs *Hall* and her Son founded on an Adjudication upon a Bond granted by *Roſs* of *Lethinty* and Cautioners, payable to the deceas'd *John Hall* and *Elizabeth Gellie* his Spouſe, the longeſt liver of them two, for *Elizabeth Gellie*'s Liferent Uſe allennerly; and failing of them by Deceaſe, to *John Hall* their eldeſt Son, with 2000 Merks of liquidate Expences in Caſe of Failzie.

Alledged for the other Creditors. The ſaid Adjudication could only ſubſiſt as a Security for principal Sum and Annualrents, and not as to the accumulate Penalty: Becauſe, the whole 2000 Merks of Penalty is adjudged for, and yet 23 Pound *Scots* thereof was paid to *Elizabeth Gellie* the Liferentrix, conform to her Receipt produced.

Anſwered for John Hall. Penalties in Bonds are adjected for the failing in Payment of the principal Sum; and 'tis only in Infeſtments of Annualrent that termly Failzies are paction'd in Caſe of the not punctual Payment of Annualrents. For by common Cuſtom, the Penalty in a Bond doth only decreaſe by partial Payment of the principal Sum, and here the whole Principal is ſtill reſting. So that if any Part of the 2000 Merks of Penalty was paid to *Elizabeth Gellie*, it was *indebite ſolutum*, and cannot be obtruded to *John Hall* the Fiar, as a Nullity in the Adjudication.

The Lords repelled the Nullity, and ſuſtained the Adjudication as good even for the Penalty.

June 21, 1711. Alexander Calder *younger of* Aſſwanly, *againſt* Elizabeth Middleton *Daughter to* Andrew Middleton *of* Balbegno.

Andrew Middleton of *Balbegno* and *Robert Middleton* his eldeſt Son granted a Bond of Proviſion to *Charles* and *Andrew Middletons* his younger Sons; wherein they obliged themſelves to pay to *Charles* 5000 Merks, and to *Andrew* 4000 Merks, with Annualrent thereof at ſuch Terms after the Father's Deceaſe as Colonel *Middleton* and others therein-mentioned, or any Two or Three of them ſhould appoint. After the Perſons in whom this Faculty was lodged, and the Granters of the Bond were all dead, without determining the Manner and Terms of Payment, *Alexander Calder* Aſſigny to the Bond having purſued *Elizabeth Middleton*, as Heir to the ſaid *Andrew Middleton* elder her Father, to pay the Mony: The Lords, upon her Renunciation to be Heir, decerned *Cognitionis Cauſa* for Payment of the principal Sum and Annualrent thereof from this Day.

Eodem Die. *Sir* Alexander Brand, *againſt the Tenants of* Riccartoun.

IN the Suſpenſion raiſed by the Tenants of *Riccartoun* of a Charge upon their accepted Bill of Exchange, at the Inſtance of Sir *Alexander Brand*; The Lords having, 9 *February* laſt, found it relevant to annul the Bill, that it was blank the Time of accepting, and after it was out of the Accepter's Hand: They now found, That the Bill's being ſo blank, behoved to be proved *Scripto vel Juramento* of Sir *Alexander Brand*. In Reſpect no Perſon's written Evident can be taken away otherways than by his own Oath or Writ: And it were eaſie to pretend on all Occaſions that the Writ quarrelled was originally blank. So this Rule that Writ ſhould not be taken away by

Witneſſes, is moſt neceſſary to be obſerved in Bills, where no inſtrumentary Witneſſes uſe to be adhibited; and conſequently extraneous Witneſſes behoved to be relied on. Albeit it was alledged for the Suſpenders, That if it were not allowed to prove the Bill's being blank by Witneſſes, the Deſign of the Act of Parliament would be fruſtrated. Since it is not to be imagined, that the Receiver of a blank Writ, will declare under his Hand that it was blank. And it is the Act of Parliament in this Caſe, that annuls the Writ; for the Teſtimony of Witneſſes do but prove the Nullity, which is Fact.

June 22, 1711. Patrick Heriot *Merchant in* Fiſherraw, *againſt* Archibald Ker *Writer in* Edinburgh.

IN the Compt and Reckoning at the Inſtance of *Patrick Heriot* and the other Creditors of *Monktoun*, againſt *Archibald Ker* late Factor to that Eſtate: The Lords refuſed to allow any Factor-fee to the ſaid *Archibald Ker*; in Reſpect he had been negligent and had given up in his Accompts two Articles of Reſts that had been really paid to him. Albeit it was alledged for Mr. *Ker*, That this could be no Reaſon for denying him a Salary. Becauſe his Negligence prejudiced no Body but himſelf: He being liable to the Creditors for what is loſt thereby without any Allowance of Expences, which his doing of Diligence would have coſt them, and perhaps at the long Run would not have operated their Payment. So that it's more advantagious to the Creditors, that Mr. *Ker* hold compt to them for the Rents; than that he could inſtruct ineffectual Diligence done by him for Recovery thereof. And there is no more Reaſon to refuſe him a Salary, than there is to detain a Servant's Fee upon the Account of ſome Things loſt by him to his Maſter, albeit the Servant had made up his Maſter's Loſs. For the Lords thought, That Mr. *Ker* who had been negligent, and put his Conſtituents to great Charges in rectifying the Miſtakes in his Accompts, had no Title to any Salary: Or if he had, their Damage and Intereſt did compenſe the ſame. Beſides, that the allowing him a Salary, would incourage Factors to endeavour to wrong their Conſtituents.

Eodem Die. *The four Children of Sir* Patrick Aikenhead *late Commiſſary Clerk of* Edinburgh *his firſt Marriage, againſt* William *and* Walter Aikenheads *his Children of a ſecond Marriage.*

SIR *Patrick Aikenhead*, having, in his Contract of a ſecond Marriage with *Sarah Sharp*, provided 33000 Merks, and in a ſeparate Bond a Day poſterior to that Contract and before the Marriage 3000 Merks more, in the whole 36000 Merks to the Children of that Marriage: The Children of the firſt Marriage, (to whom 25000 Merks was provided in the Contract with *Griſſel Durham* their Mother) raiſed Reduction of the Proviſions in Favours of the Children of the ſecond, upon this Ground, That Sir *Patrick Aikenhead*'s Eſtate at his Death did not exceed 36000 Pound, and therefore the Proviſions made by him to the Defenders ought to be reduced as extravagant and *in Fraudem* of the Purſuers, who were lawful Creditors for the Sum provided to them in their Mother's Contract.

Alledged for the Defenders. Their Proviſions cannot be reduced, becauſe their Father at the granting thereof had a viſible Eſtate ſufficient to ſatisfie all his Childrens Proviſions, albeit it fell ſhort *ex Eventu*, which Loſs muſt affect the Purſuers and Defenders equally and proportionably according to the Extent of their Proviſions, *Craig, Lib.* 2. *Dieg.* 14. *Pag.* 238. *Stair, Inſtit. Tit.*

Heirs, §. 15. And in a late Caſe of *George Marſhal's* Children, the Children of both Marriages were brought in equally according to their Proviſions, tho' there was but one Daughter of the ſecond Marriage who was provided in the Double of what was allotted to any Child of the firſt Marriage. For the Father, notwithſtanding the Proviſions made to the Children of the firſt Marriage, continued Fiar, and could diſpoſe of his Means for ſuch an onerous and reaſonable Cauſe as Proviſions to Children of a ſecond Marriage. And by the civil Law, *Libertus Filium dotando non videtur fraudare Patronum; quia Pietas Patris non eſt reprehendenda, L.* 1. § 10. *ff. ſi quid in Fraud. Patroni.*

Replyed for the Purſuers. Albeit the Lords have found that, notwithſtanding of a general Proviſion of Conqueſt to the Children of a Marriage (which is a Sort of Proviſion by Succeſſion) the Father continued Fiar and could diſpoſe of it in Favours of Wife or Children of a ſubſequent Marriage: Yet ſpecial Proviſions of particular Sums made to Children of a firſt Marriage, cannot be evacuated or impaired by poſterior Grants to Children of a ſecond, *June* 19, 1677, *Murrays contra Murray*; eſpecially if theſe Grants be exorbitant. Now, after deducing the 25000 Merks, there's more than a Competency behind to provide the two Children of the ſecond Marriage. The Authorities adduced by the Defenders to prove that the Children in this Caſe muſt come in proportionably, according to their reſpective Proviſions, are not to the Purpoſe. For my Lord *Stair*, *Pag.* 460. ſpeaks only of Bonds granted to ſeveral Heirs Portioners, which, being of the Nature of *Prælegata* in the civil Law, make them mutually Creditors and Debtors to one another: Whereas Children of a firſt Marriage are not Heirs, but Creditors with Reſpect to Children of a ſecond. Again, tho' a rational Tocher given to a Daughter, was not reckon'd in the civil Law to be a Deed *in Fraudem Patroni*, an extravagant Tocher was quarrellable as ſuch. And the Lords bringing in *Marſhal's* Children of a firſt Marriage who had but ſlender Proviſions, *pari Paſſu* with his Children of a ſecond whoſe Proviſions were exorbitant, can be no Argument for ſuſtaining exceſſive Proviſions here in Favours of Children of a ſecond Marriage, in Prejudice of a moderate Proviſion made to thoſe of the firſt. For *non eſt conſentiendum Parentibus qui Injuriam adverſus Liberos ſuos in Teſtamento inducunt: Quod plerumque faciunt maligne circa Sanguinem ſuum inferentes Judicium novercalibus Delinimentis Inſtigationibuſve corrupti, L.* 4. *ff. de inofficioſo Teſtam.*

The Lords ſuſtained the Reaſon of Reduction againſt the Contract and Bond libelled, in ſo far as they are prejudicial to the Sum of 25000 Merks provided to the Children of the firſt Marriage: There being a further Competency remaining to the Children of the ſecond Marriage.

June 26, 1711. *Captain* James Oſwald, *againſt Captain* Thomas Gordon.

CAptain *Oſwald* having in *July* 1706 got a Ticket from Captain *Gordon* for 770 Pound *Scots* as the Price of Rigging furniſhed by the former to the latter for *The Royal William*, payable when the *Martimas* Ceſs impoſed for outrigging the ſaid Ship is paid: In *November* 1707 Captain *Gordon* drew a Bill on *John Gordon* Writer in *Edinburgh*, ordering him to pay the ſaid 770 Pound to Captain *Oſwald* out of the firſt and readieſt Mony due to the Drawer out of the Equivalent, and to retire his Note, which *John Gordon* accepted in the foreſaid Terms. Captain *Oſwald* ſeeing little Appearance of getting Payment out of the Equivalent, purſued *Thomas Gordon* upon his firſt Ticket.

Alledged for the Defender. The Ticket was innovated by taking the Bill for the ſame Sum: At leaſt was explained, and the Fund of Payment determined and agreed to, ſo as Captain *Gordon* could not be liable till that were got in and uplifted.

Replyed for the Purſuer. Innovation is not to be preſumed or inferred from Conjectures, but a poſterior Obligation is underſtood to be in Corroboration of a former, unleſs Innovation was expreſt, §. 3. *Inſtit. quibus Modis Toll. Oblig. L. ult. C. de Novat.* Stair *Inſtit. Pag.* 157. §. 8. And the Caſe, *July* 27, 1666, *Newburgh* contra *Stuart* obſerved by *Dirletoun.* 2. There is no definite Term of Forbearance, or new Term of Payment expreſs'd in the corroborative Right, but only a new additional Fund of Payment pointed to the Creditor.

The Lords found, That the Ticket was payable at the Term when the Ceſs fell due by the Country to the Publick, and that Captain *Oſwald*'s taking the poſterior Bill did not innovate the former Ticket.

June 27, 1711. George Wilſon *of* Sands, *againſt* George Mᶜkenzie *in* Stonehive.

IN the Action at the Inſtance of *George Wilſon*, againſt *George Mᶜkenzie*, for Re-payment of Sixty *lib. Sterling* contained in a Bill drawn by *George Mᶜkenzie*, and directed upon *Alexander Deuchar* and *George Wilſon*, payable to *John Campbell Deuchar*'s Servant, and indorſed by him to the Treaſurer of the Bank, which Bill the Purſuer paid upon Diſtreſs at the Bank's Inſtance: The Lords repelled this Defence, that *George Mᶜkenzie* drew the Bill only upon *Alexander Deuchar*, and that *George Wilſon*'s Name was afterwards added to the Direction by *Deuchar* without *Mᶜkenzie*'s Knowledge, and ſuſtained *Wilſon*'s Recourſe againſt the Defender as Drawer. In Reſpect, *George Wilſon* finding a Bill ſubſcribed by *Mᶜkenzie* directed to *Deuchar* and himſelf, was *in bona Fide* to accept the ſame upon the Drawer's Faith, and was not bound to know but *Mᶜkenzie* had drawn upon him. Beſides, he having paid to the Bank a Debt for which *Mᶜkenzie* was liable *in omnem Eventum*, he ought to be re-paid as a *Negotiorum Geſtor*, whether the Bill had been drawn upon him or not.

June 28, 1711. *Sir* William Baird *of* Newbyth, *againſt Mr.* Alexander Mortimer *Miniſter of the Goſpel, and* Alexander Deuchar *Writer in* Edinburgh.

IN the Competition of the real Creditors of Sir *Robert Forbes* Advocate, *Alexander Deuchar* being infeſt in Sir *Robert Forbes*'s Lands in *Newbottle*, *February* 25, 1709, in a yearly Annualrent correſponding to 10000 Merks contained in an heretable Bond granted to him by Sir *Robert* in *December* 1708; Mr. *Deuchar* claim'd to be preferred to Sir *William Baird* whoſe Infeſtment is poſterior to *Deuchar*'s.

Alledged for Sir William Baird. Mr. *Deuchar* cannot be preferred to him, becauſe he is *Correus debendi* with Sir *Robert Forbes* for the Debt contained in Sir *William*'s Infeſtment: And ſo *perſonali Objectione* muſt be ſet by till Sir *William* draw his Payment.

Anſwered for Mr. Deuchar. Whatever might be pretended for a *non Repugnantia* in him, upon any Infeſtment granted to him by Sir *Robert Forbes* for Relief of Sir *William Baird*'s Debt, in which Caſe Sir *William*'s getting Payment out of Sir *Robert*'s Effects, would operate *Deuchar*'s Relief as effectually as could be done by ſuch an Infeſtment granted to himſelf; And whatever might be pretended for ſuch a *non Repugnantia* in *Deuchar*, againſt any Infeſtment granted by himſelf to Sir *William Baird*, which he as Granter would be obliged to warrand: Yet here *Alexander Deuchar*, who is Debtor to Sir *William Baird* only by a perſonal Bond, and Creditor to Sir *Robert Forbes* by Infeſtment upon an heretable Bond for a diſtinct Debt, is ſufficiently founded in Law to claim Preference thereupon, to the poſterior Infeſtment granted by Sir *Robert* to Sir *William*, which *Deuchar* lies under no Obligation to warrand or make effectual, as being the Deed of another. And if ſuch an excluſive Exception againſt *Deuchar* founding upon his real Right, were competent to Sir *William* upon the Pretence of his being a perſonal Creditor to *Deuchar* for the Debt he Sir *William* competes upon, theſe Abſurdities would follow, 1. If Sir *Robert Forbes* had granted Infeſtment to Sir *William Baird* out of Mr. *Deuchar*'s Land, Mr. *Deuchar* could not hinder Sir *William* to poind his Ground upon ſuch a null Infeſtment, granted a *non habente Poteſtatem*; becauſe forſooth *Deuchar* is conjunct Debtor with the Granter. 2. Sir *William Baird* might upon the very perſonal Bond, tho' no Infeſtment had followed upon Sir *Robert*'s Bond of Corroboration, debar *Deuchar* from uſing the Benefit of the Infeſtment granted to him by Sir *Robert Forbes*; ſeing no Infeſtment, and Infeſtment *a non habente* have the ſame Effect in Law; And ſo it is that the Infeſtment granted by Sir *Robert Forbes* to Sir *William Baird*, after the Granter was denuded by a prior Infeſtment in Favours of Mr. *Deuchar*, for a different Debt was clearly *a non habente*.

Alledged for Mr. Mortimer. He being infeſt in Sir *Robert Forbes*'s Lands, as Creditor to him and *Alexander Deuchar* and Mr. *George Leſlie* for 3100 Merks, muſt be preferred to Sir *William Baird*, albeit his Infeſtment be regiſtred a Day before *Mortimer*'s, becauſe *Alexander Deuchar* did by his holograph Letter, *July* 14, 1709, *declare Mr.* Mortimer *preferable upon his heretable Bond and Infeſtment to Mr.* Deuchar *himſelf, and that the former ſhould be paid yearly of his Annualrent until his principal Sum were paid before the latter.* Which Letter imports an Obligement upon *Deuchar* to prefer *Mortimer* to his Infeſtment, and to give him a formal Diſpoſition and Aſſignation, *Dirletoun Deciſ.* 89. *July* 2, 1677, *November* 30, 1710, *Mackie* contra *Paton.* And tho' that Obligement doth not formally denude *Deuchar* in Favours of *Mortimer*, yet it doth ſufficiently enervate and take off any perſonal Objection againſt the impugning Sir *William Baird*'s Infeſtment, upon the Priority of Mr. *Deuchar*'s heretable Right, and *Mortimer* might thereupon adjudge, in Implement of *Deuchar*'s Right.

The Lords found, That the perſonal Obligement by *Alexander Deuchar* to Sir *William Baird* hinder'd not the Effect of *Deuchar*'s real Right, and therefore preferred *Deuchar* to Sir *William*, and *Mortimer* to *Deuchar* for the Annualrent of the Sums contained in *Mortimer*'s Infeſtment.

June 29, 1711. Daniel Hamilton *Clerk of the high Court of Admirality*; *againſt* Alexander Piper *of* Newgrange.

THe Goods in the Ship called the *Happy Amady*, that was wracked near *Inverneſs*, having by Warrant of the Admiral been inventored *March* 26, and rouped and ſold the firſt of *September* 1702, to *William Simpſon* Merchant in *Aberdeen* the higheſt Offerer, who conveyed his Right to *Alexander Piper*, who granted Bond for the Price to the Admiral Clerk, and his Succeſſors in Office; and *Daniel Hamilton* preſent Clerk, having charged *Alexander Piper* for Payment: He ſuſpended upon this Ground, That the Goods were ſold by Inventory, and betwixt the inventoring and rouping of them, they inlaked and were imbezilled, as alſo all that were rouped were not delivered, or were not delivered in ſo good Condition as they were in at the Roup.

The Lords found, That the Goods are preſumed to have been in the ſame Condition, the Time of the Roup, in which they were the Time of the Inventory; unleſs the Suſpender prove intervening Imbezilments: And found, That the Goods are preſumed to have been in the ſame Condition the Time of Delivery, in which they were the Time of the Roup. Albeit it was alledged for the Suſpender, That the *Onus probandi*, that the whole Goods contained in the Act of Sale were delivered, lies upon the Seller. Becauſe in all mutual Contracts, ſuch as Sale, the Party demanding Performance ſhould firſt inſtruct that he hath fulfilled his Part. In Reſpect it was replyed for the Charger, That ſeing the Goods were expoſed ſome Days before the Roup, to be ſeen to all who had a Mind to offer for them, and the Suſpender who offer'd, did after the Roup give a ſimple Bond for the Price without Proteſtation or Complaint; It's preſumed that he viſited the Goods, and found them to be ſuch as the Inventory mentioned: And no Alteration in them betwixt the Roup and Delivery, is to be preſumed.

Eodem Die. Adam Eliot *eldeſt Son to* Walter Eliot *of* Arkletoun, *againſt* William *and* Nicol Eliots *his younger Sons.*

W*Illiam* and *Nicol Eliots* being charg'd at the Inſtance of *Adam Eliot* to pay 70 ℔. *Sterling*, and Annualrent thereof contained in their Bond granted to *William Eliot* their Father, and aſſign'd by him to the Charger; They ſuſpended upon this Reaſon, That they offered to prove by the Charger's Oath of Knowledge, that they truly borrowed the Mony charged for, upon the Account of *Margaret Eliot* their Pupil, and that the Cedent was Debtor to the Pupil in more, which ſhe now Major was content to apply towards the Extinction of that Debt. The Lords repelled the Alledgeance of Compenſation. In reſpect no Debt due to *Margaret Eliot* by the Charger's Cedent, can meet the Suſpender's Bond, having no Relation to *Margaret*: Seing they have no Aſſignation thereto from her. The Charger is not concerned whoſe Uſe the Mony was applyed to: But the Suſpenders muſt ſatisfie their Bond to the Charger, and ſeek Relief from their Pupil as accords.

July 3, 1711. Robert Walwood *Merchant in* Edinburgh, *againſt* Jea Scougal *and* Robert Semple *of* Fulwood *her Husband.*

J*Ean Scougal* Relict of Mr. *James Hume* Merchant in *Edinburgh*, having by Tranſaction with her Husband's Heirs of Line obliged her ſelf to relieve them of all Debts reſting by Mr. *James Hume* to any Perſon or Perſons upon their diſponing to her all their Right of Succeſſion: *Robert Walwoo* purſued *Jean Scougal* and *Semple* of *Fulwood* her preſent Husband, for Payment of a Debt contained in a Bond granted by Mr. *James Hume* to th Purſuer.

Alledged for the Defenders, The Bond of Relief bearing no Obligement to pay to the Creditors, but only to relieve the Heirs of Mr. *Hume* in Caſe o Diſtreſs: Theſe Heirs are the true Contradictors, and ſhould have been called; for they might have Defences againſt the Debt, and the Instructions thereof. Yea, they may at their Pleaſure diſcharge the Bond of Relie which is conceived in their Favours, and thereby cut off the Purſuer's Pretences. So *July* 21, 1691, in the *Competition of the Creditors of* Langtoun It was found, That a Cautioner might renounce a publick Infeftment o Relief, in Prejudice of the Creditor for whoſe Debt it was granted, *Stair Inſtit. Lib.* 2. *Tit.* 2. *Pag.* 210.

Replyed for the Purſuer. No Neceſſity to call Heirs, who have no Manner of Intereſt, and are abſolutely denuded of all Right to the Succeſſion, in Favours of the Defender who is come actively and paſſively in their Place. So when an Heir of Tailzie defends himſelf with the *Beneficium Diſcuſſionis*, that he cannot be called till the Heir of Line be diſcuſs'd, it is always relevant for the Purſuer to ſay, That the Heir of Line hath ſucceded to nothing, or hath nothing to ſucceed to as ſuch, which he could affect, *Stair Inſtit. Tit. Hæris* §. 21. It's of no Moment to alledge, That the Heirs may have ſome Inſtructions of Payment, or other Defence; for the Defender, as *Emptor Hæreditatis*, is preſumed to have got up all theſe, and if any be ſtill in their Hands, ſhe is entitled to get them up. Again, by our Law any Article in a Contract betwixt two Parties conceived in Favours of a Third, affords Action to that third Party, *Stair Tit. Obligations* §. 5. for *Actiones non ſunt Multiplicandæ ſine Neceſſitate*.

The Lords found, That there was no Neceſſity to call the Heirs.

Eodem Die. William Short *Wright in* Edinburgh, *againſt* William Habkin *Beltmaker there.*

IN the Suſpenſion of a Charge upon a Decreet-arbitral, at the Inſtance of *William Short*, againſt *William Habkin*: The Lords found it to be a Nullity in a Decreet-arbitral, that it wanted the Writer's Name and Deſignation. Albeit it was alledged for the Charger, That the 175 *Act*, *Par.* 13. *J.* 6. *Anno* 1593, which requires the Writer of all Writs and Evidents to be named and deſigned, relates only to private Writs, ſuch as original Charters, Contracts, Obligations, Reverſions, Aſſignations, particularly therein-enumerated; and not to Decreets-arbitral, which are not mentioned, nor of the Nature of theſe mentioned, and muſt have the ſame Effect with other Decreets, or publick Writs. For tho' a Decreet-arbitral is not a judicial Act in a ſtrict Senſe; yet Arbiters being veſted by Law with ſufficient Authority to determine in Matters ſubmitted to them, their Decreets have all the Effects of any judicial Decreet, and may in ſome Senſe be reckoned judicial Acts. *Arbitria ad Similitudinem Judiciorum redacta ſunt, quatenus idem utrobique agendi, excipiendi, probandi, Ordo, idem Litis finiendæ Tempus, L.* 1. *ff. de receptis et his qui Arb.* Again, Arbiters being authorized to proceed with more Latitude than ordinary Judges, viz. *ſecundum Æquum et Bonum*; and ſeing the Act of Regulation 1695, declares Decreets-arbitral unqurrellable upon any Cauſe or Reaſon whatſoever, except that of Corruption, Bribery, or Falſhood: Such Decreets ought not to meet with all imaginable Allowances of Favour. In Reſpect it was anſwered for the Suſpender, That only Acts of Office, as Writs under the Hands of common Clerks or Notaries relating to their reſpective Offices, require not the inſerting the Writer's Name; and a Decreet-arbitral is not a publick Deed of that Nature, but only a private Writ, containing the Opinion and Judgment of ſome knowing honeſt Man, or Men in a private Capacity, concerning the Differences of Parties referred to him or them. And Execution paſſeth upon Decreets-arbitral, not by publick Authority, but by Conſent of the Submitters ſigning a Clauſe of Regiſtration to be ſubjoined to the Arbiters Sentence. The *L.* 1. *ff. de Receptis et his qui Arbitr.* is only a Counſel or Direction to Arbiters how to proceed: For a Decreet-arbitral could not be reduced for not obſerving that Form of Proceſs. So that there can remain no Doubt but Decreets-arbitral come under the General of all Writs and Evidents in the Act 1593, or of all probative Writs in the *Act* 5. *Par.* 3. *Ch.* 2. Nor is it to the Purpoſe, That Decreets-arbitral are not particularly mentioned in the Act 1593: For Diſpoſitions, Renunciations, and Diſcharges (which are unqueſtionably private Rights) are alſo omitted. The Act of Regulation 1605, doth indeed hinder Decreets-arbitral to be reduced, except for Corruption, Bribery, or Falſhood: But this is not a Decreet-arbitral, in ſo far as it is not duly form'd and ſign'd.

Eodem Die. *Sir* William Baird *of* Newbyth, John Baird *his eldeſt Son*, John Wauchop *of* Edmonſtoun, *and* Andrew Wauchop *his Brothers*, *Supplicants.*

THe deceas'd *William Wauchop* of *Niddry* having named by his Teſtament the Petitioners who are Proteſtants, and five others of his Popiſh Relations, to be Tutors to *Andrew Wauchop* now of *Niddry* his Son, and appointed Three to be a *Quorum*, *James Wauchop* Brother to the Defunct who is *Roman* Catholick, being always one: The Lords authorized the Petitioners to officiate and act as Tutors by Virtue of the foreſaid Nomination, and held the *ſine quo non*, and other Popiſh Nominees (who are incapable by Law to officiate) *pro non adjectis.*

Eodem Die. Andrew Brown *of* Braid *and his Curators*, *againſt* William Carſtairs *Writer in* Edinburgh.

ANdrew Brown *of Braid* having cited *William Carſtairs*, to compt and reckon for his Father's Intromiſſions as Factor with the ſaid *Andrew Brown*'s Eſtate: The Lords ſuſtained no Proceſs, in Reſpect the firſt Day of Compearance was beyond Year and Day of raiſing of the Summons; Albeit the ſame was executed within the Year. Becauſe the common Stile runs to compear at *Edinburgh* the *&c.* Day of *&c.* next to come, which argues that the firſt Day of Compearance at leaſt, ſhould be caſt within the Year.

July 4, 1711. Janet Cuningham *Daughter to the deceaſt* Alexander Cuningham *Writer to the Signet*, *againſt* James Agnew *Merchant in* Edinburgh.

A*Lexander Cuningham* having paid a Bill of 9 *Lib.* 10 *ſh.* Half-peny *Sterling* to *Gavin Thomſon*, drawn upon him by *James Agnew*, and not bearing Value in *Cuningham*'s Hand: The Lords ſuſtained Action of Recourſe to *Janet Cuningham* as repreſenting *Alexander* her Father, againſt the Drawer, for Re-imburſment. Notwithſtanding that the Defender offered to prove by his own Compt-book, That *Alexander Cuningham* had accepted the ſaid Bill for the Price of the Merchant-goods taken off by him from the Defender, and was content to give his Oath of Verity in Suppliment of the Compt-book: And cited *Gail Obſerv. Lib.* 2. *Cap.* 20. *Voet. Comment. in Pandect. Tit. de Fide Inſtrum.* §. 12. *Huber. Prælect. Ibid.* Where Merchant Books are ſaid to be fully probative, if confirmed either by the Oath or Death of the Merchant. For the Lords found, That the Defender's Compt-book having been irregularly kept, is not probative, and refuſed to allow the ſame to be adminiculated by his Oath.

Eodem Die. Mr. Samuel Gray *Writer in* Edinburgh, *againſt* Walter Chieſly *Merchant there.*

IN the Competition for the Mails and Duties of the Lands of *Blackcaſtle*, betwixt Mr. *Samuel Gray* and *Walter Chieſly*, both Adjudgers thereof from *James Chieſly* their common Debtor by Bonds.

Alledged for Walter Chieſly. Mr. *Samuel Gray* being *James Chieſly*'s Brother in Law, and the Bond which was the Ground of his Adjudication, being poſterior to that granted to *Walter Chieſly*; it was reducible upon the Act of Parliament 1621, as fraudulent and gratuitous, and the Adjudication led thereon muſt fall in Conſequence, unleſs Mr. *Gray* inſtruct the onerous Cauſe.

Replyed for Mr. *Gray.* The onerous Cauſe of the Bond granted to him is ſufficiently inſtructed by a fitted Accompt betwixt him and the common Debtor, of many Articles paid by the former for the latter to third Parties, during a long Tract of Correſpondence before, to which there is a Docket ſubjoined, ſigned by both before Witneſſes, wherein *James Chieſly* acknowledgeth himſelf to be reſtingto Mr. *Gray* a certain Ballance, for which the Bond in Queſtion bears to have been granted.

Duplyed for Walter Chieſly. The common Debtor being inſolvent and a conjunct Perſon to Mr. *Gray*, the Accompt which is of the ſame Date with the Bond, cannot prove the onerous Cauſe thereof; otherways it were eaſie for a Bankrupt to elude the Act of Parliament by granting a Writ to ſome conjunct Perſon, acknowledging that he owed him formerly what Sums he pleaſeth, and then grant Bond for the ſame.

Triplyed for Mr. *Gray.* Bonds granted to conjunct Perſons are only preſumed to be gratuitous and feigned, which Preſumption is ſufficiently taken off in this Caſe by the fitted Accompt, relating to Payments made for *James Chieſly*, long before adjuſting and ballancing the Accompt. Yea, any Probation of an onerous Cauſe uſeth to be ſuſtained to elide ſuch a Preſumption of Fraud; and ſometimes the Lords are pleaſed to take the common Debtor's Oath.

The Lords found, That Mr. *Samuel Gray* had ſufficiently inſtructed the onerous Cauſe of the Bond granted to him, and ordained him and *Walter Chieſly* to come in *pari paſſu*, their Adjudications being within Year and Day of one another.

July 5, 1711. Beſſie Bennet *and Mr.* William Drummond *Indweller in* Culroſs *her Huſband, againſt* James Sclanders *in* Bothkenner *and other Creditors of the deceas'd* John Sands *late Baillies in* Culroſs.

BEſſie *Bennet* and *James Sands* her firſt Huſband being infeft in an Annualrent of 48 *Lib.* out of ſome Tenements and Burger Acres in *Culroſs*, belonging to the deceas'd *John Sands*, upon a Precept of Seaſin in an heretable Bond for the principal Sum of 1200 Merks, granted by *John Sands* to *James* his eldeſt Son, and *Beſſie Bennet* his Spouſe the longeſt Liver of them two in Liferent, and to the Bairns of the Marriage in Fee: *Beſſie Bennet* and Mr. *William Drummond* her preſent Huſband for his Intereſt, craved to be preferred in a Competition of *John Sand*'s Creditors.

Alledged for the other Creditors. 1. *Beſſie Bennet*'s Infeftment is null, not being given by one of the Baillies of the Burgh, and common Clerk thereof as ſuch upon Reſignation, in the Terms of the Act 27. *Parl.* 1. *Ja.* 6. and the Prattick betwixt *Young and the Town of Mountroſs* 15 *December* 1629, but a baſe Infeftment granted only by a Baillie of the Burgh, as Baillie in that Part, and the Clerk as a common Notary, upon a Precept of Seaſin from the Granter of the heretable Bond to be holden of himſelf Blench. Whereas by a long Tract of Cuſtom, a Precept of Seaſin is never in uſe to be inſerted in Diſpoſitions of Burgage Lands, but only a Procuratory of Reſignation. 2. Suppoſe baſe Infeftments in Burgage Lands could be ſuſtained; yet this cannot, becauſe not recorded in the Books of the Shire, or general Regiſter, but in the Town Clerk's Books, which are only a proper Regiſter of Seaſins given to be holden Burgage upon Reſignation in the Baillie's Hands, as repreſenting the Community.

Anſwered for Beſſie Bennet. The Act of Parliament in King *James* the ſixth's Time, diſchargeth private Infeſtments to be given by any other than the Baillies and Clerks of the Burgh, as being a Caſualty due to them: Who cannot complain for being deprived thereof when they voluntarly give Seaſion upon the Granter's Precept. The Deciſion 15 *December* 1629, relating only to the Tinſel of Superiority, hath no Contingency with the Point. 2. It's ridiculous to aſſert, That any Infetment within Burgh, whether baſe or not, ſhould be regiſtred in the Shire, and not in the Town-books. 3. Whatever might be pretended for tranſmitting the Property of Burgage Tenements by publick Reſignation, nothing could hinder a Servitude upon theſe to paſs by a baſe Infeſtment: Eſpecially conſidering, that this is only a temporary Right of Liferent Proviſion, and the Precept of Seaſin was executed by the Baillie and the Clerk, and recorded in the Town Court-books in the Terms of the Act of Parliament.

The Lords ſuſtained the Infeſtment in Favours of *Beſſie Bennet.*

Eodem Die. John Lewars *late Tenant in* Mauldſlie, *againſt* Daniel Carmichael *of* Mauldſlie.

IN the Proceſs of Spuilzie and Ejection at the Inſtance of *John Lewars* againſt the Laird of *Mauldſlie*, the Defender having died after the Summons was called, ſeen, returned, and inrolled; The Purſuer transferred the Action againſt *Daniel Carmichael* now of *Mauldſlie*; and having proved the Spuilzie and Ejection, craved to be admitted to depone *in Litem* upon his Damages.

Anſwered for the Defender. The Proceſs of Spuilzie not having been Litiſconteſtat againſt the Spuilzier in his Lifetime, the Purſuer could not be allowed to give his Oath *in Litem*, which hath a penal Conſequence againſt the Defender, who is Heir to the Spuilzier, *Tit. Cod. ex Delictis Defuncti in Quant. Hæred.* For *Delicta ſuos tenent Authores.*

Replyed for the Purſuer. An Action of Spuilzie and Ejection with all the Privileges of an Oath *in Litem*, and violent Profits attending it, is competent not only againſt the principal Offender, but alſo againſt his Heir, tho' *Lis* was not *conteſtata* with the Defunct. Becauſe, 1. Alheit *Actio ex Delicto pœnalis non tranſit in Hæredes*: Yet *Actio ex Delicto Rei perſecutoria* for Reparation of Damage and Intereſt (and ſuch is an Action of Spuilzie) is always ſuſtained againſt Heirs. So by the civil Law, *Actio Furti*, or the penal Action for Theft, did not deſcend againſt the Heir: But *Condictio furtiva* ariſing from the ſame Delict for Damage and Intereſt, did deſcend againſt him, §. *ult. Inſt. de Oblig. quæ ex Delicto*; And *Actio Legis Aquiliæ tranſitura fuiſſet in Hæredem, ſi ultra Damnum nunquam Lis æſtimaretur* §. 9. *Inſtit. de Lege Aquilia.* Which is agreeable to the Opinion of Lawyers, *Vinnii Comment. in Inſtit. de Perpet. et Temp. Act.* §. 1. *in Fin.* And to our own Prattick, 23 *February* 1667, *L. Renton and Lambertoun.* 2. The Purſuer's Oath *in Litem* is no Penalty in the Action of Spuilzie, but only the legal Mean of proving his Damages, which is no heavier upon the Heir than it would have been upon his Predeceſſor, with whom he is reckoned in Law to be *eadem Perſona, et Nemo lucrari debet cum alterius Jectura.*

Duplyed for the Defender. Where the Action is *Rei perſecutoria ex Parte Actoris*, and penal *ex Parte Rei*, the Heir is not liable, *L.* 26. *ff. de Dolo malo, L.* 9. §. 1. *ff. quod falſo Tut.* And it will not be pretended, That any of the Purſuer's Goods, or any Profit thereby, came to the Defender.

The Lords found, That the Purſuer cannot be allowed to prove his Damages by his Oath *in Litem*, againſt the Defender who is Heir to the Spuilzier.

July 6, 1711. Mary Clerk *Relict of* Nicol Hardy *Writer to the Signet, againſt Mr.* William Dallas *Writer to the Signet.*

IN a Purſuit at the Inſtance of *Mary Clerk*, againſt Mr. *William Dallas*, for a Year's Rent of a Houſe and Writing Chamber poſſeſſed by him as Tenant to her a Matter of 19 Years ago, preſcribed *quoad Modum probandi*, and referred to the Defender's Oath: He deponed, *That he is not reſting the Rent libelled, but that eighteen Years ago Payment was made thereof to the Purſuer, by* William Cockburn *Merchant in* Edinbugh, *his giving her Allowance of the like Sum upon that Account, which the Deponent allowed to* William Cockburn *in Part of Payment of a greater Sum owing by him to the Deponent.*

Alledged for the Purſuer. Since the Defender doth not depone, That he paid the Debt to *William Cockburn* by her Order, or paid it to her ſelf, his Oath can not be ſuſtained to prove a Debt betwixt Mr. *Cockburn* and her; nor could Mr. *Cockburn*'s allowing the Debt to the Purſuer, entitle him to uplift it from the Defender, without a Conveyance from the Purſuer. And in a parallel Caſe 9 *December* 1664, *Lermonth* contra *Ruſſel*, one having adjected a Quality to his Oath, That the Debt purſued for was compenſed by a Debt due to himſelf: The Lords refuſed to ſuſtain the Quality as intrinſick, but found it behoved to be proved by the Deponent.

Anſwered for the Defender. 1. *Perinde eſt*, whether he made Payment to the Purſuer, or *William Cockburn* his Debtor and her Creditor gave her Allowance of the Sum in the firſt End of what ſhe owed him: Seing *quod quis facit per alium ipſe facere videtur*. The Prattick betwixt *Lermonth* and *Ruſſel* is nothing to the Purpoſe. For there the Defender adjected to his Oath this Quality, That the Debt purſued for was compens'd by another Debt owing by the Purſuer to him by Bonds and Decreets, which Quality was moſt extrinſick, and could not be ſuſtained as proved by the Oath: Since that would have made the Deponent judge of the Validity of his own Ground of Compenſation. Whereas here the Defender hath deponed, That the Debt purſued was not reſting, but actually paid. 2. The Purſuer muſt prove the Rent libelled to be reſting owing by the Defender's Oath: And therefore tho' it did not prove Payment (as it do's) it certainly proves not reſting owing; which is a ſufficient Ground to Aſſoilzie the Defender, without Neceſſity to diſpute here the Import of intrinſick or extrinſick Qualities.

The Lords found the Quality that the Defender paid the Rent libelled to the Purſuer by her Delegation of that Debt to *William Cockburn*, intrinſick, and therefore aſſoilzied the Defender.

Eodem Die. *Poor* John Stuart, *againſt the Children of the deceas'd* William Cuming *of* Pittoully.

SIR *Robert Innes* of *Balveny* having wadſet to *George Cuming* of *Bregach* the Half *Davach* Lands of *Lettervandich*, he *in Anno* 1629 diſponed the Wadſet to *Duncan Cuming* his Son and *Jean Gordon* his Spouſe, who in the Year 1634 transferred it to *George Cuming* Merchant in *Elgin*, with the Reſervation of *Jean Gordon*'s Liferent. *James Sutherland* of *Kinmanity*, who purchaſed the Right of Reverſion from Sir *Robert Innes*, did in *Anno* 1657, by a Contract of Vendition with *George Cuming* and *William Cuming* of *Auchry*, afterwards of *Pittoully*, his eldeſt Son, expreſly narrating the Wadſet and whole Progreſs of Rights above-mentioned, diſpone the Lands irredeemably, to *George* and *William Cumings*, who were publickly infeſt upon *Kinmanity*'s *manity*'s Reſignation. *John Stuart*, as repreſenting the ſaid *Jean Gordon* his Grand-mother, purſued the Children of *William Cuming* now deceas'd, as repreſenting their Father and Grand-father, for Payment of the Rents of the wadſet Lands from the Deceaſe of *Duncan Cuming Jean Gordon*'s Husband in *Anno* 1654, till her own Death in the Year 1682.

Alledged for the Defenders. *Jean Gordon*'s liferent Right is preſcribed, no Action having been raiſed, nor Document taken thereon for Fourty Years after *Duncan Cuming* her Husband's Deceaſe.

Replyed for the Purſuer. Tho' the liferent Right, had it been in a Paper apart, might have preſcribed; yet the Defenders Predeceſſors having poſſeſſed by Virtue of Rights with this Liferent *in Gremio*, it could never preſcribe ſo long as theſe Rights ſtood.

Duplyed for the Defenders. All Actions on any Ground whatſoever not purſued within Fourty Years preſcribe, except Reverſions incorporated or duly regiſtred, *Act* 12. *Parl.* 22. *Ja.* 6. And a liferent Right is not a Reverſion: Nor doth the long Preſcription require *bonam Fidem*, but only a colourable Title. Beſides, tho' the irredeemable Right by which the Defenders Authors poſſeſſed, narrate the Wadſet, they cannot be underſtood to have poſſeſs'd thereby, ſince they enter'd not to the Poſſeſſion, till they acquired the irredeemable Right: And common Stile requires the Narration of many Writs that will never make real Burdens upon ſubſequent Conveyances.

Triplyed for the Purſuer. There's a great Difference betwixt *mala Fides* ariſing from the Title of Poſſeſſion, and that which ariſeth from other extrinſick Evidences, *V.G.* of an anterior Right: For a Purchaſer's Right acknowledging another's, cannot be free of the Burden thereof by the poſitive Preſcription. As a Vaſſal cannot preſcribe againſt his Superior, except as to bygone Duties preceding Fourty Years: Becauſe, the Vaſſal's Right acknowledgeth the Superior's, and he poſſeſſeth both for himſelf and for the Superior. 2. Neither can the negative Preſcription take Effect in the preſent Caſe: For the Clauſe in the Act 1617 whereby it is ordained that all Actions upon whatſoever Ground ſhall preſcribe except incorporated or regiſtred Reverſions hath by Law and Deciſions been qualified with other Limitations and Exceptions. So *contra non valentem agere non currit Præſcriptio*: Upon which Account, Bonds preſcribe not from the Date, but from the Term of Payment; and Inhibitions preſcribe not from their Date, but from the Date of the Diſpoſition in Prejudice thereof. The Lords have alſo found, That one was not obliged, for interrupting Preſcription, to raiſe a Declarator of his Right, while it ſtood affected with a Liferent that would have excluded his Proceſs. 3. Obligations for annual Preſtations, as *Jus annui Redditus* or a liferent Right, not being conſidered as one, but as many Obligations *quæ renaſcuntur* yearly, do not preſcribe from the Date of the firſt Obligation, but every Year runs a Courſe of Preſcription from the Time it fell due, *L.* 7. §. 6. *C. de Preſcript.* 30 & 40 *Ann.*

The Lords found, That there being no Action intented for Payment of *Jean Gordon*'s Liferent for Fourty Years after *Duncan Cuming* her Husband's Deceaſe, her Right and the Purſuer's Claim thereupon is preſcribed.

July 11, 1711. Alexander Nairn *of* Drumkilbo, *againſt* Robert M^{c}clelland *and* James Betſon *of* Kilry.

IN the Competition of the Creditors of the deceas'd *William Liddel*, for the Mails and Duties of ſome Tenements and Land in the North *Queensferry*, which were adjudged by them from him.

Alledged for Drumkilbo. Since *M^{c}clelland*'s Adjudication adjudgeth but one Tenement in ſpecial, and all other Lands and Tenements belonging to the ommon Debtor, lying within the North *Queensferry*, *Drumkilbo*'s Adjudication which doth more ſpecially deſign and point out the whole Tenements by the articular Boundings and Extent thereof, denoting what they are; and where hey ly) tho' Year and Day poſterior to *M'lellan*'s Adjudication, ought to e preferred as to all other Lands except the Tenement particularly deſigned. For *in toto Jure Generi per Speciem derogatur, & illud potiſſimum habetur, quod d Speciem directum eſt.* So it was decided *November* 21, 1673, *Fairholm* gainſt *Retoun*, *July* 21, 1680, the competing Adjudgers upon the Eſtate of *Enoch.* To adjudge in general all Lands lying within a Burgh wherein the Debtor is infeſt, is no better than to adjudge in general all Lands within *Scot-lhd*, wherein ſuch a Debtor ſtood infeſt: Since *Majus & Minus non variant Speciem.*

The Lords repelled the Objection againſt *M'lellan*'s Adjudication, that it was in general Terms; In Reſpect the Houſes adjudged are circumſcribed within the Town of *Northferry*, and the Debtor is deſigned to have lived here.

Then it was alledged for *Drumkilbo*, That his Adjudication ought to be preferred to *Kilrie*'s Adjudication. Becauſe *William Liddel* was no otherways *Kilrie*'s Debtor, than by *Kilrie*'s obtaining a Decreet in Abſence againſt him, for a Debt of his Uncle's, holding him as confeſt upon the paſſive Titles, after he *William Liddel* ſtood inhibited at *Drumkilbo*'s Inſtance: Of which Decreet *Drumkilbo* repeted a Reduction *ex Capite Inhibitionis.*

Anſwered for Kilrie. Inhibitions ſtrike only againſt voluntary and extrajudicial poſitive Deeds, and not againſt judicial Deeds, or Deeds of Omiſſion.

Replyed for Drumkilbo. If a Debtor *vergens ad Inopiam* could allow the Conſtitution of a Debt to be made up againſt him by his Oath, or Circumduction of a Term, whereupon a Diligence might inſue to compete with lawful Creditors; it were eaſy to make up ſuch a Maſs of Debts in the Name of Confidents, as might in a Competition reduce the Intereſt of a lawful Creditor to a very ſmall Share of his Debtor's Effects: And this is plainly a voluntary Deed of the Debtor, which he might have prevented by ſigning a Renunciation.

Duplyed for Kilry. If a Debtor inſolvent colluſively ſuffer a Decreet upon lame and defective Proof to be patch'd up againſt him, ſuch a Decreet might be reduced upon the Act of Parliament 1621 at the Inſtance of a Creditor, but Inhibition is effectual only againſt poſitive real Deeds of the Debtor, and not againſt his Omiſſions, which are but Privations of Deeds. Nor is *Fraus ex Re ipſa* by *William Liddel*'s not renouncing and deponing, ſufficient in Law to reduce the Decreet upon the Act 1621. Eſpecially conſidering, that *William Liddel* is now dead without offering a Renunciation or deponing, and *Kilrie*'s Mean of Probation by his Oath periſhed.

The Lords found, That the Inhibition took no Effect againſt the Decreet holding the Perſon inhibited as confeſt.

Eodem Die. John Carmichael *in the Park of* Douglaſs, *againſt* William Bertram *of* Nisbet, *Chamberlain to the Duke of* Douglaſs.

THE Earl of *Hyndford*, who had a Rental of the Park of *Douglaſs* from the late Marqueſs of *Douglaſs*, having ſet a Tack thereof to *John Carmichael*, with this Proviſion, That it ſhould be null in Caſe the Earl's Rental Right ſhould fall before expiring of the Tack; *William Bertram* the Duke's Chamberlain, did at *Martinmas* after the Earl's Death, eject *John Carmichael Via Facti* betwixt Terms, without previous Warning, or Order of Law. Whereupon he raiſed a Proceſs of Ejection and Intruſion, with a Concluſion of

Damages againſt *William Bertram*, upon this Ground, That the Purſuer a Tenant or Labourer of the Ground, tho' his Author's Right was expired, could not be ſummarly removed, but behov'd to be allowed to poſſeſs till the next *Whitſunday*, *Act* 26. *Parl.* 3. *Ja.* 4.

Alledged for the Defender. Rentals not mentioning Heirs, ſubſiſt only for the Rentaller's Lifetime, and even when Heirs are mentioned, expire with the Death of the firſt Heir, *Stair, Inſtit. Lib.* 2. *Tit.* 9. §. 19. Rentallers, as kindly Tenants, ſhould labour and Poſſeſs themſelves, and have no Power to aſſign or ſubſet: And if they do, both the Aſſignation, or Subtack, and Rental it ſelf become void and null by Way of Exception, or Reply, *Stair, Ibid.* §. 21. Whence it is clear, 1. That the Earl of *Hyndford*'s Rental fell not only by his Death, but alſo by his granting a Subtack to the Purſuer. 2. The Purſuer's Tack became null upon the expiring of the Earl's Rental, by expreſs Paction in the ſaid Tack. 3. The Setter of a Rental is not bound to notice any Perſon but the Rentaller, and any others in the natural Poſſeſſion, are preſumed to be only his Servants: Seing he cannot poſſeſs by either Subtenants or Aſſignies. 4. The preſent Earl of *Hyndford* after his Father's Deceaſe, intimated by a Letter to the Defender, to take Poſſeſſion in the Name of the Duke: And ſo the Defender having the Rentaller's Conſent, was *in tuto* to enter the Poſſeſſion, without any Warning. Yea, any Poſſeſſion the Purſuer had after the Earl's Rental fell, and renounced, was at beſt but very precarious: And ſummary Removing without Warning, obtains where the Poſſeſſion is vicious, or precarious, *Stair, Inſtit. Lib.* 4. *Tit.* 26. §. 14.

Replyed for the Purſuer. The Nature and Effect of Rentals have much varied, ancient and later Deciſions concerning them differ, and by preſent Cuſtom Tacks by Rentallers are ſuſtained. Yea, tho' Rentals *de Jure* expire upon the Rentaller's Death; yet they are in Uſe to be renewed or continued with their Succeſſors. Therefore the Purſuer could not be ſummarly removed without Warning, more than any other Tackſman whoſe Tack is expired 2. Seing the Purſuer entered by a Tack from the Earl, who had a Right for his Lifetime, his Poſſeſſion was neither vicious, clandeſtine, nor precarious And ſo he is juſtly intitled to the Protection that Law affords to all righteous Poſſeſſors. The Earl's Renunciation could not prejudice the Purſuer: For as the Earl could not have removed him without Warning, neither could he impower, by his Renunciation, the Duke of *Douglaſs* to do it.

The Lords found, That the ſummary removing of *John Carmichael* betwixt Terms from the Lands libelled, without a previous Warning, was unwarratable.

July 12, 1711. Janet *and* Mary Nielſons, *Children to Umquhile* Robert Nielſon *in* Bourhouſe, *againſt* Janet Culter, *and Mr.* Ritchard Willson *her Husband.*

James *Nielſon* Merchant in *Rowan*, having *May* 10, 1701, diſponed his Eſtate to *Janet Culter* his Wife, with the Burden of a Legacy of Fourty Pound *Sterling*, to be paid to *James Nielſon* his Nephew, in Caſe upon Information he ſhould demand the ſame perſonally within ſeven Years after the Teſtator's Death; and failing thereof, to fall and accrew to *Robert Nielſon* his Brother, with Annualrent thereof during the not Payment: *Janet* and *Mary Nielſons*, as having Right to the ſaid Legacy by Aſſignation from *Robert Nielſon* their Father, thro' *James Nielſon*'s failing to demand it within the Time limited, purſued *Janet Culter*, and her preſent Husband for his Intereſt, to pay the Fourty Pound, with Annualrent thereof ſince the Teſtator's Deceaſe.

Alledged for the Defenders. The Clauſe of Annualrent being ſubjoined only to the Subſtitution, no Annualrent was due within the ſeven Years. Nor could it be claimed till they were *in Mora* to make Payment after the Legacy fell due: And it cannot be pretended that they were *in Mora* for not paying to *James* the firſt Inſtitute, he not having compeared to require Payment in the Terms of the Deſtination; or for not paying to the Purſuer, who had not *Jus exigendi* till after elapſing of the *Septennium*. So a Bond payable at a certain Term with Annualrent during the not Payment, inſers Annualrent only from the Term of Payment.

Replyed for the Purſuers. James Nielſon the Inſtitute might have compeared and required Payment of the Fourty Pound immediately after the Teſtator's Death, or any Time within the ſeven Years, with Annualrent from his Death. Seing it cannot be imagined, That the Teſtator would have burdened his Relict with Annualrent in Favours of the Subſtitute, and not of the Inſtitute, *Perſona Prædilecta*. And the Purſuers have all the Right that *James* had, now that the Condition of the Subſtitution is purified, which muſt be drawn back to the Teſtator's Death. Where a Bond is payable at a Term, with Annualrent during the not Payment, tho' the Mony could not be demanded before the Term, Annualrent would be due from the Date.

The Lords found Annualrent due from the Teſtator's Death.

Eodem Die. *Mr.* Robert Blaw *Schoolmaſter in* Edinburgh, *againſt his Father.*

MR. *Robert Blaw* having purſued an Adjudication againſt his Father, upon a Bond granted to him by his Father, for borrowed Mony payable at the Father's Deceaſe, upon this Ground, That the Father was *vergens ad Inopiam* by granting a Bond of Proviſion to his younger Children, that would exhauſt all his Effects.

Alledged for the Defender. There can be no Adjudication in this Caſe, for the Sum in the Bond whereof the Term is not come. Becauſe Adjudications ſince the 1672 are come in Place of Appriſings, and ſuch a Debt for which a previous Poinding could not be us'd, cannot be appriſed for. 2. Property cannot be transferred without Statute or Cuſtom, and there is neither Statute nor Cuſtom for an Adjudication of this Kind. 3. It would be inconvenient, in ſo far as, it would let all the Father's Creditors looſe upon him. And upon the ſame Ground Adjudication might be ſought upon Warrandice before Eviction, upon Relief without Diſtreſs, and at the Inſtance of Wives and Children upon Contracts of Marriage during the ſtanding thereof.

Replyed for the Purſuer. Adjudication here is not crav'd upon the Act 1672, but only an Adjudication in Security, whereof the Legal doth not expire, introduced by Cuſtom from the Analogy of the Statute. So Adjudications are allowed in Favours of Wives againſt their Husbands, in Implement of their Contracts of Marriage, albeit the Term of Payment was not come, or uncertain by the Husband's ſurviving the Wife. And my Lord *Stair* holds *Inſtit. Page* 749. That Adjudication is competent for illiquid Debts. In the *Roman* Law *Creditor in Diem* might have had the Benefit of *Miſſio in Poſſeſſionem*, eſpecially where, as here, there was Evidence of the Debtor's growing Poor. And for the ſame Reaſon a Purſuit for Relief in ſuch a Caſe is competent with us to a Cautioner before Diſtreſs, or an Action for Implement upon a Contract of Marriage before the Term. Is there not *par Ratio* for granting Adjudication in Security in this Caſe, as for granting Arreſtment upon a Bond before the Term of Payment, till it be looſ'd upon Caution.

The Lords, upon Report of the Lord *Cullen*, were clear, That Decreet of Adjudication ſhould be granted, in Reſpect the Defender was *vergens ad Inopiam*: Unleſs within a certain Time he find ſufficient Caution to the Purſuer.

July 13, 1711. William *and* Jean Pringles, *Children of the deceas'd* David Pringle, *Chirurgion Apothecary in* Edinburgh, *againſt* Thomas Irvine *of* Gribtoun.

IN a Proceſs at the Inſtance of *William* and *Jean Pringles*, againſt *Thomas Irvine*, for exhibiting to the Purſuers five Rings belonging to them, which Maxwell Lady *Kirkhouſe* had pawned to the Defender, for Sixteen Pound *Sterling* owing by her to him by Bond granted while ſhe was *veſtita Viro*.

Alledged for the Purſuers. 1. The Bond granted by the Lady for borrowed Mony *ſtante Matrimonio* being null, the Pledge was null in Conſequence. For a Pledge being *Res Creditori data in Securitatem Debiti*: Where there is no Debt, there can be no effectual Impignoration in Security thereof; *Acceſſorium ſequitur ſuum Principale.* So the *Senatuſ-conſultum Velleianum* declaring *Interceſſiones Mulierum*, Womens Obligations for others to be null, comprehended Pledges granted by Women, *L.ult.* §.2. *ff. ad Senatuſ-conſultum Velleianum*: 'Cauſe otherwiſe that Law might have been eaſily eluded. 2. A Wife, being *ſub Poteſtate Viri*, cannot Pledge her *Paraphernalia*, without Conſent of her Husband, *Reg. Majeſt. Lib.* 1. *Cap.* 30. §. 6. *Quon. Attach. Cap.* 21. *January* 5, 1666, the Lady *Bute* againſt the Sheriff of *Bute*, *December* 19, 1626, *Matthie* againſt *Sibbald*. For all her Pactions or Deeds (except Obligations *ad Factum præſtandum* relating to the Alienation of her Lands, &c.) without Conſent of her Husband, are alike null, as the Deeds or Pactions of Minors, without Conſent of their Curators: Now, a Minor cannot pledge his Moveables without Conſent of his Curators for Mony borrowed by him without their Conſent. Again, as a Woman cannot, without her Husband's Conſent, aſſign her Bonds that fall not under the *Jus Mariti*, tho' the Husband's Intereſt were reſerved; neither can ſhe pledge her Jewels, Watch, Rings, or other *Paraphernalia*, wherein the Husband hath no Intereſt. For otherwiſe a Wife might ruin her Husband by alienating her whole *Mundus muliebris*, which he for his own Credit would be obliged to make up again.

Anſwered for the Defender. The *Senatuſ-conſultum Velleianum* is miſapplyed: For that favours only Women whether married or not, ingaging themſelves as Cautioners for others, and doth not concern ſuch as bind principally for themſelves, as the Lady *Kirkhouſe* hath done; And 'twas only a Woman's giving a Pledge for another Perſon, that was accounted *Mulieris Interceſſio* in the civil Law. Our Law hinders not Women from becoming Cautioners for others. A Wife's Obligation for borrowed Mony is indeed null with us; But the Pledge given in Security thereof is valid, there being no Neceſſity of a Bond for Mony borrowed upon the Faith of a Pledge. 2. Albeit it be a general Rule in our Law, That Bonds granted by a Wife without the Husband's Conſent are null, there are ſeveral Exceptions. As a Wife, being *præpoſita Negotiis domeſticis*, may without her Husband's Conſent buy Things neceſſary for the Uſe of the Family; for the Price whereof, tho' miſapplyed and ſquandred away, he will be liable. She may pledge the Furniture of the Houſe, which is *ſub Cura ejus*. Yea, a Wife's having her Husband's Bond of borrowed Mony in her Cuſtody, was found to infer a Warrant from her Husband to borrow the Mony, *February* 4, 1665, *Paterſon* againſt *Pringle*: And *multo magis* may ſhe diſpoſe of her own *Paraphernalia*, eſpecially Rings, which may be beſt wanted, and whereof ſhe hath the abſolute Property, Poſſeſſion, and Adminiſtration. The Purſuers Citations out of *Regiam Majeſtam*, and the Lords Deciſions, are foreign to the Caſe, for they relate only to Rights belonging to the Wife, which by their Nature could not be tranſmitted without Writ: Whereas Rings and the like are tranſmitted by ſimple Delivery *de Manu in Manum*. Nor is there any Parity betwixt a Wife's Obligation, and that of a Minor: The latter being ineffectual *ob Defectum Rationis*, for Want of a free and ſolid Conſent, (the Eſſential of Obligation) which a married Woman is as capable of as one that is ſingle, or any other Perſon.

The Lords found, That the Nullity of the Bond annulleth not the Pledge; and that the Wife might pledge her *Paraphernalia* without Conſent of her Husband.

Eodem Die. James *Duke of* Montroſe, *againſt the Feuars of* Kilpatrick.

FIve Chalder and two Bolls of Meal reſerved by King *Robert* the Firſt, in the Feu granted by him of the Lordſhip of *Kilpatrick*, being in King *James* the Sixth's Time made payable to the Caſtle of *Dumbartoun* for the Subſiſtence of the Gariſon, and called, *The Watch-meal*: In a Proceſs for Payment thereof at the Duke of *Montroſe*'s Inſtance (who for onerous Cauſes procured the ſaid Feuduty or *Watch-meal* to be diſſolved from the Crown in his Favours) againſt the Feuars of *Kilpatrick*; The Lords found, That the ſaid *Watch-meal*, being a Feuduty payable out of the Queen's Property, was not liable to Ceſs. In Reſpect ever ſince the Exciſe was annexed to the Crown, Ceſs is never impoſed but by a voluntary Offer made by the Subjects to the Sovereign.

July 17, 1711. John Sharp *of* Hoddam, *againſt* Charles Maxwell *of* Cowhill.

IN diſcuſſing a Suſpenſion at *Cowhill*'s Inſtance, of a Decreet obtained at the Inſtance of the Procurator Fiſcal of the Juſtices of Peace within the Shire of *Dumfreis*, and *John Sharp* of *Hoddam*, fining *Cowhill* in Four hundred Merks, for ſaying that *Hoddam* was guilty of ſeveral Acts of Falſhood, Injuſtice and Malverſation in his Office: The Lords found, That the Juſtices of Peace are not Judges competent to cognoſce upon Scandal, or a verbal Injury.

Eodem Die. *The Magiſtrates of* Glaſgow *and their Stent-maſters, againſt* Robert Sanders *of* Aldhouſe *Printer in* Glaſgow.

KIng *Charles* the Second, having, by his Gift and Patent under the great Seal, *May* 12, 1671, granted to *Andrew Anderſon* his Partners, Subſtitutes and Aſſignies, the ſole Privilege of printing and cauſing to be printed and publiſhed all manner of Books learn'd or vulgar within *Scotland*, together with the Direction and Regulation of all other Preſſes there, and an expreſs Immunity and Exemption from Taxations, Stents, Annuities, and Impoſitions upon the ſaid Office or Trade to him and his Foreſaids, for the Space of Fourty one Years after his Entry thereto: *Andrew Anderſon* aſſumed four Printers as his Co-partners in the Art of Printing, and communicated to them the Privilege of the Gift. *Robert Sanders* (who hath Right by Progreſs from one of theſe four Partners, to an eight Part of the Gift) being charged by the Magiſtrates of *Glaſgow* and their Stent-maſters, for Payment of his Proportion of Stent for his Trade, he ſuſpended upon this Ground, That the Aſſignment in his Favours did intitle him to an Exemption from Stent. But the Lords found, That transferring a Share of the Gift by Progreſs to the Suſpender, did not transfer to him an Immunity from publick Burdens. Seing the Heir of *Andrew Anderſon* and his other Partners do ſtill claim to enjoy the ſame Immunity and Exemption. And albeit the Sovereign hath Power to name one of every Imployment to be His own Servant therein, with ſpecial Immunities and Exemptions to that Perſon, and ſuch Partners as he ſhould aſſume; it were abſurd to think, That that Gift might be divided and ſub-divided *in Infinitum*, or in ſo many Parts as would turn the Privilege to be univerſal. *Andrew Anderſon* or his Partners might indeed denude themſelves, by aſſigning their Share of the Gift and Privilege to another, who comes in their Place, but could not both give away and retain the ſame Privilege; *Dans & Retinens Nihil dat.*

Eodem Die. James Gordon *of* Daach, *againſt* James Gordon *Meſſenger in* Edinburgh.

JAmes Gordon of *Daach*, having charged *James Gordon* Meſſenger, for Sixty ſix Pound contained in a Decreet, and Annualrent thereof ſince the Denunciation was uſed on the Decreet, and he having ſuſpended; At diſcuſſing the Suſpenſion, the Lords found no Annualrent due upon the Denunciation. In Reſpect it was only at the Market Croſs of *Edinburgh*, and the Party denounced lived not within the Shire of *Edinburgh*.

Eodem Die. *Dam* Elizabeth Nicolſon, *againſt* William Moriſon *of* Preſtoungrange.

IN the Action of Recourſe at the Inſtance of the Lady *Nicolſon*, againſt *Preſtoungrange*, for Two thouſand five hundred Merks contained in a Bill of Exchange, drawn by him payable to her, and proteſted for not Payment, mentioned the ſeventh of *February* laſt: The Lords found, That whatever in the Caſe of foreign Bills may be held a ſufficient Inſtruction, That the Drawer was certiorated of his Bill's being duly proteſted; Yet in this Caſe of an Inland Bill, where the Poſſeſſor did not purſue Recourſe till two or three Years after it was proteſted, this Certioration muſt be inſtructed otherways than by the Poſſeſſor's Oath.

Eodem Die. *The Magiſtrates of* Edinburgh, *againſt the Country Brewers and Heretors of the Shire of* Edinburgh.

THE Magiſtrates of *Edinburgh* obtained a Charter under the great Seal in the Year 1603, granting to the Good Town the Privilege of exacting a petty Cuſtom of eight Pennies for each Load, and four Pennies for each Burden of Ale coming in at the Ports, when the ordinary Way of importing Ale to the Town, was either by Loads on Horſeback, conſiſting of two four gallon Barrels on Hough-hams, or Burdens on Men's Backs. In *Anno* 1636, the Town obtained another Charter confirming the ſmall Cuſtoms, and all Rights and Privileges they were in Poſſeſſion of; and their whole Charters and Privileges were ratified in the Parliament 1661. The Country Brewers having fallen upon another Method of bringing in their Ale and Beer to the Town upon Carts, Sleads, Slips, and otherways; the Magiſtrates and

Town Council altered their Manner of exacting and uplifting the ſaid Cuſtom or Cauſey-mail, and by their Act in *January* laſt, appointed their Tackſmen to collect and exact for each Cart-draught of Ale two Shilling *Scots*, and for each nine gallon Tree brought in upon Sleades, Slips, or otherways, from any Place without the Town's Privileges, eight Pennies, and proportionably for greater or leſſer Quantities. The Country Brewers ſuſpended the Act, upon this Ground, That the Magiſtrates of Burghs could not at their own Hand impoſe or exact any new Stents, without being liable to be convened as Oppreſſors of the Lieges, *Act* 4. *Par.* 4. *Ja.* 4. *Act* 54. *Par.* 11. *Ja.* 6. And they had no Warrant for exacting the ſaid Impoſition: For any Grant in a Charter not conform to former Right is null. Beſides, the Impoſition quarrelled is diſconform to the Charter 1603, which lays the Cuſtom upon the Load and Burden, without Diſtinction of greater or leſſer: Whereas this Impoſition is upon the Quantity of the Liquor riſing in Proportion to it, turns a downright Exciſe. No Regard to the Charter 1636, in Reſpect that confirms only to the Town the Impoſitions they were in Poſſeſſion of, and they muſt prove antecedent Poſſeſſion. Nor doth the Ratification in Parliament (which paſs'd of Courſe, and gave no new Right) make the Thing better than the Town's Rights and Law made it. 2. *Et ſeparatim*, if the Town had ever any ſuch Right, they have loſt it *non utendo*: By being in Uſe to exact only one Penny *in* ſtead of eight for the Load, and $\frac{1}{2}$ Penny in ſtead of four Pennies for the Burden. At leaſt this negative Preſcription qualifies and reſtricts the former Titles to the latter Exaction.

Replyed for the Magiſtrates. All the Burrows in *Scotland* have no other Warrant for exacting ſuch Cuſtoms and Impoſitions, but ſuch Charters from the Sovereign: And ſo this Impoſition falls not under the foreſaid Acts of Parliament. Changing the Manner of bringing in Ale from Loads and Burdens to Carts, Sleades, Slips, or otherways, doth not alter the Nature of the Impoſition; ſo long as the ſame is within the Quantity allowed to be uplifted by the Charter. For if the Charter 1603 did not allow the Cuſtom and Cauſey-mail to be exacted conform to the Quantity of the Liquor, that Grant in Favours of the Town, might be eaſily eluded by changing the Form of the Cask, or Manner of the Carriage. Which Right in Favours of the Town, hath all the Conſent of Parliament that could be had: And albeit Ratifications in Parliament paſs often in Courſe, they have many good Effects, as not only to exclude the Sovereign from quarrelling the Right confirmed; but alſo to ſtop the Mouths of Subjects ſo long as no better Right is produced. 2. The Good Town cannot be ſaid to have loſt the Privilege of exacting the Cuſtom upon Ale by the negative Preſcription *non utendo*. Becauſe, 1. The Cauſey-mail was always exacted upon Carts that brought Ale in to the Town; and the being in Uſe of exacting it upon any one Sort of Carriage, is ſufficient to preſerve the Town's Right of exacting the Cuſtom upon the Load or Burden of Ale: Since the Poſſeſſion of a Part of any Servitude or Impoſition interrupts the negative Preſcription as to the Whole. Eſpecially conſidering, that the Exaction upon the Load did ceaſe only by the Change of the Manner of Carriage, without any Neglect on the Town's Part.

The Heretors of the Shire of *Edinburgh* compeared for their Intereſt, and repeted a Declarator in Defence of the Brewers, upon a Contract in *Anno* 1676, betwixt the Shire, the College of Juſtice, and the Town; whereby the Town was to accept of one Penny upon the Pint of Country Ale imported, in full of all they could claim from the Country Brewers; In Conſideration of the Shire's giving Way to the Grant of Impoſt in Favours of the Town of Two Pennies upon the Pint.

Replyed for the Town. The Declarator at the Inſtance of the Shire upon the Contract 1676, can't be received in this Proceſs: In Reſpect it is a diſtinct Action at the Inſtance of different Purſuers, upon a different *Medium* relating to a different Subject, and containing a different Concluſion.

The Lords found the Town of *Edinburgh*'s Charters in the *1603*, and *1636*, and Ratification of Parliament thereupon, are a ſufficient Title for the Town to impoſe the ſmall Duties therein-mentioned upon Loads and Burdens for maintaining their Cauſeys; And found that Sleads not being then uſed, and now much uſed for bringing in Ale to the Town, the Town can transfer the Duty upon Loads to Sleads, and can impoſe Eight Pennies upon the Nine-gallon Tree brought into the Town upon Sleads. And found the Town's exacting a leſs Duty for Fourty Years paſt, not relevant to reſtrict their Title to that leſſer Duty by Preſcription. And repelled the Alledgeance founded upon the Contract betwixt the Commiſſioners of Exciſe for the Shire, and the good Town, in the Year *1676*.

July 19, 1711. *Mr.* Peter Rae *Miniſter at* Kirkbride *and* Agnes Corſon *his Spouſe, againſt* George Maxwel *of* Munſhes.

A*Gnes Maxwel* Lady *Tinwall* in *January* 1669, diſponed the Lands of *Dinwoodie* and others to *Robert Maxwel* her Grand-child, and the Heirs-male of his Body; which failing, to *George Maxwel* of *Munſhes*, &c. with this expreſs Proviſion, That it ſhould not be in the Power of *Robert Maxwel*, to burden or affect the Lands with more as 6000 Merks of Debt. *Robert Maxwel* in *Anno* 1695, interdicted himſelf to certain Friends; and thereafter finding that he had no Children, nor Proſpect of any, he, with Conſent of the Interdictors, granted a gratuitous heretable Bond for 1000 ℔. to each of *Agnes* and *Margaret Corſans* his Siſter's Children, upon which they were infeſt. Mr. *Peter Rae* Huſband to *Agnes Corſan* having Right to the ſaid 2000 ℔. purſued a Poinding of the Ground againſt *Munſhes* after he ſucceeded to the Eſtate.

Alledged for the Defender. The Bond is null: Becauſe the Interdictors could not Authorize the interdicted Perſon to grant Deeds for Love and Favour in prejudice of his Heir, which is a dilapidation in Law; more as Curators could authorize their Minors, to gift away their Subſtances, and ſo ruin *cum Privilegio* that which they were appointed to preſerve.

Replyed for the Purſuer. A Perſon interdicted can do every thing with Conſent of his Interdictors, that he could do were he not interdicted; and *Tinwall*, had he not been interdicted, could have granted the heretable Bond quarrelled, or could alienate gratuitouſly, as well as for onerous Cauſes. Interdictors are not like Curators: For the former are not, as the latter, liable to Diligence. And a Minor being prohibited by Law to alienate even tho' he had no Curators, there are legal Ruiles reſtraining the Adminiſtration of his Curators: Whereas ſince nothing reſtrains an interdicted Perſon's Diſpoſal, but his own Conſent, that Reſtraint can go no further than his Conſent hath limited him; which is, That he ſhall not have Power to diſpoſe without Concurrence of the Interdictors. Again, as a Perſon inhibited may dilapidate with Conſent of the Inhibiter, What ſhould hinder an interdicted Perſon to do the like with Conſent of his Interdictors? 2. Granting the heretable Bond, was but only an Exerciſe of the Faculty of diſpoſing of the 6000 Merks in Favours of his own neareſt of Kin.

Duplyed for the Defender. An interdicted Perſon can't do, with Conſent of his Interdictors, whatever he could do were he not interdicted: For a Perſon not interdicted is at perfect Liberty; whereas after Interdiction, neither he nor his Interdictors are ſo. And tho' Interdictors are not liable for Omiſſions, they are liable for Commiſſions; And what they do unwarrantably to the Prejudice of thoſe they are bound to preſerve from Hurt, is reducible. *Negotiorum Geſtores* are liable for Malverſations; And Interdictor who are choſen and accept, are leſs ſavourable, when they counteract thei Truſt. An interdicted Perſon cannot do with Conſent of his Interdictors what an inhibited Perſon could do with Conſent of the Inhibiter: Becauſe, the Prohibition in an Interdiction is univerſal; whereas the Prohibition in an Inhibition, hath a ſpecial Regard to the Inhibiter's Intereſt. Therefore as one inhibited cannot prjudice the Inhibiter: So a Perſon interdicted cannot even with Conſent of the Interdictors prejudice his Heretage. 2. The Faculty to burden is not poſitive, but only negative, that he ſhould not be able to burden the Eſtate with more than 6000 Merks. Beſides, it could not put him in a better Condition than if he had had the full and free Adminiſtration: In which Caſe he could neither burden nor alienate without an onerous Cauſe: The Faculty could only be underſtood *in Terminis habilibus*, as accords of the Law. Again, this Faculty being given when *Tinwal* was not interdicted, it could not be given *eo Intuitu* to capacitate him when interdicted. And as *Tinwal* could have renounced this Faculty; So he effectually renounc'd it by interdicting himſelf.

The Lords ſuſtained the Bond, tho' gratuitous, it being granted with Conſent of the Interdictors, and repelled the Defence.

Eodem Die. *The Lady* Kinfawns, *Mr.* Patrick Lyon *of* Auchterhouſe, *and* James Carnegy *of* Phinhaven, *againſt* Alexander Carnegy *of* Kinfawns.

IN the Proceſs at the Inſtance of the Lairds of *Auchterhouſe* and *Phinhaven*, and the Lady *Kinfawns*, againſt the Laird of *Kinfawns* her Huſband, for Payment of 2000 Merks contained in a Bond, granted by the Lady to the Two other Purſuers, and advanced to her (after her Huſband had refuſed when required by Way of Inſtrument to furniſh her) for defraying the Charges of her going to the hot Baths in *England*, by the Advice of Phyſicians, as neceſſary for her Health.

Alledged for the Defender. The Bond is null, being granted by his Wife, *ſtante Matrimonio*, without his Conſent; and ſo could not oblige her ſelf, and far leſs her Huſband.

Replyed for the Purſuers. The Rule in Law, That a Wife's Obligement cannot bind her Huſband or her ſelf, ſuffers an Exception in Caſes where ſhe is truſted with Neceſſaries, either in her Huſband's Abſence, or when he unreaſonably refuſeth to furniſh her: So that, as a Wife could oblige her Huſband in ſuch Caſes, her Obligement given for what is advanced is binding. *V. G.* Her Subſcription to a Merchant-accompt for neceſſary Furniſhing, will afford Action againſt the Huſband, as obliged to provide for her. And the furniſhing Medicaments to a Wife, or following out neceſſary Remedies for Preſervation or Recovery of her Health, is a Debt upon the Huſband, ariſing from the ſame Obligation as her daily Maintenance, under which theſe are comprehended.

Duplyed for the Defender. Albeit a Wife may contract Debt for her neceſſary Aliment; yet ſhe cannot borrow Mony for her Supply. There is a great Difference betwixt the Caſe of a Merchant or Apothecary, furniſhing Goods or Drugs in the Courſe of their Trade to a Wife, according to her Condition and Quality; and the Caſe of one who lends Mony to her, which may be diſſipated and miſapplyed, and the Huſband notwithſtanding remain bound to ſuch as furniſhed her with Neceſſaries. Nor doth a Wife's ſigning a Compt-book prove of it ſelf, but the Merchant muſt inſtruct the Furniſhing *aliunde*.

Triplyed for the Purſuers. If furniſhing Neceſſaries to a Wiſe, doth effectually oblige the Husband, for the ſame Reaſon the Advancers of Mony to her, obviouſly neceſſary for the Charge of a Journey in order to her Cure, muſt bind them. For tho' uſually at Home, Goods are furniſhed, and Remedies applyed before Payment : Yet it is as neceſſary to advance Mony to a Wiſe when the Nature of the Thing requires it, as to make a Journey. *Conceſſo enim Jure, omnia Concedi videntur, ſine quo Jus illud expediri non poteſt* : And to deny the Advance of Mony, in Order to a Journey to the Bath, is to refuſe the Remedy it ſelf.

The Lords found the Bond null, but found the Libel relevant for Repetition of the Sums advanced, in ſo far as the ſame was neceſſary.

Eodem Die. *Dam* Helenor Nicolſon *Lady* Greenock, *againſt Sir* John Schaw *of* Greenock.

THe deceas'd Sir *John Schaw* of *Greenock* by his Bond, *Auguſt* 19, 1700, narrating, That in Reſpect Dam *Helenor Nicolſon* his Lady had by a Diſpoſition of the ſame Date diſponed to their Son (now Sir *John Schaw*) the Fie of her third Part of the Lands of *Carnock* and *Plain* : Therefore he obliged him, his Heirs and Succeſſors to pay to her 8000 Merks yearly during her Lifetime, from the firſt *Whitſunday* or *Martinmas* after his Deceaſe. There was ſuch a Diſpoſition ſign'd by the Lady with Conſent of her Husband, in Favours of their ſaid Son, diſpenſing with the not Delivery thereof, in Caſe the ſame ſhould be found in the Hands of either of them at their Deceaſe.

The Lady after her Huſband's Death purſued Sir *John Schaw* her Son, as Heir to his Father, to pay the 8000 Merks for ſeveral Years bygone, and in Time coming during her Lifetime.

Alledged for the Defender. His Father's Obligement for the Liferent Annuity of 8000 Merks, is of the Nature of a mutual Contract betwixt him and the Purſuer, wherein ſhe was to grant a valid Diſpoſition of the Fie of a third Part of *Carnock* and *Plain* to the Defender, which appears not done At leaſt it doth not appear to have been either judicially ratified by her (which ſhe was obliged to have done in the Terms thereof) or to have been delivered to the Defender. Eſpecially conſidering, That the Clauſe diſpenſing with the not Delivery, if found lying by either the Purſuer or her Huſband, implies a Power of reſiling in either of them; and that the Diſpoſition was not delivered at the Date thereof, and the not Delivery diſpenſed with only in the Event of its being found in the Hands of either at their Deceaſe intire and uncancelled. Again, the Diſpoſition appeared cancelled in the Purſuer's Cuſtody ſince her Huſband's Deceaſe : Whence Law preſumes, That ſhe cancell'd it; becauſe ſhe might lawfully, and it was in her Power to do it; Conſequently, the Defender's Father's Bond is null, as being granted *ob Cauſam quæ ſecuta non eſt, July* 26, 1665, *Brotherſtones* contra *Ogle* and *Orrocks, December* 23, 1684, Lord *Huntingtour* contra Earl of *Lauderdale.*

Replyed for the Purſuer. Her Huſband's Bond is a clear Obligement for onerous Cauſes performed, under no ſuſpenſive Proviſion or Condition, and doth imply nothing to be unperformed by the Purſuer. 'Tis no more a mutual Obligement, than a Bond acknowledging the Receipt of borrowed Mony, and obliging the Granter to repay, can be called a mutual Obligement. The Diſpoſition's being found cancell'd in the Lady's Hand, is no Ground to preſume, That ſhe did it : Seeing that were to preſume a Delinquency contrary to the common Rule of Law. 2. The Purſuer's cancelling the Diſpoſition, could not infer a Nullity of the Bargain, or Reſtitution againſt the Bond, but only a Ground for Reparation and Damage if any were; which cannot be in this Caſe, where the Purſuer is willing and able to renew the cancell'd Diſpoſition, and her Condition is no worſe now, than when ſhe granted the firſt.

Duplyed for the Defender. The Purſuer who hath done Deeds inconſiſtent with the Bond purſued on, cannot recur to it, but the Defender muſt have the Benefit to repudiate in his Turn, 21 *December* 1680, *Anderſon* contra *Bruce.* And the Diſpoſition, which was the onerous Cauſe of the Bond, being cancelled without the Defender's Fault, can never be made up without a new Bargain, which he utterly declines to enter into.

The Lords found, That the Purſuer's Diſpoſition of the Fee of her third Part of the Lands of *Carnock* and *Plain*, which is the onerous Cauſe of the Bond purſued on, being found cancelled in her Hands after her Huſband's Deceaſe, and never ratified, it's preſumed that ſhe cancelled it. And therefore found, That the Bond is null, *Cauſa data non ſecuta.*

July 20, 1711. Iſobel Moncrieff *and her Husband, againſt* Catharin Monipeny *Relict of* George Moncrieff *of* Sauchop.

IN the Proceſs at the Inſtance of *Iſobel Moncrieff*, as neareſt of Kin to *George Moncrieff* her Brother, againſt *Catharin Monipeny* his Relict; The Lords 14 *July* 1710, having reduced the Teſtament, which Sentence was, upon the Relict's Appeal, affirm'd in the Houſe of Peers: *Iſobel Moncrieff* and her Huſband purſued *Catharin Monipeny* for her Intromiſſions with her Huſband's Effects.

Alledged for the Defender. The written Teſtament, tho' reduced, muſt ſubſiſt as a nuncupative Teſtament to the Extent of 100 *Lib. Scots* to each Legatary, 7 *July* 1629, *Wallace* contra *Muir.* Becauſe, the Defunct's endeavouring *ob majorem Cautelam* to have his Will declared by Writ, that he might have the greater Freedom of diſpoſing of his Means, can never evacuate the nuncupative Will, which is clear and formal in every Reſpect: As the Lord *Dirletoun* ſign'd the laſt Settlement of his Eſtate, not only with his own Hand, but alſo before two Notaries and four Witneſſes; That if the holograph Subſcription had not been good, the Writ might ſubſiſt by the notorial Atteſtations, *et e contra.*

Replyed for the Purſuer. The written Teſtament reduced cannot ſubſiſt a a nuncupative. Becauſe, one who declares his Intention to make his Will in Writ, excludes all nuncupative Wills, tho' the Writ ſhould be null for Want of the legal Solemnities, as effectually as the written Teſtament, had it ſubſiſted, would have left no Place for a nuncupative Will. *Qui Teſtamentum facere opinatus eſt, nec voluit quaſi Codicillos id valere, nec Codicillos feciſſe videtur, ideoque quod in illo Teſtamento ſcriptum eſt, licet quaſi in Codicillis poterit valere, tamen non debetur.* Whence the Lawyers conclude, *Si Teſtator voluit facere Teſtamentum in* Scriptis, *et omiſerit aliquas Solennitates in eo requiſitas, quæ tamen ſufficiunt ad* Nuncupativum, *ne quidem valere ut tale, quia quod voluit, in Scriptis* ſcil. *teſtari, non potuit, et quod potuit,* ſcil. *nuncupare, non voluit. Quia una Species non poteſt contra Voluntatem Conſtituentis in aliam converti,* Perez. *ad Codicem Lib.* 6. *Tit.* 23. *N.* 19. *Voet. in Pandect. Lib.* 28. *Tit.* 1. *N.* 10. And tho' Writs for Sums above 100 *Lib.* ſubſcribed by one Notary and two Witneſſes, will be ſuſtained for 100 *Lib*: It doth not follow, That a null written Teſtament ſhould ſubſiſt as a nuncupative, which is *vitioſa Tranſitio de Genere in Genus.* But to run the Parallel cloſe, as in the foreſaid Caſe, it being the Granters Will the Writ ſhould ſubſiſt for a greater Sum than Law allowed, the ſame ſhould be ſuſtained for the Sum allowed by Law: So a nuncupative

Teſtament for 200 *lib. Scots*, might *a pari* be ſupported for 100 *lib.* becauſe of his Inclination *teſtari nuncupative*, which cannot be pretended in this Caſe.

The Lords found, That the Teſtament could not be ſuſtained as a nuncupative Legacy.

July 21, 1711. *Sir* Andrew Kennedy *Conſervator, &c. Supplicant, againſt Sir* Alexander Cuming *of* Culter.

SIr *Andrew Kennedy* gave in a Bill repreſenting, That the Decreet pronounced againſt him in Favours of Sir *Alexander Cuming* 9 *December* 1707, was, upon the Petitioner's Appeal, reverſed by the Lords Spiritual and Temporal in Parliament aſſembled, who 19 *April* laſt, declared and adjudg'd, That the Commiſſion granted by Her Majeſty to Sir *Alexander Cuming* is void, and that the Commiſſion granted the Petitioner and *John Vere Kennedy* his Son, is ſtill ſubſiſting in full Force; and ordered the Lords of Seſſion to direct the Expences in theſe Suits to be tax'd according to the Courſe of their Court, and paid to the Petitioner by Sir *Alexander Cuming.* Purſuant to which Decree of the Houſe of Peers, the Petitioner 14 *June* laſt cauſed Intimation to be made under Form of Inſtrument to Sir *Alexander Cuming*, That he was to inſiſt before the Lords in *Scotland* the fifth of *July* inſtant, conform to the ſaid Judgment of the Lords of Parliament. Therefore the Petitioner crav'd, That the Lords, in Compliance with the ſaid Ordinance of Parliament, would pleaſe to direct and tax the ſaid Expences conform to an Accompt extending to 1500 *lib. Sterling* in groſs, and decern Sir *Alexander Cuming* to make Payment thereof to the Petitioner.

Some of the Lords were of Opinion, That they might proceed to tax the Petitioner's Expences without citing Sir *Alexander Cuming* by Order of their Lordſhips: Becauſe it is not left to the Lords to determine if Expences ſhall be modified or not; but they are ordered to tax the Expences according to the Courſe of their Court, which is to modifie Expences *poſtquam concluſum eſt in Cauſa*, before extracting Decreet, without any new Citation to the Party to be decerned: And conſidering the Connexion of the Proceſs firſt intented before the Seſſion, with the Appeal, Judgment, and Order of the Peers to tax the Expences; both Parties are now before the Seſſion in the ſame State as if Sir *Andrew Kennedy* had prevailed againſt Sir *Alexander Cuming* in that Court. Beſides, Sir *Alexander Cuming* being preſent in the Houſe of Peers a pronouncing the Decree, he was warned *apud Acta*, that the Lords of Seſſion were to tax the Expences: Which he was further certiorated of by the notorial Inſtrument. But the Plurality of the Lords refuſed to enter upon the Conſideration of the Petitioner's Expences, till Sir *Alexander Cuming* be legally cited by an Order of the Seſſion, that he may come prepared to object againſt the Quantity of the Expences to be modified: There being no Proceſs in Dependence before the Seſſion, the ſame having terminated by an extracted Decreet; and the Order to the Lords is not to tax Expences but according to the Courſe of their Court, which is by Proceſs upon lawful Citation. Sir *Alexander*'s hearing the Decree of the Houſe of Peers was no legal Certiorati-on, the Day of Compearance not being therein prefix'd. Again, the Intimation by a Notary was inſufficient, that being only a private Deed without any Authority. And Sir *Alexander*'s private Knowledge cannot be conſidered as equivalent to a Citation. *Vide June* 26, 1711.

Eodem

Eodem Die. David Ogilvie *of* Clova, *againſt* William Baillie *of* Lamingtoun.

IN a Proceſs at the Inſtance of *Clova* againſt *Lamingtoun*, for Payment of 2000 Merks of Legacy left by Miſtreſs *Griſſel Hamilton* Daughter to the Lady *Bargeny*, to which the Purſuer had Right by Aſſignation from the Legatary: The Defender produced a Declaration under the Teſtatrix's Hand for proving that ſhe had Power to bequeath only the half of the ſaid Sum. The Purſuer replyed, That the Declaration was null, as wanting Date, Place, Witneſſes Names and Deſignations.

Duplyed for the Defender. Date and Place are not *de Subſtantialibus* of a Writ; and he offered to condeſcend upon the Witneſſes, which he might do, the Writ being ſign'd before the Act of Parliament 1681.

Triplyed for the Purſuer. Date and Place are eſſential to a Writ, and cannot be ſupplied: Nor were ever the Names and Deſignations of Witneſſes not mentioned in the Body of the Writ allowed to be ſupplied by a Condeſcendance, tho' the Deſignations of Witneſſes whoſe Names were inſerted might be ſupplied.

The Lords found, That Date and Place are not eſſential to the Validity of a Writ, not being mentioned *inter Subſtantialia* in the Act of Parliament 1681. And found that the Declaration being emitted before the making of the ſaid Statute, the Deſignation of the Witneſſes may be ſupplied, tho' their Names were not inſerted in the Body of the Writ.

Eodem Die. *The Magiſtrates of* Edinburgh, *againſt* Thomas Mackie Prieſt.

THomas Mackie being charged upon a Decreet, obtained againſt him as a Prieſt, upon the *Act* 3. *Seſſ.* 8. and 9. *Par. K. W. and Her Majeſtie's Proclamation* 2 *September* 1709, before the Magiſtrates of *Edinburgh* as Juſtices of Peace within the Liberties and Privileges thereof, at the Inſtance of Mr. *Samuel Gray* their Procurator Fiſcal, to remove himſelf furth of *Scotland* within a certain ſhort Space with Certification, That he ſhould incur the Pain of Death in Caſe of returning: He offered a Bill of Suſpenſion upon theſe Grounds, 1. The ſaid Act 3. impowers only the Lords of Privy Council or Juſticiary to baniſh Popiſh Prieſts convict: And therefore now when the Privy Council is taken away, the Lords of Juſticiary are the only proper Judges to ſend Prieſts into Baniſhment. So that the Sentence againſt Mr. *Mackie* is *a non ſuo Judice.* For Her Majeſty's Proclamation 2 *September* 1709, requiring Juſtices of Peace to put the Laws in Execution againſt Papiſts, gives no new Juriſdiction, but only continues what the Law had formerly given them within their reſpective Diſtricts. 2. The Decreet is intrinſecally null for Want of Probation, in ſo far as the Conſtables were admitted as Witneſſes, who were the Accuſers and to be Gainers in the Event; 500 Merks being appointed by Act of Parliament as a Reward to the Diſcoverer of any Popiſh Prieſt, Jeſuite, or trafficking Papiſt. Women were alſo admitted to bear Witneſs. 3. The Trial proceeded without an Inqueſt, which ought not to have been done in the Caſe of a Crime inferring ſo ſevere a Puniſhment.

Anſwered for the Chargers. Whatever might be ſaid of Laws referring the Cognition of Matters to the Privy Council with diſcretionary Powers: Yet in preſent Caſe, where Law hath determined the Nature, Proof and Puniſhment of a Crime, and hath left only the Execution to the Privy Council, the Suppreſſion of that Court cannot be reckoned an Abrogation of the other Heads of the Act 1700. But the Execution thereof becomes the Province of every Judge and Magiſtrate within his particular Juriſdiction. For it is upon the Account of executing the Laws, that they are inveſted with Powers and Juriſdiction, which Execution is univerſal, except in ſo far as it is reſtrained by the ſpecial Privilege or Competency of any other Juriſdiction; and when that is ſuppreſs'd, the ordinary Juriſdiction, as freed of that Reſtriction, takes Effect univerſally for executing the Laws. Nor is it any Abſurdity that the Magiſtrates of *Edinburgh* who have but a territorial and circumſcrib'd Juriſdiction, ſhould baniſh out of *Scotland*: Becauſe, that is the Sentence of the Law, which their Juriſdiction gives them only Authority to pronounce. And Her Majeſty in whom the Privy Council Powers are veſted eminently, did by Her Proclamation call and authorize the ordinary Judges to put the Laws in Execution, which is their Duty. 2. A Reward of the Law is no Bribery, or Exception againſt a Witneſs. Beſides, the Proſecution was not at the Inſtance of the Conſtables, but of the Procurator Fiſcal. And the Conſtables had no Pretence to a Reward in this Caſe: Theſe were not the Diſcoverers, but were in Obedience to the Magiſtrates Order, and ſeized *Mackie*. Again, Women are habile Witneſſes in occult Crimes, as this is. And he refuſed to purge himſelf by taking the *Formula* againſt Popery. 3. No Law requires Trial by an Inqueſt before the Juſtices of Peace in *Scotland*: And the Privy Council (when in Being) did proceed in the Trial of the ſame Crime without any Inqueſt.

The Lords refuſed to paſs the Bill of Suſpenſion.

July 26, 1711. James Halyburton *of* Foderance, *againſt Mr.* James Cook *of* Ardlair.

AT diſcuſſing the Suſpenſion of a Charge at the Inſtance of *Foderance*, againſt Mr. *James Cook*, for Payment of the Remains of a Bond of 33500 Merks, granted by the Latter to the Former; Mr. *Cook* the Suſpender, having conform to Agreement with the Charger, paid three Debts to his Creditors, and retired Diſcharges thereof in the Charger's Name: The Lords found, That the Diſcharges bearing that Payment was received from *Foderance* could not be allowed to the Suſpender in Part of Payment of the Sum charged for, unleſs he prove by Writ or Oath of the Charger, That Payment was made by the Suſpender out of his own Effects. Albeit the Diſcharges were ſtill in the Suſpender's Hands, undelivered to the Charger. For he the Charger could force theſe Diſcharges as his own Evidents from the Suſpender by an Exhibition, *Stair Inſtit. Pag.* 570.

Eodem Die. *Mr.* Alexander Paterſon *and others, againſt the Town of* Edinburgh, *and their Aſſignies to the Two Penies on the Pint.*

AN Act of Parliament, *June* 13, 1693, gave to the Town of *Edinburgh* an Impoſition of Two Penies *Scots*, over and above the King's Exciſe upon the Pint of all Ale and Beer to be brewed, in-brought or vended withithin the City, and Privileges thereof (except what is ſold within the Palace of *Holyrudehouſe*, and the Caſtle of *Edinburgh*) for Fifteen Years, and further, during the Sovereign's Pleaſure, not exceeding Thirty Years, for paying the Town's Debt, commencing from the firſt of *July* thereafter; to be paid, uplifted and gathered weekly, monthly, quarterly, or otherwiſe, as the Magiſtrates and Town-council ſhall Preſcribe and Order; who are impowered to farm and ſet in Tack the ſaid Impoſition by Way of publick Roup to the beſt Advantage, at the Sight of the Lords of Privy Council or their Nominees. In Caſe of Miſapplication of this Fund by the Magiſtrates, they, as well as the Receivers of the miſapplyed Impoſition, ſhall be liable to refound the ſame with Intereſt to the Creditors of the Town, at the Inſtance of them, or any Burgeſs of the Burgh. Two of the Lords of Seſſion to be named by the Sovereign from Time to Time, with the eldeſt Commiſſioners to the Parliament of the Shires of Mid and Eaſt *Lothian*, are to inſpect the Town's Book of Accompts; and in Caſe of Miſapplication or Malverſation, to control and make the Miſapplyers or Malverſers liable in Manner aforeſaid. The Debts of the City remained a very great Burden, altho Her Majeſty had been pleaſed to continue the Grant, and there were but Thirteen Years thereof to run: For Four of which Years Mr. *William Johnſton* and his Partners had a Tack of the ſaid Impoſition. In Order to ſink theſe Debts, The Town Council by their Act transferred their Right of the ſaid Impoſition to the ſaid Mr. *William Johnſton* and his Partners for Thirteen Years (including the Four Years of their current Tack) from the firſt of *July* 1700, for Payment of 547 *lib. Scots*, with Annualrent from *Lammas* thereafter.

Mr. *Alexander Paterſon* and his Partners raiſed a Reduction and Declarator of Nullity of the Aſſignment, upon this Ground, That that Branch of the Town's Revenue was not ſet by Roup, as the Act of Parliament abovenarrated preſcribes, containing a Concluſion of 500 *lib. Sterling* of Damages to the Purſuers, againſt the Magiſtrates and others of the Council who ſubſcribed the Agreement.

Alledged for the Defenders. No Proceſs can be ſuſtained at the Inſtance of the Purſuers, who have no Title to call the Magiſtrates to Accompt for their Adminiſtration.

Replyed for the Purſuers. 1. It's an inherent Right in the Members of every Society to ſee to the right Management of the Common Good thereof: For which *Actio popularis* is competent to every Burgeſs; Eſpecially conſidering, That he may be *Subſidiarie* liable for the Debts and Burdens of the Community, if the Common Stock ſhould fail. So in the Caſe of Sir *Francis Kinloch* and Sir *Andrew Ramſay*, The Lords ſuſtained a Declarator at the Inſtance of private Burgeſſes, and reduced an Act of the Town Council of *Edinburgh* perpetuating the Magiſtracy, as prejudicial to the Rights of the Burgh: And much more may they purſue the pecuniary Concern and Common Good, whereof the Magiſtrates are but Tutors and Adminiſtrators. 2. The Purſuers have another Title as higheſt Offerers for the Aſſignment; whom the Magiſtrates rejected by their arbitrary Act in Favours of Mr. *Johnſton* and his Partners.

Duplyed for the Defenders. 1. The Adminiſtration and Policy of Burrows is under the Direction of the Sovereign, whoſe great Officer in that Matter anciently was the high Chamberlain, who had his *Iter Camerarii* or his Airs, *Cap.* 38 of *Iter Camerarii*, *Act* 36. *Par.* 4. *J.* 4. when theſe Chamberlain-airs ceaſed, the Accompts of the Common Good of Burrows were brought before the Exchequer, *Act* 26. *Par.* 1535. And in the *Act* 39. *Parliament* 1693, the Care, Overſight and Control of the publick Goods and Revenues, and Adminiſtration thereof is aſſerted to belong to the Sovereign. For to oblige the Magiſtrates of Burghs, to anſwer at the Inſtance of every ſingle Burgeſs as ſuch, would encourage Faction, to the Diſcouragement of Magiſtracy, *M'kenzie* Obſer. on the *Act* 26. *Par.* 4. *J.* 5. Nevertheleſs the Magiſtrates of Burghs are not left without Control; being accountable not only to the Government, but alſo to their Succeſſors in the Magiſtracy. It's philoſophizing againſt the Rules of the Burgher

Conſtitution, to pretend that the *Burgeſſes* would be liable perſonally for the Debts, *Ergo*, have Right to quarrel the Adminiſtration of the Revenue, which ſhould be applyed for Payment of theſe Debts: For ſo remote poſſible Conſequences do not found a Title of Action. This is not *Actio popularis* which was allowed only, *publici Juris tuendi Gratia, cuilibet ex Populo*; for the Purſuers inſiſt upon their Right to the Subject, as Burgeſſes of *Edinburgh*. Beſides, popular Actions, which aroſe under the *Roman* Republick, don't agree with a monarchical State; And, as the Doctors obſerve, *Moribus hodiernis populares Actiones exoleverunt, Wiſſembach Tit. ff. de popularibus Actionibus, Gudelin. de Jure noviſſimo, Lib.* 4. *Cap.* 1. Therefore this decanted Notion of a popular Action, can never found a Title in this Country, where ſuch Actions are only known by Sound, except in ſome few Caſes upon a freſh Notion, That Laws might be made ſo as to execute themſelves; a Conceit more aceptable in Speculation, than ever it will be found in Practice. 2. The Pretence of higheſt Offerers is no Title: Seing there was no Roup. And a Seller hearing different Propoſals at different Times from Perſons intending to buy, is not obliged, by hearing theſe Propoſals, to let any of them have the *Bargain*, nay, not the higheſt Offerer.

Triplyed for the Purſuers. This Action doth not claſh with the Royal Prerogative, whereof the Act 1693 is declaratory: For tho' Her Majeſty hath the deciſive Capacity, private Burgeſſes may provoke to Judgment. Again, tho' it be the Privilege of Her Majeſty to call Magiſtrates to Account for all their Proceedings in general, Burgeſſes may purſue a particular Malverſation or Deed of imbezelling before the Judge competent. Again, by a Clauſe in the Town's Gift, Burgeſſes and Creditors are impower'd to purſue the Town-council for miſapplying the Fund: Conſequently, they may purſue when thro' Miſmanagement the ſame is not rightly and fully got in. *Actio popularis* is not ſo circumſcribed as the Defenders plead it; but is more or leſs extenſive according to the Nature of the Thing. *V.G.* If any thing hazardous to the Life of Man be ſet up in a publick Highway, *Actio popularis* is competent to any *Scottiſh* man; And here *Actio popularis* is competent to any Burgeſs of *Edinburgh*, for redreſſing Miſmanagement of the Common Good of that City.

It was farther alledged for the Purſuers. That the Magiſtrates Aſſignment was null; not being conform to either of the two Methods of Ingathering determined by the Act of Parliament, *viz.* by Collection, imported by theſe Words, *To be uplifted and gathered weekly, monthly*, &c. or by Way of publick Roup, to the beſt Advantage.

Anſwered for the Defenders. Theſe Words in the Act, *To be uplifted and gathered weekly, monthly, quarterly or otherways, as the Town Council ſhall think fit to preſcribe*, imply an Adminiſtration *cum Libera*, by giving Factories, Aſſignments, or in any other probable Way for the Town's Advantage. And the true Meaning of the ſubſequent Clauſe preſcribing the Form of a Roup, was not to tie down the Council to roup the Impoſt, but becauſe of an Act of Parliament reſtraining the *Burrows* from ſetting longer than Three-year Tacks, to declare it lawful for the Magiſtrates to ſet for as many Years as ſhould be agreed upon, at the Sight of the Privy Council. Now, the Privy Council being ſuppreſt, the Magiſtrates had full Liberty to uſe a diſcretionary Power as *bonus Paterfamilias*, or provident Men, which they have done.

Replyed for the Purſuers. The General *or otherways*, cannot be extended beyond the foregoing Particulars: As a general Clauſe of a Diſcharge ſubjoined to Particulars, is never extended beyond the Species. 2. *Quorſum* would the Act have left a Latitude to aſſign for as many Years as they pleaſed in a private Way, and yet reſtrained a Farm to a publick Roup, this is to catch at Words, *et interim Sententiam Legis circumvenire, L* 29. *ff de Legibus.*

The Lords waved to adviſe the Dilator. And found that, tho' Proceſs were competent at the Purſuer's Inſtance; yet the Magiſtrates and Town-council of *Edinburgh* had Power by the Act of Parliament, to diſpoſe of the Impoſition of two Penies on the Pint otherways, than by Tack and publick Roup.

Eodem Die. William Nisbet *of* Dirletoun, *againſt* Marion Johnſton *Relict of* Alexander Wood.

IN the Compt and Reckoning at the Inſtance of *Dirletoun*, againſt *Marion Johnſton*, as repreſenting *Jaſper Johnſton* of *Warieſtoun* her Father, who had been Tackſman of ſome Lands belonging to the Laird of *Craigintinny* the Purſuer's Father; The Defender craved Allowance of two Debts, ſhe alledged were paid by her Father for *Craigintinny* to the Laird of *Balmadies*, conform to two Diſcharges produced by the Defender. The Lords refuſed to allow this Article. In Reſpect the Diſcharges bore, that the Mony was received from *Craigintinny* himſelf. Albeit the Defender produced a Declaration under *Balmadies* Hand *ex poſt Facto*, that he received the Mony from *Jaſper Johnſton*. And alledged that the taking the Diſcharges in *Craigintinnie*'s Name, is no Argument that the Payments were made by him, ſeeing 1. The Diſcharges remained in the Cuſtody of *Jaſper Johnſton*, who had it in his Power to have retired them, and taken in Lieu thereof an Aſſignation from the Creditor; which he ſcrupled as little to grant, as the Declaration aforeſaid. 2. Tenants uſually take Diſcharges of Ceſſes, Miniſters Stipends, or the like in their Maſters Name; and yet having theſe in their Cuſtody, never fail to get Allowance of the ſame as ſo much paid of their Rent. So that *Craigintinnie*'s Name has been inſerted only for the more eaſy expediting of the Accompt betwixt him and *Jaſper* his Tackſman.

November 7, 1711. Thomas Scot *in* Caſtlemains *of* Crawfurd, *againſt Mr.* William Baillie *of* Glentewing *Advocate.*

THOMAS *Scot* purſued Mr. *William Baillie*, as Heir to *James Baillie* of *Glentewing*, for Payment of a Bond dated 23 *April* 1696, whereby *James Baillie* acknowledged himſelf to be juſtly addebted and reſting to *Robert Scot* of *Gilesby* the Purſuers Author 100 Merks, which he obliged himſelf, his Heirs and Executors to pay to *Robert Scot* his Heirs, Executors or Aſſignies at the Term therein-mentioned, with Annualrent from *Martinmas* preceding 1695.

Alledged for the Defender. The Bond is uſurary and null; the Debtor being obliged to pay Annualrent five Months and twelve Days before the Date, without any Declaration (as is uſual when Mony is borowed betwixt Terms) that the Mony was lent at *Martinmas*, for this is like the taking Annualrent before Hand, which imports Uſury, *December* 1, 1680, *Johnſton contra L. Haining:* And the many different Shapes that uſurious Oppreſſion hath broken forth in, ſhould be a prevailing Motive to check the leaſt Appearance of it.

Replyed for the Purſuer. Uſury by our Law is the taking a greater Intereſt for Mony than the Act of Parliament allows, or taking fore-hand Payment of Intereſt: neither of which can be alledged in this Caſe. For the Words *juſtly addebted and reſting*, do not argue neceſſarily, or imply, that the Mony was borrowed and received at the granting the Bond: but it is to be preſumed, *ut Actus valeat*, that the Bond was granted for Mony owing by the Granter to the Receiver at *Martinmas*; And it was reaſonable to make it bear Annualrent from the Time the Mony fell due. And tho' the Bond be uncautiouſly written, for not expreſſing when the Mony was firſt due to the Creditor; this Overſight cannot be ſuſtained as a Ground to charge the Guilt of Uſury upon the Purſuer, who is not the original Creditor, but an Aſſigny for an onerous Cauſe: Eſpecially conſidering, that no Annualrent hath been paid as yet.

The Lords found, That the Purſuer is not guilty of Uſury, and therefore repelled the Defence.

November 8, 1711. *The Lord and Lady* Ormiſtoun, *againſt* John Hamilton *of* Bangour *and his Tutrix.*

B*Angour* having raiſed Reduction of a Decreet obtained at my Lord and Lady *Ormiſtoun*'s Inſtance, againſt him as Heir ſerved *cum Beneficio Inventarii*, to the Lord *Whitelaw*, for Thirty three thouſand eight hundred and fourty nine Pound: The Lords allowed *Bangour*'s Reduction to be received *incidenter*, in a Proceſs of Adjudication upon the Decreet, as to Reaſons *in Jure*, and inſtantly verified; But found, That he behoved to proceed in the common Courſe, as to other Reaſons *in Facto*, requiring a Term to prove them, and refuſed to diſcuſs even the Relevancy of theſe *incidenter* to ſtop Adjudication, reſerving the ſame *contra Executionem*.

November 9, 1711. *Sir* Andrew Kennedy, *againſt Sir* Alexander Cuming.

SIR *Andrew Kennedy* having applyed to the Lords by Bill, Repreſenting That he had cauſed duly cite Sir *Alexander Cuming* to appear againſt the Third of this Inſtant now paſt, to anſwer ſummarly to the Petitioner's Claim of Expences, which the Houſe of Peers ordered to be directed and taxed in the Seſſion (*ut ſupra July* 21 laſt) and craving, That the Lords would proceed therein and determine, according to the Inſtructions he was ready to offer: The Lords found, That Sir *Alexander Cuming* being a Member of Parliament, was not bound to anſwer to the Petitioner's Claim, during the Continuance of his Privilege of Paliament; notwithſtanding the Order of the Houſe of Peers.

November 13, 1711. Willam Douglaſs *of* Dornock, *againſt* William Caruthers *of* Nutholm.

W*Illiam Douglaſs* of *Dornock*, who acquired the Reverſion of a Wadſet of the Lands of *Nutholm* granted by *Maxwell* of *Caſtlemilk*, to *William Caruthers*, raiſed a Reduction and Improbation of *William Caruthers*'s Right, and while his Title to the Reverſion was lying in the Hands of *William Caruthers*'s Lawyers given out to be ſeen in that Proceſs, uſed an Order of Redemption againſt *Caruthers*; and thereafter uſed a new Order, wherein he produced his Right to the Reverſion. When *Dornock* came to inſiſt in a Declarator of Redemption, the Defender alledged, That no Declarator could proceed upon the firſt Order, becauſe *Dornock* was a ſingular Succeſſor to the Reverſion, and his Title not produced either in the Inſtrument of Requiſition, or Conſignation.

Replyed for the Purſuer. 1. No Law requires the Uſer of an Order of Redemption to produce his Title, which the Wadſetter ſhould not controvert, more than a Tackſman or Vaſſal can controvert their Superior or Conſtituent's Right, *February* 19, 1674, Lord *Borthwick* againſt *Pringle*. For in Orders of Redemption, the Inſtrument needs only to bear Production of the Right of Reverſion, when 'tis doubtfull or controverted, *Stair*, *Inſtit. Tit. Wadſets*, §. 17. that Wadſetters may not be diſquieted by meer Pretenders: And not where the Right of Reverſion is in the Wadſetter's own Hand at the Time of uſing the Order, *February* 19, 1662, the Children of *Wolmet* againſt *Ker*, *February* 17, 1663 *Montgomery* againſt the Heirs of *Halyburton*, *February* 19, 1635, L. *Earlſtoun* againſt L. *Grimmet*. Now the Production of the Purſuers Right to *Nutholm*'s Lawyers, (who were able to adviſe the Validity and Import thereof) was more favourable to him, than if it had been produced at the Time of the Order, whereof the Procedure would not have allowed him ſo long Time to conſult it. Beſides, how ſoon the Defender's Lawyers returned to the Purſuer his Papers, he renewed the Order of Redemption, and exhibited them.

Duplyed for the Defender. Writs in the Hands of his Lawyers in another Proceſs, are not to be conſidered as in his own Hands: For he might know nothing thereof. Yea, tho' the Papers had been in the Defender's own Hand, the Purſuer, to complete the Order, ought to have required Production of them, as my Lord *Stair* obſerves: Seing the Formalities of an Order of Redemption are to be exactly performed, and Orders have been annulled even for not producing a Procuratory, or not deſigning the Parties Dwelling-houſe; which are leſs material Defects than the not producing of his Title.

The Lords ſuſtained the Order of Redemption to take Effect only from the Time that the Purſuer's Title was produced.

November 16, 1711. Alexander Watſon *Carpenter*, John Gay *and others*; *againſt* William Arbuckle *Merchant in* Glaſgow.

W*Illiam Arbuckle*, who purchaſed the Ship *The Caledonia* at a publick Roup, did, in Purſuance of a Contract betwixt him and Captain *Breholt*, order, by a Commiſſion under his Hand, the Apparelling and Pertinents of the Ship to be delivered to *Breholt*, for chalking and refitting her for an intended Voyage; and thereafter went with him and communed with *Alexander Watſon* a Carpenter, about repairing the Ship. In Proſecution of which Communing, *Alexander Watſon* and others, having expended in Workmanſhip and Furniſhing, to the Value of One hundred and eighty four Pound four Shillings and three Pence *Sterling*, purſued *Arbuckle* for Payment, before the high Court of Admirality; and upon the Dependence of the Proceſs, arreſted the Ship. *Arbuckle* looſed the Arreſtment upon Caution, and ſent off the Ship to proſecute ſome Voyage. The Judge found the Purſuers had a Right of Hypotheck upon the Ship, for Payment of their Expences in refitting her; and that the Defender was liable to them as he who looſed the Arreſtment, and intrometted with, and carried off the Ship after the looſing, and decerned.

Arbuckle raiſed Suſpenſion and Reduction of the Admiral's Decreet upon Iniquity. In ſo far as, 1. There is no Foundation in our Law, for a tacit Hypotheck in Favours of Repairers of Ships: And the civil Law allows them only a perſonal Privilege, *Inter Creditores Chyrographarios*, *L.* 26. & 34. *ff. de Rebus Aut. Jud. Poſſid.* The *Title ff. in quibus Cauſis Pignus vel Hypotheca tacite contrahitur* (where all the tacit Hypothecks are fully enumerated) mentions no Hypotheck in Favours of one who expends in the repairing Ships; and *Caſus omiſſus habetur pro Omiſſo*: Yea, it were out of Meaſure hard, to alienate any Perſon's Property without his Conſent, where the Law is ſilent. Nor is the Reaſon for indulging this Privilege to a Creditor *in Domum reficiendam*;

endam, viz. *Ne Aſpectus Urbis deformetur Ruinis*, applicable to the Repairer of a Ship. 2. A Hypotheck being only an acceſſory Security, requires and ſuppoſeth a principal Obligation, to which it is acceſſory: And when *principalis Cauſa non conſiſtit, nec ea quæ ſequuntur Locum habent.* In the *Roman* Law the Hypotheck did not take Place in Favours of *Redemptor Operis*, who advanced Mony to any Perſon *ad reficiendas Ædes*; unleſs the ſame was done *mandante Domino, L.* 1. *ff. in Quib. Cauſ. Pign. & Hyp. Tacit. Voet. Comment. Ibid. N.* 28. Now, it is not pretended that *Breholt* was Proprietar of the Ship: And *Arbuckle*'s Order to deliver to him the Materials and Utenſils, in order to refit the Ship, cannot import a Mandate to him for repairing her, or contracting with other Perſons about the Reparation upon *Arbuckle*'s Account. Beſides, the Admiral's Decreet doth not proceed upon any ſuch Mandate, but upon the Suſpender's being Intrometter with the Ship that was hypothecated to the Chargers for their Expences and Reparations.

Replyed for the Chargers. 1. The legal Hypotheck in this Caſe, may be pleaded from the Reaſon of the *L.* 6. *ff. Qui potior Inpig. ſalvam enim fecit totius Pignoris Cauſam*: And from the parallel uncontroverted Hypotheck given to the Repairers of Houſes. Tho' the *Roman* Law be not expreſs for us, the Cuſtom of *Scotland* and other trading Nations in *Europe* is. So by the *Scottiſh* Law, Mariners have a tacit Hypotheck upon the Ship and Fraught for their Wages; a Skipper has a tacit Hypotheck upon the Goods for his Fraught. *Voet. Comment. Tit. ff. in Quib. Cauſ. Pign. Tacit. N.* 29. And *Simon Van Lewen* tells us, That *Uſu hodierno illis qui in Navis Refectionem crediderunt, Hypotheca competit in ipſam Navem.* Now, the true Rule to regulate ſuch Matters, is the *Jus Gentium* collected from the concurring Teſtimonies of famed Lawyers. 2. By the Practice of this and other trading Places, if Mony be lent for repairing a Ship affected with an expreſs Hypotheck, as a Bill of Bottomry, or, which is more favourable, if ſhe be repaired by Tradeſmen; the Lender or Repairer is preferred to the Bottomry: If the Borrower or Imployer had but the temporary Direction of the Ship, whether he was truly Owner or not. For if, when a Ship needs to be repaired in Order to a Voyage, Workmen ſhould be obliged to inquire narrowly into the Title of the Overſeer of the Ship (which often is not, and cannot be at Hand) Ships ſhould either fail for Want of Reparation, or the Voyage be defeated thro' their not being timely refitted; which would prove ruinous to Trade and Navigation. Upon which Account, many Privileges are indulged to Ships, and Seafaring Men, *præter Juris communis Regulas.* In this Caſe, beſide the general Ground of Law, there occur many Circumſtances of Conſent to the Repairing, and Ratihabition, that *per ſe* might be pleaded as obligatory upon the Suſpender *Actione Mandati*, or *Exercitoria.*

Duplyed for the Suſpender. The civil Law which allowed no Hypotheck to the Repairer of Ships (and not the Conſtitutions of *Holland* or other Countries) ought to be our Rule, in Caſes where our own Law is ſilent. And as the ſupreme Courts of *Holland, Flanders* and *Savoy*, followed the Diſpoſition of the *Roman Law*, till a contrary Law was made among themſelves in this Matter: So before ſuch an Extenſion of the *Jus Hypothecæ tacitæ* can obtain in *Scotland*, a particular Law for that Effect is neceſſary.

The Lords repelled the Reaſons of Suſpenſion and Reduction, and found the Letters orderly proceeded.

Eodem Die. William Armſtrang *in* Bogſide, *and* John Irving *of* New-orchyard *his Maſter, againſt* John Sharp *of* Hoddam *and his Tenants.*

IN the Proceſs of Spuilzie at the Inſtance of *William Armſtrang* and his Maſter, againſt *Sharp* of *Hoddam* and his Tenants, a conjunct Probation being allowed to both Parties: The Purſuer objected againſt *Archibald Currie* produced as a Witneſs by the Defender, That he could not be received, becauſe both the Purſuer and he had ſworn judicially before the Regality Court of new *Dalgarno*, That each of them dreaded Malice, Illwill, and Bodily Harm of other, whereupon both were put under Lawburrows to keep the Peace.

Anſwered for the Defender. *Archibald Currie*'s being under Lawburrows at the Purſuer's Inſtance, is no Argument that the former bears bodily Malice againſt the latter; Lawburrows being uſed, not out of Malice, but as a legal Remedy to defend againſt Oppreſſion. And ſuppoſe the Witneſs might fear Oppreſſion from the Purſuer, that doth not argue that he hates him: Seing our SAVIOUR commands us to do Good for Evil, and love our Enemies; And if the Witneſs purge himſelf of Malice, it's ſuppoſed that he walks conform to the Goſpel Rule.

The Lords allowed the Witneſs to be received; he purging himſelf by Oath of any Malice towards the Purſuer.

November 20, 1711. ACT *of* SEDERUNT, *for the more ready and eaſie Adminiſtration of Juſtice before the Lords of Council and Seſſion.*

I. THe Lords of Council and Seſſion, for further regulating Bills of Suſpenſion and Advocation, for the Benefit of the Liedges concerned, do Enact and Declare, That the Ordinary upon the Bills may in Time of Seſſion or Vacance, paſs Bills of Suſpenſion in part, as the Reaſons ſhall appear to him, and refuſe them as to the remainder; And that the Letters of Suſpenſion be expede accordingly, for that Part only for which the Bill is paſt.

II. *Item*, Where a Reaſon of Suſpenſion or Advocation, at paſſing, is offered to be proven by the contrary Party's Oath, and the ſaid Party is abſent, ſo that his Oath cannot be got, the Bill, in ſo far as concerns that Reaſon, is to be refuſed, unleſs the Suſpender or Raiſer of the Advocation do give his Oath of Calumny thereupon, in Caſe he be preſent; And if abſent, that ſome Document be produced under his Hand, for inſtructing that the Reaſon is not inſert in the Bill by the Drawer, without a Warrant: Which Document, and other Vouchers preſented with the Bill, ſhall be keeped by the Clerk of the Bills, unleſs delivered up by him to the Party upon Inventory and Receipt; And at or before diſcuſſing the ſame, the ſaid Vouchers or the Inventory and Receipt mentioning them, ſhall be tranſmitted to the Clerk of the *Proceſs*; To the Effect, that if the Reaſons prove calumnious, or the Vouchers be diſproven, the Suſpender or Raiſer of the Advocation may be decerned in Expences, and that any Warrant for tranſmitting ſhall be granted and executed *gratis*

III. *Item*, That a Roll of the Deliverance upon Bills of Suſpenſion or Advocation, be affixed the ſame Day they are given by the Clerks of the Bills, upon ſome publick Place of the Bill-chamber, and there continued for a Week, bearing the Date and Tenor of the Deliverance: And that all the ſaid Deliverances in Time of Seſſion, be intimated in the Outer-houſe the next Seſſion-day, with the other Deliverances and Intimations in Uſe to be made at that Time and Place; Certifying the Clerks of the Bills, That if they failzie, they ſhall be fined by the Ordinary in a Crown or more, *Toties Quoties*, for the Uſe of the Party prejudged, or of the Poor, as the Ordinary ſhall think fit, to be paid by the principal Clerks or Perſon officiating for the Time, or Collector of their Dues, or any of them.

IV. *Item*, As to Advocations, where the Party againſt whom the ſamen are raiſed, ſhall, at diſcuſſing, conſent thereto, the principal Cauſe ſhall be ſummarly diſcuſſed, without any Act againſt the Time to be appointed by the Lord Ordinary for that Effect.

V. *Item*, For preventing Delays in Proceſſes, eſpecially when firſt called in the Outer-houſe, the Advocates are ordained to be ready to debate their Cauſes, as they are called by the Courſe of the Outer-houſe Rolls, and there all Defences are to be proponed, and fairly debated, that the Ordinary may give his Interloquitor thereupon, or make *Aviſandum* therewith, as he ſhall ſee Cauſe: And if the Purſuer be not ready, the Ordinar ſhall delete the Cauſe to be again Inrolled in the ordinary Form; Or if the Defender compearing demand the ſame, Proteſtation ſhall be granted for not inſiſting: Which Proteſtation ſhall not be recalled but upon immediate Payment, at leaſt of ten Shillings *Sterling*, or more, as ſhall be modified by the Ordinary, to be given to other Party: And if the Defender be not ready, an Act or Decreet, or other Interlocutor, ſhall paſs as the Purſuer craves, and the Ordinary ſees juſt, and which are not to be ſtopped or recalled, but upon Payment in all Points as aforeſaid. And it is alſo ordained, That in any Cauſe called in the Inner-houſe, if the Purſuer be not ready, the Lords ſhall, according as the Defender deſires, and they ſee juſt, either delete the ſame to be again Inroll'd in common Form, or ſhall proceed to the Cauſe as accords; And againſt what they determine when they ſo proceed, the Purſuer ſhall not afterwards be heard, unleſs he inſtantly pay Twenty Shillings *Sterling*, to be given to the other Party. And if the Defender be not ready, an Act or Decreet, or other Interlocutor ſhall be pronounced, as above-appointed, and ſhall not be recalled, but upon inſtant Payment of Twenty Shillings *Sterling* to be given to the oppoſite Party in like manner.

VI. *Item*, That Twenty four Hours at leaſt before any Cauſe is to be called, whether in the Outer or Inner-houſe, either Party ſhall have lodged in the Clerk's Hands all Writs of which they are Maſters, not formerly given out to the oppoſite Party, or not formerly produced in Proceſs, and the particular Clauſe or Clauſes thereof marked, whereupon they intend to found any Alledgeance. As alſo, all ſuch Writs whereof the Ingiver of Bills or Anſwers to the whole Lords, or of Repreſentations and Anſwers to an Ordinary, are Maſters, ſhall be produced, with the ſaid Bills, Repreſentations and Anſwers, and the particular Clauſes thereof marked, as above, upon which any Alledgeance is founded; With Certification in both the Caſes aforeſaid, That the Alledgeance ſhall not otherways be received, but upon Payment in the Caſe of a Concluded Cauſe, of the Sum mentioned in the Nineteenth Article of the Act of Regulations 1695, and in all other Caſes, of the Sum of Fifteen Shillings *Sterling*. And generally, without Prejudice of the foreſaid Particulars, it is ordained, That the Paſſages in all Writs to be founded on, ſhall be marked, with Certification if they be not, That the Alledgeances founded thereon, ſhall not be regarded, except Payment be inſtantly made of a Mulct to be modified by the Lords, and given to the oppoſite Party.

VII. *Item*, That no Delays may happen by the Writs their not being in Proceſs at Debate or Adviſing, it is Ordained, That the Clerks give up no Writs, but upon Receipt, and that before a Proceſs come to be called, or any Point thereof to be adviſed, they bring back all Writs ſo given up, by Caption, if requiſite, as they will anſwer it to the Lords. And further, it is Ordained, That either Party who ſhall ſo detain ſuch Writs, ſhall be fined at the Arbitrement of the Lords, in Fifteen Shillings *Sterling* at leaſt, *Toties Quoties*.

VIII. *Item*, By the Twenty fourth Article of the ſaid Regulations 1672, It is provided, That the Suſpender's Advocate be not allowed to propone any new Reaſon of Suſpenſion at the Bar, which was neither at firſt libelled, nor thereafter eiked and given out to, and ſeen by the Charger's Advocates, unleſs Conſignation be made, as by the ſaid Act is appointed. Which Article of Regulation, the Lords ordain to be punctually obſerved in Time coming.

IX. *Item*, After an Ordinary hath reported a Cauſe in the Inner-houſe, the Lord Reporter is allowed to come with the Proceſs to the By-bar in the Outer-houſe, and there report the Lords Interlocutor, and apply the ſame, by aſſigning a Day, or decerning; but not to hear any new Point.

X. *Item*, That the Roll of ordinary Actions for the Inner-houſe may not be neglected, by the Appointment of Cauſes to be ſummarly heard, the Lords declare, That after elapſing of the Time which they ſhall think fit to imploy upon adviſing concluded Cauſes in the Beginning of the Seſſion, there ſhall be two Days in every Week at leaſt, *Viz. Tueſday* and *Wedneſday*, appointed and affixed for hearing ordinary Actions in the Inner-houſe Roll, and that preciſely at Eleven of the Clock at furtheſt: The Lords in the Inner-houſe will for that Effect put a Stop to all Bills and Anſwers, excepting the laſt five *Sederunt* Days of the Seſſion, both as to ordinary Actions and Bills.

XI. *Item*, Where Cauſes are appointed to be ſummarly heard in Preſence, It is ordained, That there be a Deliverance of the Lords ſigned by the Preſident thereupon, and that the Clerk of the Proceſs give a Copy thereof ſubſcribed by himſelf, to any of the Parties demanding the ſame, without Fee or Reward, the ſame being always without Prejudice of the Clerks Dues, appointed by the 8th Article of Regulations 1696, for Hearing in Preſence; And that any of the Parties producing the ſaid Copy to the Keeper of the Inner-houſe Rolls, at the ordinary Time and Place for inrolling of Cauſes, the ſaid Keeper in the Preſence and View of the Party preſenting him the Copy aforeſaid, and prior to any other Cauſes whereanent he has not, or ſhows not a Copy of a Deliverance for a ſummary Hearing already in his Hands, ſhall Inrol the ſaid Cauſe in a Book to be keeped by him for that Purpoſe only, for which Inrollment, he ſhall not exact nor receive more than the Sum of half a Crown, and that the Cauſes inſerted each Day of Inrollment in the ſaid Book be Numbred on the Margin thus, 1, 2, 3, 4, *&c.* And that the Keeper immediately, and cloſe beneath each Day's Inrollment, ſubjoin a Note in Words at Length and not in Figures, bearing the Date of the Inrollment, and the Number of Cauſes ſo Inrolled, and that he carry the ſaid Book, with the Books of Inrollment for the Outer-houſe to the Ordinary there for the Time, to be ſigned and reported by the Ordinary, and under the ſame Certification to the Keeper of the Rolls as to the whole Premiſſes concerning him, as is appointed by an Act of *Sederunt*, dated the 27th *December* 1709, and Intituled, *Act anent the Outer-houſe Rolls.* And it is further Ordained, That out of the ſaid Book a Roll ſhall be Weekly made up and affixed upon the Wall, with the other Rolls for the Inner-houſe, to the Effect the Cauſes therein contained, may be called and diſcuſſed, according to to the ſaid Rolls, in the ſame Manner as is appointed by the Act of *Sederunt* of the 11th of *November* 1708, for the Side-bar-roll of the Outer-houſe.

XII. *Item*, It is Ordained, That the Clerks Dues for prepared States modified by the Ordinary on concluded Cauſes, be paid immediately after preparing, and that the Keeper of the Rolls, before Inrolling any ſuch Cauſe, ſee the Clerks Collector's Receipt of the ſaid Dues Marked on the Proceſs, with Certification to the Party who ſhall not have paid his half thereof before calling of the Cauſe, that he ſhall be made to pay to the other Party the whole Sum modified.

XIII. *Item*, That conform to the Regulation 1672, the Lords when there is Occaſion for it, will meet in the Afternoon to receive Reports, and adviſe Bills and Anſwers which do not require the *Preſence* of Advocates.

XIV. *Item*, The Lords Declare, That whereever *Parties* are found to be Calumnious in their Alledgeances, either in ordinary Actions or Suſpenſions, they will modifie large Expences to the *Party* leſed.

XV. *Item*, For reſtricting the Number of reclaiming Bills, The Lords Diſcharge the Clerks to receive more reclaiming Bills againſt any Interlocutor in

Preſence than Two, and that they receive not the ſecond, but upon the Ingiver's conſigning of Twenty Shillings *Sterling* to be delivcred to the other Party in Caſe of Refuſal, but otherways to be given back to the Petitioner. And further the Lords Declare, That they will not for hereafter, receive or hear any third reclaiming Bill, unleſs upon new Matter of Fact, and ſufficient Evidence given for Verifying what is recently come to the Party's Knowledge.

XVI, *Item*, For further preventing of unneceſſary Delays in Proceſſes, The Lords appoint all dilatory Defences to be proponed at one Time, and theſe being diſcuſſed, all peremptory Defences or other Alledgeances to be proponed, at leaſt before any Report or Application to the Lords in Preſence, with Certification, That any Alledgeance not proponed timeouſly, as ſaid is, ſhall not be heard thereafter, unleſs it be come recently to Knowledge, or to the Proponer's Obſervation; And that in either of theſe Caſes, he pay a Mulct to the other Party for his Expences to be modified, as there ſhall be Cauſe: And in all Caſes where it is pretended, That an Alledgeance is but recently come to Obſervation, the ſame ſhall be inſtructed by Oath, and no otherways.

XVII. *Item*, That where a Party propones an Alledgeance to be inſtructed *Scripto*, or where Writs are to be uſed *in Modum Probationis*, if either the Purſuer or Defender be Maſter of the ſaid Writs, they are appointed inſtantly to produce them, with Certification, That if they occaſion the aſſigning of Terms, or the granting of Diligence for Recovering of them, the Party who is Maſter thereof, and who occaſions the ſame, ſhall, in that Caſe, pay ſuch a Mulct as the Ordinary, before whom in the Courſe of the Proceſs the ſame is made appear, ſhall modifie, or as the whole Lords ſhall modifie in Preſence, when the Caſe happens in the Inner-houſe, the ſame not being under Fourty Shillings *Sterling* for the Uſe of the other Party. And generally it is ordained, That all Mulcts Sentenced in Proceſſes be Marked by the Clerk in the Minutes for a Record thereof.

November 22, 1711. ACT *of* SEDERUNT *for the more ſpeedy diſcuſſing of Compts and Reckonings.*

I. THE Lords of Council and Seſſion, for the more ſpeedy Diſpatch of Proceſſes of Compt and Reckoning, Enact and Declare, That the ſaid Proceſſes ſhall be Inrolled in the Regulation Roll.

II. *Item*, When any ſuch Proceſs is called before the Ordinary, or when a Proceſs originally of another Kind reſolves into a Compt and Reckoning; the Ordinary is to aſſign a Day to the Accomptant, in Caſe there be Compearance for him, betwixt and which he is to give in to the Clerk of the Proceſs a Charge againſt himſelf of the whole Subject, to be compted for with Certification, That if he ſhall neglect or refuſe to charge himſelf, he ſhall be holden as confeſt upon the Charge to be given in by the Purſuer, the ſaid Purſuer always giving his Oath of Calumny thereupon: And where the Defender gives in a Charge, if any Part thereof ſhall be found to be *doloſe* omitted, or that the Defender being directly and principally liable to compt, and the actual Intrometter ſhall conceal any Part; in either of theſe Caſes they ſhall be decerned in the Double of what ſhall be found to be ſo omitted, it being always free to the other Party, to make up and add to the Charge as he ſhall ſee Cauſe.

III. *Item*, The Defender, or Accomptant, ſhall with his Charge againſt the Day appointed, give in a Copy of his Diſcharge, both Charge and Diſcharge to be ſigned by the Party, if preſent, or by his Procurator, if abſent, with the Vouchers and whole Inſtructions he is Maſter of, and in the ſaid Copy ſhall condeſcend upon the Articles inſtructed and their Vouchers: As alſo, mark the Articles not inſtructed, that the ſame may be conſidered by the Auditor, in Order to aſſign a Term for inſtructing them, as he ſhall find juſt, certifying the Defender, That he ſhall not thereafter be heard upon any new Article of Diſcharge, unleſs it be made appear that it recently came to his Knowledge, and then, if *in Culpa*, that he pay a Mulct to the other Party for his Expence of the Delay, to be modified by the Ordinary as he ſhall ſee Cauſe, it being always free to the other Party, to object againſt the Diſcharge, as accords.

IV. *Item*, That the Ordinary before whom the Proceſs is firſt called, or is turned to a Compt and Reckoning, ſhall at the ſame Time, that he aſſigns a Day to the Defender or Accomptant to produce, as aforeſaid, name the Lord who, in Courſe is to be Ordinary to the next Compt and Reckoning, to be Auditor thereof; and that the Dues formerly given with the Bill in Preſence, craving an Ordinary, be paid to the Clerks Collector, and marked by him on the Proceſs.

V. *Item*, After the Charge and Diſcharge with the Inſtructions are produced, the Ordinary (according to former Practice) is hereby authorized to appoint one or moe Advocates, who are not imployed in the Cauſe, or other proper Perſons, Men of Integrity, Judgment and Experience, to conſider the whole Accompts with the Writs and Inſtructions produced, and thereupon to ſtate the Points in Controverſie, and to prepare and adjuſt the Minutes for the Ordinary to give his Interlocutor upon the whole, and that with Reſpect to ſuch Proceſſes already depending, as well as theſe to be raiſed; and the ſaid Advocates, or other Perſons are hereby required to be diligent and exact in their ſaid Work, and are alſo authorized and impowered to appoint Days to the Parties and their Lawyers with the Clerk of Proceſs, to come and point out to them their ſeveral Alledgeances; and when the State is ſo prepared, the ſame ſhall be marked by the ſaid Advocates or other Perſons, and their marking dated, and immediately thereafter lodged in the Clerk's Hands, there to ly for the Space of Eight Days, to be ſeen by all concerned, without any Fee or Reward; after which Time no Objection ſhall be received againſt the Fact ſo ſtated, but upon Payment of Twenty Shillings *Sterling* to the other Party that's delayed thereby, and with Power to the Ordinary to increaſe the Mulct from Circumſtances: And if any new Point ſhall occur, the Ordinary may diſcuſs or remit the ſame, to be conſidered and reported by the ſaid Advocates or others, as above: Which Advocates, or others foreſaid, ſhall have ſuch Allowances from both or either of the Parties for their Pains and Attendance, as the Lord Ordinary ſhall modifie and ordain.

VI. *Item*, For the Benefit of Creditors, that they may be acquainted with the State of Accompts of Factors upon Eſtates ſequeſtrate: The Lords do Enact and Declare, That all ſuch Factors for hereafter, ſhall within Six Months after the extracting of the Factory, make up a Rental of the Eſtate, and of bygone Reſts, to be reported to the Lords, and lodged in the Hands of the Clerk to the Proceſs, there to ly, and be made forthcoming to all Parties having Intereſt, without Fee or Reward, that accordingly the Factor may be charged thereby.

VII. *Item*, When any Alteration happens in the Rentals, by giving down any Part of the Rent (which is always to be done according to the Rules of Law) or when it falls out that the Rental is increaſed or further diſcovered; then the Alteration and what is further diſcovered, ſhall within three Months thereafter be reported and put in the Clerks Hands, in Manner and to the Ends above-mentioned.

VIII. *Item*, The ſaid Factor ſhall once every Year give in a Scheme of his Accompts, Charge and Diſcharge to the Clerk of the Proceſs; ſo that the Creditors may have Occaſion yearly to ſee them, and provide themſelves with proper Means of checking them; Certifying ſuch Factors, That if they fail in any Part of the Premiſſes, it ſhall be a Ground of removing them: And further, If the Rental made up, and reported by them ſhall be found deficient and concealed, or any Addition thereof ſhall be omitted to be eiked in Manner above-mentioned, they ſhall in that Caſe be decerned in the Double of what is ſo omitted; and if they ſhall neglect yearly to give in a Scheme of their Accompts in Manner foreſaid, they ſhall be liable in ſuch a Mulct as the Lords ſhall be pleaſed to modifie, not being under an Half Year's Salary.

IX. *Item*, Such Factors as are already appointed, are hereby ordained within Six Months after the Date of this Act, to give in Rentals, and within a Year after its Date, Schemes of their Accompts of Charge and Diſcharge ſince their Entry in Manner foreſaid, and to renew them every Year thereafter, under the Certification and Penalties above-mentioned.

X. *Item*, That all Bonds of Cautionry for the ſaid Factors for hereafter, ſhall contain an Obligement for the Factors their Obſervance of the Rules and Inſtructions appointed them by the Lords in this and former Acts, and otherways according to Law.

Eodem Die. Elizabeth Dickſon *Spouſe to* Patrick Heriot *Merchant in* Fiſherraw, *againſt Miſtreſs* Iſobel Logan *Relict of Mr.* John Dickſon.

IN the Proceſs at the Inſtance of *Elizabeth Dickſon*, as Executrix decerne to Mr. *John Dickſon* her Brother, and having a Licence to purſue, againſ *Iſobel Logan* his Relict, for exhibiting ſome of her Husband's moveable Effects in her Cuſtody, that the Purſuer might make up Inventory and confirm.

Alledged for the Defender. She cannot be obliged to exhibite and delive the Goods, becauſe ſhe hath a general Aſſignation from the Defunct to al moveable Goods and Gear that ſhould belong to him the Time of his Deceaſe which, tho' not good, without Confirmation, to recover the Subject from a Third Party by Way of Action, is good for retaining what the Aſſigny hath in her proper Cuſtody. As in an Action upon the paſſive Titles; it's a relevant Defence, if the Goods be in the Hands of a Third Party, that the Eſchea is gifted and declared: But it ſufficeth for the Defender, if they be in his own Cuſtody, to ſay, That the Eſcheat is gifted, tho' not declared; in which Caſe Poſſeſſion of the Goods ſupplies the Want of a Declarator, as it doth here the Neceſſity of a Confirmation. Nor can the Purſuer obtrude to th Defender the Want of Confirmation, ſeing the former cannot have Decree againſt the latter until ſhe her ſelf confirm the ſame Goods as Executrix fo the Intereſt of all Parties: And both cannot confirm the ſame Subject. Now tho' the Purſuer had confirmed and were in Poſſeſſion, the Defender woul oblige her to reſtore them; and *fruſtra petitur quod mox eſt reſtituendum* which is a good Defence in all Caſes except a Spuilzie.

Replyed for the Purſuer. The *Act 26. Seſſ. 2. Parl. W. & M.* declaring ſpecial Aſſignations not intimated or made publick in the Cedent's Lifetim to be good and valid Rights to poſſeſs, purſue or defend without Confirmatio implies that a general Aſſignation can be no Title to defend or purſue: *Caſu omiſſus* being held *pro omiſſo*. And if a general Aſſignation were a ſufficien Right to retain, the Defunct's Means and Eſtate might be huddled up to th Prejudice of Creditors.

The Lords found, That the Defender by Virtue of the general Aſſignatio had Right to retain the Moveables that were in her own Cuſtody without Neceſſity of a Confirmation: The Purſuer being only Executrix decerned with a Licence to purſue and not having confirmed the Goods.

Novembe

November 23, 1711. ACT *of* SEDERUNT *Anent Bankrupts, the Ranking of their Creditors, and Sale of their Eſtates.*

THE Lords of Council and Seſſion, for the more ſpeedy Diſpatch of Proceſſes for Sale of Bankrupts Eſtates, and Ranking of their Creditors, do, according to the Power given to them by Laws and Acts of Parliament, for ſetting down Orders and Rules for the Adminiſtration of Juſtice, and the laudable Practice of their Predeceſſors, in Purſuance thereof, Enact and Declare, That Proceſſes of Sale of Bankrupts Lands and Eſtates may be raiſed and carried on, and Decreet thereon expede in Manner following, *Viz.*

I. That the Raiſer of a Proceſs of Sale and Ranking in the Caſe of Bankrupt, cauſe cite the Debtor and all his real Creditors, who are in the known actual Poſſeſſion of his Eſtate, by labouring or uplifting Rents in the ordinary Form of Law, and the Bankrupt's other Creditors, and all others, having or pretending to have Intereſt by an edictal Citation upon a Warrant to be contained in the Summons of Sale for that Effect, upon Sixty and Fifteen Days for firſt and ſecond Diets, at the Market Croſs of *Edinburgh*, and Peer and Shore of *Leith*; which edictal Citation muſt be alſo execute to the ſame Day at the Pariſh Church Doors where the Lands ly, after Divine Service, upon Twenty one and Six Days before the ſaid Days of Compearance. The Executions of which edictal Citations at the Market Croſs, Peer and Shore of *Leith*, and Church Doors *reſpective* above-mentioned, are to be duly returned nd recorded in a particular Regiſter at *Edinburgh*, to be kept by the principal Clerks of Seſſion in Books apart, betwixt and the laſt Day to which the Citations are given; with Certification, That otherways they ſhall make no Faith, nor Proceſs be ſuſtained thereon: And it is hereby provided, That no more ſhall be exacted or received for Regiſtration of each Execution, and delivering back the Principal to the Party for Dues, or under the Pretence of Drink-mony, or otherways, than the Sum of Twelve Shillings *Scots*: And the ſaid Clerks are hereby appointed to make exact Minute Books of the ſaid Regiſter, mentioning the Names of the Purſuer and Debtor, and the Dates of the Executions and Regiſtrations; which Minute Book and Regiſter ſhall be made patent to the Inſpection of the whole Liedges without Fee or Reward: And in Caſe any Extract of the ſaid Executions ſhall be deſired, the Party requiring the ſame ſhall pay for the ſaid Extracts the ſame Dues that are payed for Extracts of probative Writs.

II. *Item*, For the more eaſie expediting Diligence by Adjudication, and preventing the great Inconveniency that ariſes betwixt Creditors and their Truſtees, in the Caſes where Aſſignations are made of Debts in Order to adjudge for the Cedent's Behoof, it is provided, That when Sequeſtration happens to be made, and a Factor appointed for the Bankrupt's Eſtate, all Creditors are allowed to give in their Bonds, or Extracts thereof, or other Inſtructions of Debt in the Clerk to the Proceſs his Hands, at any Time within Fourty Days after the making of the Sequeſtration, and that with this Declaration to be taken in, in the Proceſs, and ſigned by the Creditor, that he gives in his Bonds, or other Documents of his Debt, mentioning their Dates, and the Sums reſting, to the Effect the Factor appointed for the Debtor's Eſtate may raiſe and obtain Adjudication thereon to his Behoof; and upon this Ingiving and Declaration, the Factor being thereof certiorate, is appointed to raiſe and execute Summons, and obtain Decreet of Adjudication in his own Name to the Behoof foreſaid, he always libelling upon the foreſaid Declaration: And it is hereby declared, That the ſaid Adjudication ſhall be carried on by the Factor at the Expence of the Eſtate, to be allowed him at compting, but thereafter at the Event of the Ranking and Sale, to be proportioned amongſt the Creditors, for whoſe Behoof the ſaid Adjudication is led, according to their ſeveral Shares and Intereſts in the Price, and failing thereof, to be repeated from them by the preferable Creditors, to whom the Rents intrometted with by the Factor ſhall be found to belong: And it is further provided, That ſuch Creditors as ſhall not give in their Bonds, and other Inſtructions of Debt within the ſaid Fourty Days, or at leaſt before raiſing of the Summons for adjudging, as ſaid is, That the Factor ſhall at their Deſire adjudge a ſecond Time in his own Name for their Behoof in Manner above-mentioned, but upon the Creditor's own Expences, and ſo reſerving for all Creditors to adjudge from Time to Time in their own Name, or in the Factor's Name, as they ſhall pleaſe, until the Ranking be concluded. Declaring always, That all the Creditors for whom Adjudication is led in the Factor's Name, as ſaid is, ſhall have the ſame Benefit thereof, and by Virtue of an Extract taken of the ſame, as if they had adjudged by themſelves on their reſpective Grounds of Debt, or were retroceſſed by the Factor; and it ſhall be leiſom to every Creditor for his own Security, to extract that Particle of the Decreet which concerns his own Debt, upon Payment of the ordinary Dues, without any Neceſſity of extracting the whole.

III. *Item*, That after a Proceſs of Sale is raiſed, the Purſuer ſhall have Diligence granted him againſt all Havers of the Writs of the Debtor and Bankrupt's Eſtate and Lands, to the Effect the ſame may be timeouſly exhibited in the Clerks Hands.

IV. *Item*, If the Purſuer of a Proceſs of Sale and Ranking ſhall, during the Dependence die, or forbear to inſiſt, or if his Title and Intereſt ſhall happen to be ſatisfied or extinguiſhed, the Factor, if any be, or otherways any other real Creditor may, upon ſpecial Warrant from the Lords, take up the Proceſs where it left, and carry it on to its final Iſſue, for the common Behoof of the whole Creditors.

V. *Item*, If the Debtor, or any of the Creditors, Defenders, compearin and producing, ſhall happen to die, the Proceſs thereupon ſhall ſtop no longe than till their apparent Heir be cited to compear upon a Diligence, withou any Neceſſity of waiting the Year of Deliberation, or transferring the Proceſs *paſſive* againſt them; ſo that if no Perſon appear in the Place of the commo Debtor or Creditor deceaſed, the Lords declare they will proceed in the Proceſ where it laſt left, and to the diſcuſſing thereof in ſuch Manner, as when Partie alive do not compear.

VI. *Item*, The Proceſs of Sale and Ranking being ſeen and returned, an called in the Regulation Roll, the Ordinary before whom it is called, ſhall affig a Day betwixt and which the Creditors ſhall produce their Rights an Intereſts, and at the ſame Time name the Lord who in Courſe of the Book is to be Ordinar to the next Ranking, before whom their ſeveral Rights an Intereſts are to be Ranked, the Dues formerly given with the Bill in Preſenc craving an Ordinary, being always payed to the Clerks Collector, and marke by him on the Proceſs: And if any of the Creditors ſhall fail to produce, a leaſt within Eight Days of the Day affixt, they ſhall not be allowed to produc thereafter without paying a certain pecuniary Mulct to be modified by th Ordinary, not under Twenty Shillings *Sterling*, and to be increaſed accordin to the Delay the Producer is guilty of, and this Mulct to be payed in to th Factor or Clerk, towards the defraying of the Charge of the Proceſs; and a to theſe Creditors who ſhall produce their Intereſts, the Ordinar ſhall prefix Time for their deponing on the Verity of their Debts, wherein if they fai they ſhall not be admitted to Depone thereafter, but upon Payment of a Mulc not under the foreſaid Sum of Twenty Shillings, to be increaſed and applied a above.

VII. *Item*, The Creditors and others having produced their Intereſts, the Ordinar is hereby authorized to appoint one or more Advocates, who are not imployed in the Cauſe, and Men of Integrity, Judgment, and Experience, to conſider the whole Production, and make a State of the Intereſts produced, and of the Points of Controverſie, and adjuſt the Minutes for the Ordinary, to give his Interloquitor upon the whole, and that with Reſpect to the Proceſſes already depending, as well as theſe to be raiſed: And the ſaid Advocates are hereby required to be diligent and exact in their Work, and are alſo impowered to appoint Days to the Creditors and their Procurators, with the Clerk of the Proceſs, to come and point out to them their reſpective Intereſts, with Certification if they fail, their Production ſhall not be regarded: And when the State is prepared, the ſame ſhall be marked by the ſaid Advocates, and dated, and immediately thereafter lodged in the Clerk's Hands, there to ly for the Space of Eight Days, to be ſeen by all concerned without Fee or Reward; after which Time no Objection ſhall be received againſt the Fact ſo ſtated, but upon Payment of Four Crowns in to the Factor or Clerk for the Uſe foreſaid, and with Power to the Ordinary to augment the Mulct if he ſee Cauſe: But if any new Point ſhall occur, the Ordinary may either inſtantly diſcuſs, or remit the ſame to be reconſidered by the Advocates as above; and theſe Advocates ſhall have ſuch Allowance for their Pains and Attendance out of the Bankrupt's Eſtate, as the Lord Ordinary ſhall modifie.

VIII. *Item*, If any Perſon lawfully ſummoned, either in common Form or Edictally, in Manner above-mentioned, ſuffer the Decreet of Ranking to go out, without producing and competing upon his Intereſt, the Decreet and Sale ſhall not the leſs ſtand good, and the Purchaſer be bound to pay conform thereto, and the Perſon failing ſhall have no other Remedy, but to purſue the Receivers of the Price, and the Heirs, for Repetition, as accords.

IX. *Item*, It is hereby declared, That the Expence of raiſing and carrying on all Proceſſes of Sale and Ranking, and of extracting Decreets thereon, ſhall upon Application be advanced out of the Rents of the Bankrupt's Eſtate as formerly; but with this Proviſion, That an Accompt of the whole Expence be produced before the Ordinary of the Sale, to be by him conſidered and liquidate, and ſtated upon the Price, at ſo much upon the Hundred Pound, That it may be proportioned amongſt the Creditors, according to their ſeveral Shares; Which Expence ſhall immediately after the Sale be payed in by the Purchaſer to the Factor, if any be, or otherways to the Clerk of the Proceſs, to be compted for by them to the Creditors, or to the Purſuer of the Sale and Ranking, in Caſe he advanced the ſame; and the ſaid Expence ſhall be allowed to the Purchaſer, out of the firſt End of the Price, or retained by him off the Creditors having Right as accords.

Eodem Die. Alexander Murray *of* Burghtoun, *againſt* William M'guffog *of* Ruſcoe.

R*ichard Murray* of *Burghtoun*, Debtor to the deceas'd *William M'guffog* of *Ruſcoe*, in Four thouſand Merks, by an heretable Bond dated *in Anno* 1675, did, by a Tack of the ſame Date narrating the Bond, ſet to him the Lands of *Murraytoun* and *Cullindoch*, for Payment of Two hundred and fourty Merks, two Wedders and two Stone of Butter yearly: With this Proviſion, *That the Tackſman ſhould retain in his own Hands of the foreſaid Tackduty, in ſo far as will compenſe and ſatisfie his Annualrents yearly and termly during the not Payment of the principal Sum. Alexander Murray* now of *Burghtoun*, Heir to *Richard* his Grandfather, purſued a Reduction and Declarator of Extinction of the heretable Bond, by *Ruſcoe* the Defender and his Predeceſſors Poſſeſſion of the Lands ſeveral Years without paying any Tackduty: And contended, That the Prices of the Wedders and Butter, liquidated in this Proceſs, ought to be imputed in Payment and Satiſfaction of *Ruſcoe*'s principal Sum, at the Terms they fell due by the Tack.

Anſwered for the Defender. *Species* or *Corpora* cannot compenſate Mony, till once they be liquidated, and then the Compenſation takes Place only from the Date of the Liquidation, *December* 4, 1675, *Watſon* againſt *Cuningham*: Conſequently the Butter and Wedders can compenſate and extinguiſh the Defender's principal Sum only from the Time of the Liquidation.

Replyed for the Purſuer. Where a Creditor intromets with Goods and Effects of his Debtor, upon ſome extrinſick Cauſe, the Rules of Compenſation and Liquidation ought to take Place: But it's otherways in the Caſe of Intromiſſion with a Subject given in Security and Payment, as here, where the Tackſman was juſt in the Caſe of an improper Wadſetter, whoſe Intromiſſion with the Rents doth ſtill impute from the Time they are upliſted; and in Effect, this Extinction doth not ſo much ariſe upon the Ground of Compenſation, as of Payment.

Duplyed for the Purſuer. 'Tis frivolous to fancy *Ruſcoe* in the Caſe of an improper Wadſetter, for he never entred to Poſſeſſion by Virtue of the heretable Bond, (which was a tranſcendent heretable Right upon *Burghtoun*'s whole Eſtate) But only by Virtue of his Tack. By which he had indeed Power to retain the Tackduty, in ſo far as would ſatisfie his Annualrents, but not for Payment of his principal Sum.

The Lords found, That the Compenſation upon the Butter and Wedders, takes Effect only from the Time of the Liquidation.

November 27, 1711. Rodger Gordon *of* Troquhen, *againſt* John M^{c}ghie *of* Balmaghie.

R*odger Gordon* of *Troquhen*, and the deceas'd *Alexander M^{c}ghie* of *Balmaghie*, having granted Bond to Mr. *John Birnie* for 1000 Merks Principal bearing Annualrent: *Troquhen* purſued *John M^{c}ghie* now of *Balmagie*, as repreſenting *Alexander M^{c}ghie* his Grandfather, for Payment of the equal Half of ſome Years Annualrent of the Bond, which the Purſuer alledged he had paid to *Birnie* the Creditor, conform to ſeveral Diſcharges produced, whereof ſome bear Receipt of Annualrents by Mr. *John Birnie*, *From* Troquhen *for himſelf, and in Name and Behalf of* Balmaghie; And ſome bear only Receipt of the Annualrents *from* Troquhen, without the Addition of *for himſelf, and in Name and Behalf of* Balmaghie.

Anſwered for the Defender. The Purſuer can only aſk Repayment from the Defender of Annualrents whereof the Receipts bear the Mony received from *Troquhen*: For Annualrents paid upon Diſcharges mentioning Receipt of the Mony from the Purſuer for himſelf, and in Name and Behalf aforeſaid, are preſumed to have been advanced by both equally; and *Troquhen* has been only the Carrier.

Replyed for the Purſuer. The Tenor of the Diſcharges mentioning the Mony to be received from the Purſuer, prove it was his Mony, unleſs redargued: For the Addition, *In Name and Behalf of* Balmaghie *and* Troquhen, ſheweth only, That the Debt was totally extinguiſhed as to the Creditor. And had the Half of the Mony been *Balmaghie*'s, the Diſcharge would not have born ſimply, *Received from Troquhen*, but *received from Troquhen and Balmaghie*.

The Lords found, That the Defender ought not to refound to the Purſuer the Half of the Annualrents, whereof the Diſcharges bear Receipt of the Mony from *Troquhen*, for himſelf and in Name and Behalf of *Balmaghie*; but only that he ſhould refound to him the Half of thoſe Annualrents paid upon Receipt of the Mony ſimply from *Troquhen*, without the foreſaid Addition of *for himſelf, and in Name and Behalf of Balmaghie*.

November 30, 1711. *The Lady* Semple, *againſt the Lord* Semple *and his Tenants.*

IN the Proceſs of general and ſpecial Declarator of ſingle and liferent Eſcheat, at my Lady *Semple*'s Inſtance, againſt my Lord *Semple* and his Tenants: The Lords repelled this Objection made againſt the Denunciation whereupon the Eſcheat fell, that it did not bear that a Copy was affixed and left upon the Market Croſs, and ſuſtained the Denunciation notwithſtanding that Omiſſion.

Eodem Die. *The Creditors of* Spot *competing.*

IN the Ranking of the Creditors of *Archibald Murray* of *Spot*, the Lords repelled this Objection againſt a printed Bond of Cautionry granted by *Archibald Murray* in the Year 1697, for *Kenneth Urquhart* then Collector at *Aitoun*, to the Earl of *Glaſgow* and other Tackſmen of the Cuſtoms; that it wanted and could not have the Writer's Name and Deſignation. Seing the Filler up of the Blanks, *Viz.* The Debtor's Name and Deſignation, Date and Witneſſes, was fully deſigned, and that is ſufficient in printed Bonds, which Cuſtom hath made legal with us in the publick Offices of Cuſtoms and Exciſe, and Manufactures; whoſe Affairs are much expedited by having the common Stile of their Bonds lying by them, and nothing to do but fill up the eſſential Parts as Occaſion offers. Albeit it was alledged for the Laird of *Keir* and other Creditors, That Fraud (which the Acts of Parliament deſigned to obviate) may be committed in printed Securities, as well as written ones. And there is no imaginable Reaſon, why a written Security without the Writer's Name is not as good, as a printed one without it, or a printed Bond without the Name of the Drawer, as bad as a written one without it. Since both do alike fruſtrate the Deſign of the Law, *Viz.* To aſcertain the Writer or Drawer of the Security.

December 1, 1711. *Mr.* Francis Wauchop *of* Cakemuir *Advocate, againſt* William Hamilton *of* Fallahall *and his Tutors.*

IN the Proceſs of Reduction and Declarator at the Inſtance of *Cakemuir*, againſt *Fallahall*, for ratifying a Decreet-arbitral pronounced in *Anno* 1608, determining the Marches betwixt the Lands of *Cakemuir* and *Falla*, upon this Ground, That there was a literal Error in the Decreet, *Northweſt* being written in Place of *Northeaſt*: The Lords found, That the Purſuer's uſing and founding on that Decreet *per Modum Tituli* in Actions at his Inſtance, and againſt him, was no Homologation of the Marches crav'd to be rectify'd. Becauſe, Homologation doth *regulariter* infer a Conſent to the Deed only as it is in *Rei Veritate*; and the uſing a fitted Accompt, doth not infer Homologation of Errors *in Calculo*: Seing *nihil tam Conſenſui contrarium eſt quam Error. Plus valet quod agitur, quam quod ſimulate concipitur.* And the Truth which is inſtructed by the Tenor of the Writ, is not impaired by the Error, but prevails over it: *Actorum Verba emendare Tenore Sententiæ perſeverante, non* *eſt prohibitum, L. 46. ff. de Re Judic. Veritas Rerum Erroribus geſtarum non vitiatur, L. 6. §. 1. ff. de Officio Præſid.* Beſides, the Purſuer founded upon the Decreet by Way of Action and Defence to ſupport his Claim, according as he now pretended it ſhould have been worded: And *Actus agentium non operantur ultra eorum Intentionem.*

December 6, 1711. William King *Merchant in* Glaſgow, *againſt* Robert Eſdale *Merchant in* Dumfreis.

IN the Suſpenſion of a Charge at the Inſtance of *William King*, againſt *Robert Eſdale*, for Payment of 25 Pound *Sterling* and Intereſt thereof, which *Robert Eſdale*, by his Note *December* 2, 1709, promiſed to pay upon the firſt of *May* then next to *William King* or Order for Value received: The Lords found, That the *Engliſh* Statute of 3 & 4 *A. c.* 9. giving the like Remedy upon promiſſory Notes, as is now uſed upon Bills of Exchange, for the Space of Three Years, tho' made perpetual by the 7 *A. c.* 25. An Act of the *Britiſh* Parliament ſince the Union, doth not extend to promiſſory Notes in *Scotland*. Becauſe, the *Britiſh* Statute doth only make the former, which before was a temporary Law of *England*, to be a perpetual Law thereof. And the *Britiſh* Statute, being but an Acceſſory, can go no farther than the Statute of *England* it was calculated to continue.

December 12, 1711. *Sir* John Erskin *of* Alva, *againſt* William Thomſon *Merchant in* Leith.

WIlliam Thomſon having accepted a Bill drawn upon him by *Alexander Colvil* of *Kincardin* in theſe Terms, *William Thomſon pay to me or my Order againſt the Term of* Whitſunday, Lammas *and* Martinmas *next to come* 120 *Pound Scots, and this without Receipt ſhall be a ſufficient Diſcharge to you of* 25 *Bolls of Beer bought and received by you from me, this being but Prejudice of any Bills formerly accepted by you to me. Alexander Colvil* indorſed this Bill to Sir *John Erskin*, who charged *William Thomſon* for Payment. He ſuſpended upon Payment made to the Indorſer before the Indorſation, conform to his two Receipts: Whereof one bore, *Received from* William Thomſon 100 *Pound in Part of Payment and to Accompt of a greater Sum due by him to me*; And another bore, *Received from* William Thomſon 20 *Pound in Part Payment of a greater Sum reſting by him to me* per *accepted Bills*.

Alledged for the Charger. No Debt of the Indorſer of a Bill can be a Ground of Compenſation, nor his ſeparate Receipts of partial Payment a Ground of Extinction againſt the Poſſeſſor, *Forbes Treatiſe on Bills of Exchange, Pag.* 163. Becauſe of the exorbitant Truſt among Traders, whoſe Buſineſs requires more Diſpatch than to allow them Time to inquire at the Accepters of Bills (who perhaps are at ſome hundreds of Miles diſtant from them) whether they had made any partial Payment to the Creditor ſince their Acceptance. Yea, to ſuſtain partial ſeparate Receipts would open a wide Door to much Fraud: It being eaſie for Perſons to accept Bills, and with the ſame Breath take private Receipts of Payment from the Poſſeſſor, who being Bankrupt might uſe them as Funds of Credit to intangle and cheat honeſt Men. Therefore no prudent Man will pay the whole Sum in a Bill, without getting up the Bill; or pay any Part, without getting the partial Payment marked upon the Back of the Bill, or deſtroying the old Bill, and granting a new one for the Remainder. 2. The Receipts produced do not relate particularly to this Bill, the Tenor whereof bears that there were other Bills granted by the

Suſpender to the Indorſer, to which *in Dubio* the Payments muſt be aſcribed: Eſpecially conſidering that Law preſumes, That the Bill charged on is not paid, from its being ſtill unretired in the Creditor's Hand. And if the partial Payments had been to be imputed in Satisfaction thereof, the laſt of the Receipts would not have born *in Part of Payment of a greater Sum owing to Kincardin*, (as it does) but *in full Payment of the Sum contained in ſuch a Bill*: Since the Sums in the two Receipts make preciſely the total Sum contained in the Bill charged for.

Anſwered for the Suſpender. Tho' Compenſation upon the Indorſer's Debt be not receivable againſt the Poſſeſſor of a Bill, Payment to the Indorſer is good againſt any Poſſeſſor. Becauſe, Payment extinguiſheth *ipſo Jure*: Whereas Compenſation takes no Effect till it be proponed; ſeing *Judex non poteſt vaticinari invicem quid deberi*, as the Lawyers ſay.

The Lords ſeem'd to be of Opinion, That in the general, ſeparate Receipts relative to Bills do not militate againſt ſingular Poſſeſſors. And found, That far leſs in the preſent Caſe could the Receipts founded on by the Suſpender be ſuſtained to extinguiſh the Bill in Queſtion: Seing that Bill mentions other Bills to have been granted by the Suſpender to the Indorſer; And the Receipts do not expreſly relate to the Bill charged on.

December 13, 1711. John Glaſſels *Merchant in* London *and Baillie* Henry Hathorn *his Factor, againſt the Magiſtrates of* Forfar.

IN the ſubſidiary Action at the Inſtance of *John Glaſſels* and his Factor, againſt the Magiſtrates of *Forfar*, for Payment of Fifty two Pound Seven hilling Five Pence *Sterling* contained in a Decreet obtained by the Purſuers gainſt *John Durham* Merchant in *Montroſe*, upon this Ground, That the ſaid *ohn Durham* being incarcerated by a Caption for that Debt, was ſuffered to eſcape out of their Priſon thro' the Fault or Negligence of the Jaylor, for which the Defenders are anſwerable: The Lords found the Defenders not liable *ſubſidiarie* to the Purſuer. Becauſe, the *Act* 32. *Parl.* 1696 impowers Magiſtrates to ſet at Liberty a Priſoner complaining to them, That he is not able to aliment himſelf, and deponing thereupon: If the Creditor refuſe or delay to provide and give Security for the Priſoner's Aliment within Ten Days after Intimation to him for that Effect. And in this Caſe the Creditor delayed to provide and give Security for ſuch Aliment: Albeit he was twice required to do it. And whether the Priſoner obtained his Liberty by a formal Order of the Magiſtrates, or by an Eſcape, *perinde eſt* to the Purſuer, *cui nihil deeſt*, the one Way more than the other.

December 14, 1711. Alexander Swinton *Factor for* Mary Bonnar, *againſt* James Maxwell *of* Leckiebank.

J*Ames Maxwell* Tutor dative to Mr. *John Bonnar* of *Greigſtoun*, a fatuous Perſon, having confirmed Mr. *John* ſole Executor *qua* neareſt of Kin to the deceas'd *William Bonnar* his Brother, and given up in Inventory a Share of his capital Stock in the *African* Company, and bound himſelf as Cautioner for Mr. *John*: He uplifted that Share; and was thereafter removed from his Office by Sentence of the Lords, ſubſtituting *Moncrieff* of *Mornipea* in his Room. *Alexander Swinton*, as Factor for *Mary Bonnar* Mr. *William*'s Siſter, purſued *James Maxwell* for her Part of the Sum confirmed.

Anſwered for the Defender. Mr. *John Bonnar* is principal Executor and liable in the firſt Place to the Purſuer as another neareſt of Kin. But the

Defender cannot be liable as Tutor; becauſe he is exauctorated, unleſs it could be inſtructed that he hath of the Pupil's Effects in his Hand: Nor can he be inſiſted againſt as Cautioner for the Executor, till the Principal be firſt diſcuſs'd.

Replyed for the Purſuer. A fatuous Perſon confirmed Executor is but *Nomine tenus* ſuch, the Tutor being in Effect Executor. For no furious or fatuous Perſon can be bound in Law *niſi ex Re* or *quantum locupletior factus eſt.* And by the civil Law, he could not enter Heir, becauſe incapable to conſent, *L.* 63. *ff. de acquir. vel om. Hæred:* Conſequently cannot be an Executor, who is *Hæres in mobilibus.* Therefore one becoming Cautioner for an Executor he knows to be fatuous, is either not bound at all, or bound *tanquam Reus principalis.* And if ſuch an Executor were, he might be ruined by the Faults of a malverſing Tutor. 2. Tho' an Executor or his Tutor may have *Jus exigendi,* they have not the Property of the Defunct's Goods and Gear. Bonds granted to Executors for the Defunct's Means are affectable by his Creditors, who are preferable to the Creditors of the Executor, *Stair, Inſtit. Pag.* 516. *December* 16 1674, *L. Kilhead contra Irving, November* 24, 1675, *Elies contra Hal* obſerved by *Dirletoun.* The Defunct's Moveables fall not under the Executor's ſingle Eſcheat, in Prejudice of the Defunct's Creditors, Relict, neareſt o Kin, *&c.* but only in ſo far as the Executor's own Share and Intereſt therein can extend, *December* 21, 1671, *Gordon contra L. Drum, Stair, ibid. & Pag.* 413 Whence it is evident, That *Leckiebank,* who uplifted the Defunct's Mony, is liable to the Purſuer one of his neareſt of Kin for her Share, either as having the ſame in his Hand, or as *Dolo deſiens poſſidere.*

Duplyed for the Defender. Furioſus & Pupillus obligantur ubi ex Re Actio venit, L. 46. *de Obli. & Act.* As in the Action *communi dividundo,* or, which is of the ſame Nature, *in Actione Familiæ Herciſcundæ.* Whatever Doub there was by the old *Roman* Law as to the Capacity of furious Perſons to b Heirs, *L.* 63. *ff. de acq. vel om. Hæred:* Yet *Jure novo* they might not onl *adire Hæreditatem,* or *petere Bonorum Poſſeſſionem,* but there lay a Neceſſit upon their Curators to do it for them, *L.* 7. §. 3. *C. de Curat. Furioſi & Prodig Bruneman, ibid.* and the furious Perſons thereby become bound both to *Creditores hæreditarii,* and to the reſt of the Heirs. The fancied Abſurdities tha the Purſuer would infer from ſuch an Obligation, are no other than what al Pupils are expoſed to, whoſe Tutors may dilapidate their Effects: But th Minors leſed may be redreſs'd by Reſtitution, and Action againſt their Tutor and their Cautioners. 2. Whatever Right a Defunct's Creditors may hav in his Effects while extant, in a Competition with the Creditors of the Executor; its plain, That the Executor ſtands principally bound to the Defunct's Creditors or neareſt of Kin, and his Cautioner only *ſubſidiarie.* Where a Executor is *ſub Tutela,* the Tutor acts but *tutorio Nomine,* and can only b purſued by the Defunct's Creditor or neareſt of Kin *eo Nomine,* or *in quantu* he has of the Pupil's Effects. And tho' a neareſt of Kin might *Rei Vindication* recover any Part of an extant *Species* belonging to the Defunct, he hath only a perſonal Action for *Nomina, & Quantitates* againſt the Executor. So tha by Payment of the Mony to the Defender as Tutor, his Pupil became Owne thereof, and it mix'd with his other Effects, for which the Defender wa comptable to his Pupil.

The Lords found, That Mr. *John Bonnar* the fatuous Perſon was principa Executor, and liable in the firſt Place to the Purſuer; and that the Defende could only be purſued *tutorio Nomine,* or as Cautioner for the Executor; an found, That he could not be liable *tutorio Nomine,* now after he is exauctorated, unleſs the Purſuer inſtruct that the Defender hath the Pupil's Effects i his Hand; and he could not be inſiſted againſt as Cautioner for the Executor till he and his preſent Tutor be firſt diſcuſſed.

Eodem

Eodem Die. *The Repreſentatives of* James Smith *late Baillie in* Tranent, *againſt* Robert Semple *of* Fulwood.

IN the Suſpenſion of a Charge of Horning upon a Decreet of the Lords of Seſſion, obtained by *James Smith*, againſt *Robert Semple*: The Lords found, That an Advocate's compearing for *Fulwood* in that Decreet, and making no Defence, but declaring that he had nothing to object againſt the Debt therein-claimed; did not make a Decreet *in Foro*; and therefore reponed the Suſpender againſt that Decreet.

December 19, 1711. James *Duke of* Montroſe, *againſt* M'aula *of* Ardincaple.

IN the Reduction and Declarator at the Inſtance of the Duke of *Montroſe* againſt *Ardincaple*, about the Right to the heretable Bailliarie of the Regality of *Lennox*, the Purſuer being cited upon an incident Diligence as Haver of the Defender's Rights: The Lords found, That the Duke in this Caſe of Exhibition ought to depone in common Form; The Oath demanded in an Exhibition, not being an Oath of Calumny. In the reaſoning of the Lords upon this Point, one ſaid, That the Defender in an Exhibition might be held as confeſt for not appearing, or refuſing to depone; and therefore an Oath in an Exhibition is *Litis Deciſorium quoad* the Deponent. And tho' the Purſuer could not be hindred afterwards to produce the Writ formerly called for in the Exhibition, notwithſtanding the Defender's Oath: Yet he could never oblige the Defendcr to depone again upon his having thereof, nor fix the ſame againſt him by any other Probation. Another of the Lords thought that an Exhibition approached to the Nature of a Probation by Witneſſes: And therefore Peers called therein ſhould depone in common Form, ſeing by the Law of *England* they depone ſo as Witneſſes.

December 20, 1711. *The Earl of* Levin, *againſt the Earl of* Glencairn.

THE deceas'd Earl of *Glencairn* in *Anno* 1690, granted Bond to Mr. *David Scrimzeour* then Keeper of the Signet for 273 lb. *Sterling*, as the Secretarie's Dues for 39 Commiſſions to the Officers of the Regiment, then under the Earl's Command, payable out of the firſt and readieſt of the Pay due to the Regiment; and drew a Precept of the ſame Date with the Bond for the like Sum upon *James Oſwald* and *James Dunlop* General Receivers, payable to Mr. *David Scrimzeour* out of the firſt End of the Pay aforeſaid. The Earl of *Levin* (in whoſe Perſon this Bond and Precept at length came) purſued *William* now Earl of *Glencairn* as repreſenting his Father.

Alledged for the Defender. No Recourſe is competent againſt him, either upon the Bond, or Bill: Becauſe, 1. The Sum is preſumed to have been paid from the uſual Method of paying for Officers Commiſſions very quickly after they are received; from the Earl of *Melvil*'s then great Influence and Intereſt in the Nation as Secretary of State, for whoſe Behoof the Bond and Bill were granted in Truſt to Mr. *Scrimzeour*; and from the Payment of 150 lb. thereof very early after the Date. 2. *Et ſeparatim*, The Defender's Father being denuded by the Precept on the General Receivers, of the Equivalent Sum due by them to him, which he was obliged to leave in their

Hands to anſwer it: The Purſuer cannot now after 20 Years, recur againſt the Defender as repreſenting his Father; unleſs he can inſtruct Diligence for Recovery thereof. Becauſe, Precepts are Mandates which in the civil Law oblige to the exacteſt Diligence, *L.* 13. *L.* 23. *C. Mandati.* And by our Cuſtom make the Mandatar liable to ſuch Diligence as he uſeth in his own Affairs. Beſides, the Defender's circumſtantiate Caſe is more ſtrongly ſupported than by the general Rule: Souldiers, *qui Arma magis quam Leges ſcire tenentur*, are much privileged, and their Pay allowed to circulate by Notes, Orders, Bills or Precepts from Colonels without Neceſſity of the Forms required in other Caſes; The Receivers, on whom the Precept was drawn, were Perſons of publick Faith and Credit; the Precept was out of the firſt and readieſt of the Regiment's Pay, which was monthly put in the Receiver's Hands by the Government; the Receivers interpelled by the Precept duly intimated could not pay to the Earl of *Glencairn*; and Mr. *Scrimzeour* has or might have got Payment of the whole if he had not been *in Culpa lata, quam ex Natura Negotii tenetur præſtare.*

Replyed for the Purſuer. 1. All Precepts are Mandates with Reſpect to Perſons they're directed to; but not with Reſpect to the Receivers or Creditors therein, as to whom they are plainly *Ceſſiones Actionum*, or Aſſignations, which being *in Rem ſuam*, eſpecially where granted as corroborative Securities, don't import any Obligement to do Diligence: For *cuilibet licet Jure ſuo uti vel non uti*, as well as *renunciare*, *December* 16, 1668, *Fraſer* contra *Keith*, *July* 17, 1672, Earl of *Weems* contra Sir *William Thomſon*, *December* 27, 1709, *Smith* contra *Vint*, *July* 27, 1666, Earl of *Newburgh* contra Sir *William Steuart* obſerved by *Dirletoun*. 'Tis true that Appriſers and Adjudgers entring into Poſſeſſion by Virtue of their Diligences, are obliged to continue, unleſs they can ſay, Debarr'd; that ſuch might not be allowed clandeſtinely to deſert their Poſſeſſion, and thereafter pretend to the irredeemable Right by expired Adjudications. But it cannot be thence inferred, That the Receiver of an Aſſignation or Precept in Security (tho' he hath recovered partial Payments thereby) is obliged to uſe Diligence for the Remainder. There are not wanting ſpecial Grounds why Mr. *Scrimzeour* could not be liable to negotiate the Precept: It was drawn upon the general Receivers who never uſed to accept Precepts, and did not accept this, and againſt whom no Man ever proteſted Bill, or Precept, or us'd Diligence, but other Methods were taken by applying to the Treaſurer, where the Caſhier refuſed to pay. Again, the Defender cannot object Want of Diligence, becauſe, he himſelf hath uplifted the Fund of Payment: In ſo far as the Precept is payable out of the firſt and readieſt of the Pay; And the Earl of *Glencairn* hath uplifted more Pay ſince the Date of the Precept than would have ſatisfied the ſame. Nor is it ſufficient, that he left more Pay in the Receivers Hands than would do it: For the Queſtion is not, What Pay was due to the Earl of *Glencairn* over and above his Receipts; but whether he exhauſted the Subject out of which the Precept was payable? And ſince at ſeveral Times he received a great Deal of the Regiment's Pay, after granting of the Precept; what hindred him to receive the whole, had there been ſufficient Caſh in the Receivers Hands?

Duplyed for the Defender. What is argued from the Parallel of Aſſignations or Precepts in the uſual Form, is foreign to the preſent Debate: For the Earl of *Glencairn* was not perſonally bound to pay, and the Precept was limited to the Pay of the Regiment. Tho' the general Receivers have been ſo far indulged, as not to be obliged to accept Precepts drawn on them, even when they had Effects in their Hands (which was neceſſary for expediting the publick Concerns of the Government) The porteur

Creditor in the Precept was ſtill obliged to negotiate it, and do what Diligence the Nature of the Thing required. It's but trifling what is pleaded for the Purſuer, on the Precept's being to be paid out of the firſt and readieſt of the Regiment's Pay, and the Earl of *Glencairn*'s receiving great Payments. For it is not to be ſuppoſed, That when the Earl of *Glencairn* drew this Precept, his Regiment was to ſtarve. The Earl was only tied up by the Precept from acting any Thing in Defraud of it; which he never did, on the contrary he never uplifted any Payments but with a due and ſuitable Regard to the Honour of this Precept, leaving always in the Receiver's Hand much more than was needful to anſwer it. And in a late Caſe 1703, *James Henderſon* having charged *Daniel Hamilton* for Payment of three Precepts proteſted both for not Acceptance and for not Payment; The Letters were *ſimpliciter* ſuſpended upon this Ground, That the Proteſtation was not for four Months after the Drawing, and three Months after they fell due. The Deciſions cited for the Purſuer do not meet the Caſe. For in that, *December* 16, 1668, betwixt *Fraſer* and *Keith*, the *Ratio decidendi* was, That the Minute wanted a Procuratory of Reſignation neceſſary for expediting the Commiſſion; and the old Evidents were not delivered. The Deciſion, *July* 17, 1672, betwixt the Earl of *Weems* and Sir *William Thomſon* makes for the Defender, who ſubſumes in the Terms of the Quality, that if the Precept had been negotiated, the Mony might have been recovered. The Caſe betwixt the Earl of *Newburgh* and Sir *William Steuart* has probably been ſtop'd and altered; ſeing the Lord *Stair*, whoſe Collection is very full and exact before and after that Time, hath not taken Notice thereof. Beſides, that Caſe toucheth a Miſſive, and not a Precept, it related to a Debt perſonally due by the Writer, was neither preſented, intimated or proteſted; which differenceth it from this Caſe, where the Precept was preſented, partial Payment made, and ſufficient Effects left to anſwer the *Superplus*, which thro' wilful Neglect were omitted to be taken up. The Prattick betwixt *Smith* and *Vint* hath no Contingency with this Caſe: For there it was found, That the Aſſignation being granted in Security, and never intimated, the Property continued notwithſtanding in the Cedent's Perſon, who ſuffered the Loſs thro' the Debtor's Bankrupcy, conform to the Rule, *Res perit ſuo Domino*. Juſt ſo in the preſent Caſe, the Mony being transferred to the Aſſigny, by the Intimation to the Receivers, the Creditor in the Precept has himſelf to blame that he did not look after it.

The Lords ſuſtained the Payment of 150 *lib.* to Mr. *Scrimzeour* to extinguiſh the Bond and Precept *pro tanto*; and found, that the Earl of *Levin* hath no Recourſe againſt the Earl of *Glencairn* for the Remainder, but that he the Earl of *Glencairn* muſt aſſign to the Earl of *Levin* the firſt and readieſt of the Debentures due to him by the Government for his Father's Regiment, for Payment of that Remainder.

Eodem Die. *The Dean of Gild and Magiſtrates of* Aberdeen, *againſt* John Gordon *and* George Burnet *Chirurgion Apothecaries there.*

THe Magiſtrates of *Aberdeen* having, upon a Complaint at the Inſtance of their Dean of Gild as Fiſcal, fined *John Gordon* and *George Burnet* Chirurgion Apothecaries in the Sum of 50 ℔. *Scots* payable by each of them, for exerciſing Merchandize there, contrary to the *Act* 66 *Par.* 14. *J.* 2. *Act* 12. *Par.* 2. *Act* 107. *Par.* 14. *J.* 3. And the Conſtitution of the Burgh; they ſuſpended upon the Reaſons following, 1. Theſe Acts of Parliament reſtraining Craftſmen from Merchandizing, extend not to

Chirurgion Apothecaries; but only to Crafts where Eſſays of Work are taken, who have Deacons or Viſitors for that End, and where the Craftſmen work for Days-wages, and are imployed in Manufacturing the Product of *Scotland*, that they might not neglect that and their own Craft by having Liberty to import made Work from abroad, which is not applicable to Chirurgion Apothecaries (eſpecially thoſe in *Aberdeen* who are under no Deaconries) whoſe Profeſſion is more properly a Science (being a Part of Medicine) than a Handy-craft. For every Art that is performed by manual Operation, goes not under the Denomination of *Mechanick*, unleſs it be exerciſed with a painful laborious working. So Chirurgery is to be reckoned a liberal Art as well as the Arts of Fortification, Muſick and Limning, which are all executed by manual Operation. 2. The Laws reſtraining Craftſmen from Merchandizing were never in Obſervance, at leaſt are altered by poſterior Laws inlarging the Freedom of Trade, or are gone in Deſuetude. Doth not King *James* the Sixth's Determination upon the Submiſſion made to him by the Gildrie and Craftſmen of *Edinburgh* more as 150 Years ago, for ſettling Differences betwixt them, allow Craftſmen to be received Gildbrethren, they being fit and qualified Burgeſſes of the Burgh. Every Inhabitant of a Burgh was anciently intitled to Merchandize, and uſe his Craft promiſcuouſly at his Pleaſure. The firſt Attempts to reſtrain this Liberty, did only hinder Craftſmen to Merchandize, if they uſed their Craft with their own Hands, and not by Servants, *Leg. Bur. Cap.* 99. Again, moſt of the Burghs of *Scotland*, particularly *Aberdeen*, would never have allowed by Indentures (as they have done) their incorporated Craftſmen to trade in all Inland Merchandize, and debarred them from foreign Trade upon certain Conditions to be performed by them on the other Part, had Craftſmen been wholly excluded from Merchandizing by ſtanding Laws. Beſides, the Wiſdom of the Nation finding at length, That the more Hands were imployed in a foreign Trade Riches would the more increaſe, and the Nation flouriſh; they gave Freedom of Trade to all Perſons without Diſtinction. After which ſo univerſa Communication of Trade, it is not ſuppoſeable that the greateſt Part o the Burgeſſes in Royal Burrows are ſtill debarred. 3. It's the Right o every Burgeſs to claim to be admitted to the Gildrie, upon paying the ordinary Dues payable at ſuch Admiſſions; and the Gildrie are obliged t receive him. For tho' incorporated Craftſmen have by a voluntary Agreement tied themſelves up from Trading, unleſs they renounce their Craft that doth not concern the Suſpenders, who have the ſame Freedom tha any other Subjects have.

Anſwered for the Town of Aberdeen. 1. The Policy of Royal Burrows i lodged in the Magiſtracy and Town Council, with a Juriſdiction over all Craftſmen, and Power of regulating them, except in ſo far as their Incorporation have by ſpecial Conſtitutions, certain Privileges, and Seals of Cauſe, for overſeeing their Work by Deacons: So that no Handy-craft can be ſet up in Roya Burrows, except as Freemen of a Corporation by Allowance of the Magiſtrates Craft and Art or ſpecial Cunning in Handy-work, and Craftſmen or Workmen are ſynonimous Terms. Nor is there any Diſtinction between Craft where an Eſſay of the Work can be taken, and others: For what can hinde Magiſtrates to appoint an Eſſay upon intrant Chirugions, and to debar them from Practice till they be tried by a Phyſician or two before the Magiſtrates or to appoint a Form of viſiting an Apothecaries Shop, with the Aſſiſtance o Men of Skill; as Litſters are not admitted Burgeſſes *in ſua Arte*, till the have given Proof of their Skill before the Dean of Guild; That a Chirurgio is a Craftſman is unqueſtionable, the Name imports, as well as the Object o his Cure is Handy-work; and tho' the Subject, *Viz.* the Body of Man be in

dee

deed more Noble than any other, and the Rules more delicate, and more cloſely connected with other Sciences: That hinders him not to be a Craftſman, but ſerves only to give him a greater Dignity among Artiſts. Apothecaries are alſo Craftſmen, for as he who brings home Silk, Wool, Marble, Timber, or any other Materials is a Merchant, and he who joins them by Art and makes a Specification, is a Craftſman: So he that deals in Simples is a Merchant, and he that compounds Drugs and keeps an Apothecaries Shop is a Craftſman, *Stracha. tacit. de Mercat. Par.* 1. *N.* 4. *in Fin. N.* 23, 24, 25, and 51. Whether they have Deacons or Eſſay-maſters or not, doth not alter the Caſe: Becauſe, the Magiſtrates may name Deacons or Eſſay-maſters when they pleaſe; And the Arts of both Chirurgions and Apothecaries are capable of Eſſays, that is Forms of Trial before their being permitted to exerciſe their Craft, and Cenſures in Caſe they fail in the Exerciſe of it. 2. There are no Laws derogating from the ancient Laws reſtraining Craftſmen from Trafficking. For the Statutes allowing all Freemen to trade, are to be underſtood according to their different Privileges, without Prejudice to the particular Laws regulating the Policy of the Burgh, whereof one was, That the ſame Perſon could not be Merchant and Craftſman at the ſame Time. And tho' the Acts for Communication of Trade did impair the Intereſt of the Royal Burrows in general with Reſpect to Traders without Burgh; Yet none of theſe Laws alter the Diſtinctions and Orders of Men within Burgh directly or indirectly. Nor is there any contrary Cuſtom. It's in vain to recur to the Cuſtom of *Edinburgh*. For that is indeed ſingular, and the Matter was ſettled by King *James* the ſixth's Decreet-arbitral, and confirmed by ſeveral Acts of Parliament. Yea even the Apothecaries of *Edinburgh* have oft-times ſought to be incorporate under a Deacon, but did not obtain it: And the Magiſtrates appointed Overſeers of the Apothecaries. For tho' the Magiſtrates had Power to erect Deaconries when they thought it neceſſary for the good of the Town, they were under no Neceſſity to do ſo: As appears from the Caſe, 20 *February* 1679, and 20 *January* 1681, Craftſmen of *Bruntiſland contra* the Town. But 3. Whatever be obſerved in *Edinburgh*, that is not to the preſent Purpoſe: The Cuſtom of one Burgh is not a Rule to another. It's ſufficient that the Town of *Aberdeen* doth preſerve the ancient Inſtitution, in which Burgh the Suſpenders not being admitted Burgeſſes ſimply, but having accepted of Burgeſs-Tickets *in ſua Arte*, and being under no Deaconry, can be reſtrained from uſing Merchandize, and obliged to renounce their Trade; and are not entitled to crave to be admitted Gild-brethren, and to exerciſe Merchadize upon Payment of the ordinary Dues: Albeit there were no better Reaſon to be given for it, than what is printed in very legible Letters in the Council-houſe of *Aberdeen*, *Servate Terminos quos Patres veſtri poſuere*. Which is indeed a Principle of civil Society, on which its Tranquility depends. And therefore the civil Law ſays, *Non omnium, quæ a Majoribus conſtituta ſunt, Ratio reddi poteſt; et ideo Ratio eorum quæ conſtituuntur inquiri non oportet: Alioquin multa ex his quæ certa ſunt, ſubvertuntur, minime ſunt mutanda, quæ Interpretationem certam habuerunt, L.* 20, 21, 23. *ff. de Legib.* It's *meræ Facultatis* in Magiſtrates to admit a Burgeſs or not, or to grant or refuſe the Privilege of Gild, except to Burgeſſes by Succeſſion. For tho' Sir *George Mackenzie* in his Obſervations ſays, *The Act* 86. *Par.* 6. *J.* 4. is in Deſuetude, that is only in ſo far as it requires to the making of Burgeſſes the formal Conſent of the great Council of the Town. For to this Day no Burgeſs and Gild-brother can be made without Conſent of the Dean of Gild, who hath a diſcretionary Power in that Matter, and cannot be compelled.

The Lords found, That the Suſpenders having accepted Burgeſs-tickets *in ſua Arte*, the Magiſtrates of *Aberdeen* had Right to reſtrain them from exerciſing Merchandize within their Burgh, notwithſtanding they be willing to enter Gild-brethren, and pay the ordinary Dues for their Admiſſion.

December 21, 1711. James Hutchiſon *Writer to the Signet, againſt* Thomas Couts M*erchant in* Edinburgh.

AN alimentary Annuity of 800 Merks belonging to *Elizabeth Dick* Lady *Penkil*, having, after her Separation from *James Dumbar* her preſent Huſband upon the Account of Family Differences, been divided by the Lords equally betwixt them of Conſent, during their living ſeparately; *James Hutchiſon* Factor for uplifting the whole Annuity, craved Allowance in his Diſcharge of what he had advanced to the Huſband upon Bond or Bill, out of that Part of the Annuity appointed to be paid to the Huſband, and aſſigned by him to *Hutchiſon*. *Thomas Couts* who was Creditor by alimenting the Huſband ſince the Separation, pleaded Preference to *Hutchiſon* an Aſſigny for a common anterior Debt.

Alledged for Hutchiſon. After the Diviſion of the Annuity, the half belonging to the Huſband, was no longer alimentary in his Perſon; ſo as he could not diſpoſe of it for Payment of his juſt Debts.

Anſwered for Couts. The Annuity being deſtined originally for the Aliment of the Lady and her Family, the Huſband aſſumed by her (who was not only a Part, but Head of the Family, *L.* 195. *ff. de Verb. Signif.*) hath Right to a Share of the Aliment: Which doth not alter its Nature, from what it was before the Diviſion, or become of a different Nature from the Portion of it allotted to the Wife, that is undoubtedly alimentary ſtill. For *Separatio a Thoro et Menſa, non tollit Vinculum Matrimonii*, and notwithſtanding thereof all the Effects of a Marriage continues ſafe, *Can.* 1. *Cauſ.* 32. *Q. i. et quod Juris eſt in Toto, idem eſt in aliqua ejus Parte.*

The Lords found, That the 400 Merks payable to *James Dumbar* the Huſband, is not alimentary in his Perſon, now after the Separation from his Wife.

Eodem Die. *Mr.* Alexander Burnet, *againſt the Principal and other founded Maſters of the King's College of* Aberdeen, *Mr.* William Simpſon *and others.*

THe King's College of *Aberdeen* being erected by Pope *Alexander* on Application from K. *Ja.* 4. in *Anno* 1494, and indowed with Mortifications from Biſhop *Elphinſton* (who built the Fabrick) and from others: In *Auguſt* 1498, that King granted a Charter to the College ratifying the Erection and former Dotations, mortifying ſome new Rents, and giving to the Maſters *incorporatis ſeu incorporandis*, all Rights, Privileges and Immunities competent to other Univerſities, and given by the *French* King to the Univerſity of *Paris*, or by King *Ja.* 1. to the Univerſity of St. *Andrews*, or by King *Ja.* 2. to the Univerſity of *Glaſgow*. The Principal, Sub-principal, two Regents, and one Profeſſor of Medicine, another of civil Law, and a third of Grammar, having been the only Perſons in uſe beyond the Years of Preſcription, to elect Regents or Profeſſors of Philoſophy; Doctor *Thomas Bower* was added to the founded Maſters by a late Gift from the Sovereign, conſtituting him King's Profeſſor of Mathematicks in that Univerſity, with the ſame Privileges and Immunities competent to any other Profeſſion of Mathematicks in any other Univerſity or College in *Scotland*, or which any other Profeſſor *in dicta Regia Univerſitate clamare & frui poteſt, aut potuit.* Upon a comparative Trial of Mr. *Alexander Burnet* and Mr. *William Simpſon*, Candidates for a vacant Profeſſion of Philoſophy in the ſaid King's College; Three of the founded Maſters Voting for Mr. *Burnet*, and three for Mr. *Simpſon*, Doctor *Middleton* the Principal, by his caſting Voice, determined in Favours of Mr. *Simpſon*, and admitted him: Albeit Doctor *Bower* pretending to a Vote gave it in Favours of Mr. *Burnet*. Whereupon there aroſe a Competition before the Lords, betwixt *Simpſon* and *Burnet*, about the Title to the Office. At the diſcuſſing whereof, all the Lords were clear, That the Sovereign might add new Profeſſors to thoſe in the Foundation; But that the Funds mortified by Biſhop *Elphinſton* could not be impropriated to any ſuch new ſuperadded Profeſſor; and that Doctor *Bower*, by Virtue of his Patent, is entitled to vote in the Election of Regents jointly with other Maſters, who were in Uſe to vote.

Albeit it was alledged for the Principal and other three founded Maſters, That Doctor *Bower* could no more by Virtue of the Clauſe in his Gift *cum omnibus Privilegiis et Immunitatibus quæ quivis alius Profeſſor*, &c. pretend to the Power of electing Regents, than to the Power of regenting and teaching Philoſophy, or Theology. For if the Clauſe be carried beyond the common Privileges, it cannot ſtop, but carry all the ſpecial Privileges of profeſſing Theology, conferring Degrees and other diſtinguiſhing Powers appropriated to the Principal, Sub-principal, and other particular Profeſſors, which is ridiculous. *Nam ultra Numerum aſſumptus ad Collegium, non aliter cenſetur aſſumptus, quam ſalvo et illibato Jure ordinariorum, quamvis ille nitatur nova Principis Conceſſione, Perez. in L.* 1. *§. Si quis a Principe ff. nequid in Loco publico.* The common Law determines, That *Reſcripta Principum ea Humanitate ſunt accipienda, ne cuiquam Injuriam inferant, adeo ut Reſcriptorum Verba potius improprie ſunt interpretanda, quam ut eorum Contextus in alterius Prejudicium accipiatur.* And albeit the Profeſſion of Divinity be founded 100 Years ago with the like Clauſe of all Privileges competent to other Profeſſors; yet the Profeſſor of Theology never voted in the Election of Regents. So that the above Seven founded Profeſſors, who by long Poſſeſſion have preſcribed a Right to the Election of Regents *excluſive* of others, cannot be incroached upon by this novel Pretenſion of Doctor *Bower*.

In Reſpect it was anſwered for Mr. *Burnet*, That Preſcription cannot be obtruded againſt a new created Profeſſion, that was not in Being before: Whatever might have been pretended for the Excluſion of one who had forborn for the Space of Preſcription to exerce his Privilege. Doctor *Bower*'s Right is preſerved in the very Privilege of all Members incorporated, or to be incorporated, and cannot preſcribe ſave from the Time of his being incorporated; Which differenceth his, from the Profeſſor of Divinity's Caſe, who may have loſt the Privilege of Voting by the negative Preſcription. It's own'd that Doctor *Bower*'s Patent doth not entitle him to incroach upon the particular Profeſſions of the other Maſters; But the Power of electing Regents is competent to all the Maſters and Profeſſors of that Univerſity, under the Quality of Maſters or Profeſſors.

Thereaſter it was objected by Mr. *Simpſon* againſt Doctor *Bower*, That he was not qualified to vote, becauſe he had not, at the Election, ſubſcribed the Confeſſion of Faith, and taken the Oath of Alledgiance conform to *Act* 17 *Parl.* 1690; nor had ſworn the Oath of Alledgiance and ſubſcribed the ſame with the Aſſurance, conform to the *Act* 6. *Parl.* 1693: Both which Statutes are ratified by the *Act* 6. *Parl.* 1707, whereby ſuch Nonjurants and Nonſubſcribents are diſabled from being admitted and continuing in their Offices; and conſequently his voting ſo *Jure prohibente*, was *ipſo Jure* null.

Anſwered for Mr. Burnet. Doctor *Bower* being admitted in the Exerciſe of his Office, and not objected againſt at the Time of the Election, as not qualified to the Government, his Vote muſt ſtand good to Mr. *Burnet*, according to good Order, and the Law *Barbarius Philippus*; tho' a Sentence of Deprivation ſhould follow, and follow it muſt to apply the Certification and Penalty in the Laws above-mentioned to Mr. *Bower*, who cannot be judged till he be called, and in the Field.

The Lords repelled the Objection againſt Doctor *Bower*, that he is not qualified to the Government in the Terms of Law, he being in Poſſeſſion of the Office at the Time of the Election, and that Objection not then made againſt him: Without Prejudice to any Party to inſiſt againſt him as accords.

Thereafter alledged for Mr. Simpſon. The Foundation Charter provides, That *ſi pro quocunque Supplicationes ſeu Munera quorumcunque interveniant, talis ſit inhabilis.* And *ita eſt* that Mr. *Burnet*, at leaſt his Friends for his Behoof, offered to bribe one of the Electors, which rendred him utterly incapable of being elected: As it is ſufficient to overturn the Election of a Member of Parliament, that good Deeds were done, or Bribes given by any Perſon on his Behalf.

Anſwered for Mr. Burnet. Non relevat that one of his Friends offered to bribe an Elector, unleſs it had been done by Mr. *Burnet*'s Order, Conſent or Knowledge: Seing otherwiſe the Deed of a Third Party ſhould prejudice the ignorant and innocent; and perhaps one might *malo Animo* cauſe his Friend offer Bribes againſt himſelf for his Competitor to caſt his Election. Nor is it the Offer to corrupt, unleſs Mony or good Deed were received, that can incapacitate a Voter. Beſides, the Offer is alledged to have been made to one who voted againſt Mr. *Burnet*: So that the Votes for him ſtand clear.

Replyed for Mr. Simpſon. By the canon Law a Perſon for whom a Bribe is offered, even without his Knowledge, is incapable of injoying the Benefice, *Quæſt.* 5. *Cauſ.* 1. C. 1. Yea, an Offer of Bribery by a near Relation of the Party, is preſumed to be done by his Warrant. It's not to be ſuppoſed, That Mr. *Burnet* or any Perſon would act ſo raſhly, as not firſt to ſound the Ford by his Friends; whom, no Doubt he had followed in the Way *they* led him, had he found it paſſable. It's eaſie to diſcover from Circumſtances *quo Animo* a Bribe is offered by a Third Party, *Viz.* By conſidering whoſe Friend or Acquaintance he is, and which of the Parties he has a warm Side to.

The Lords repelled the Objection made againſt Mr. *Burnet*, That there were Sollicitations and Offers of Mony made for him to the Electors; the ſame not being alledged to have been received or done by his Order.

Thereafter, *January* 23, 1712, it was objected by Doctor *Middleton* the Principal, againſt Mr. *Burnet*, That ſuppoſe Doctor *Bower*'s Vote be ſuſtained, Mr. *Simpſon* hath the Plurality: In ſo far as, he the Principal votes for him, which makes the Votes equal Four on both Sides, and gives his caſting Vote alſo in Favours of *Simpſon*. Now that the Principal hath Two Votes, *Viz.* An elective and a caſting Vote, is clear from theſe Words in the Foundation Charter, *Volumus ut in omnibus iſtis Electionibus Principalis dicti Collegii habeat vocem Electivam ſeu Nominativam, & Concluſivam*, and from conſtant Practice. The like is obſerved in Elections in the Royal Burrows, where the Provoſt votes firſt, and in Caſe of Equality has alſo the caſting Vote.

Anſwered for Mr. Burnet. Whatever Right the Principal may claim to Two Votes in other Caſes, he cannot be heard to do it in this: Where he aſſumed only a concluſive or caſting Vote as *Præſes*, after all the reſt had voted, upon an imaginary Equality preſuppoſed by him; and being *Functus*, cannot recur now to claim an elective Vote, which he ought to have done before

fore any of the other Profeſſors had voted, as is uſual where any *Præſes* hath Two Votes.

The Lords found, That in this Caſe the Principal can have only the caſting Vote: Reſerving his Claim to a double Vote in other Caſes as accords.

December 26, 1711. Robert Brown *in* Balleny, *againſt* Adam Dickſon *Merchant in* Dumfreis.

ROBERT *Herries*'s Wife having, in her Husband's Abſence, ſold to *Robert Brown* certain Goods belonging to her Husband, in Payment of a Debt owing by him to *Brown*, whereof he *Brown* delivered up the Inſtructions with a Diſcharge to the Wife in Name of her Husband, at getting the Goods; and *Herries* having never after his Return reclaimed againſt Delivery of the Goods, nor ſought them back: The Lords, in a Proceſs at the Inſtance of *Robert Brown* againſt *Adam Dickſon*, found, That the Property of the Goods was thereby effectually transferred from *Herries* to *Brown*, and could not be affected by legal Diligence at the Inſtance of *Herries*'s other Creditors. In Reſpect the Husband's Silence and detaining the Writs delivered to his Wiſe, neceſſarily imported Ratihabition and Acquieſcence in what ſhe did.

December 27, 1711. William Gray *Son to* Adam Gray *Feuar in* Dunce, *and* Adam *for himſelf, and as Adminiſtrator in Law to his Son Supplicants, againſt* William Cockburn *of* Caldra.

WILLIAM *Nisbet* Fleſher in *Dunce*, having named *William Cockburn* to be his Executor to pay his Debts and Legacies, to put on a Through Stone upon his Grave, and to finiſh the Building of a Tenement in *Dunce* out of the firſt and readieſt of the Executry; and having left ſeveral Legacies, particularly a ſpecial Legacy of 457 Pound with Annualrent thereof contained in his Father's Bond, granted to the Teſtator: *William Gray* and *Adam* his Father complained to the Lords of *William Cockburn*, for his unwarrantable charging *Adam Gray*, as Adminiſtrator in Law to *William Gray* with Horning, denouncing and regiſtrating him at the Horn for the ſaid Debt, as due to him *qua* Executor to *William Nisbet*; albeit the Debt was ſpecially bequeath'd and aſſigned to *William Gray* in the very Body of the Teſtament the Charger's Title.

Anſwered for the Charger. If the Legatary had no Right till the Teſtament be executed, and the Debts and Deeds preferable to the Legacy, were paid and performed: The Executor had *Jus exigendi*, that he might either pay it to the Legatary, or be accomptable to him for the ſame out of the free Gear, *Actione ex Teſtamento, February 24, 1623, Laird of Balnamoon contra Laird of Balcomy, March 10, 1627, Forreſter contra Clerk*; and he the Executor muſt be diſcharged with Reſpect to this Legacy. So that there is no Ground of Complaint againſt *Caldra*, for his uſing *Jure communi*. It's true, by the *Roman* Law, *Legatarius* might recover *Legatum Speciei, Rei Vindicatione*; but *Legatum Nominis* could only be recovered *Condictione certi*, at the Inſtance of the Heir, againſt whom the Legatary had Action competent to him, *ex Teſtamento*.

The Lords found the Charge of Horning unwarrantable, and ordained the Horning and Executions thereof to be put in the Clerks Hands, *that* the ſame might be cancelled and razed at the Signet.

Eodem Die. James Reid *and* John Ker *Merchants in* Edinburgh, *againſt the Magiſtrates of the ſaid Burgh, and their Tackſmen of the Impoſt upon foreign Liquors.*

IN the Purſuit at the Inſtance of *James Reid* and *John Ker*, againſt the Tackſmen of the Town of *Edinburgh*'s Impoſt upon foreign Liquors, for their unwarrantable ſeizing a certain Quantity of *Engliſh* Ale and Beer belonging to them, on Account of their not paying a Peny *Sterling* of Impoſt on the *Scottiſh* Pint impoſed on foreign Ale and Beer in Favours of the Town, by a Gift from the Sovereign *Anno* 1671, ratified in Parliament in the Year 1672: The Lords found the Town of *Edinburgh*'s Right of exacting a Duty on *Engliſh* Ale and Beer, being a private Right, is in the ſame State ſince the Union, as it was before.

Albeit it was alledged for the Purſuers. *Engliſh* Ale and Beer cannot be called foreign now ſince the Union, by the Fourth Article whereof there is a Communication of Trade, Navigation, and all other Rights, Privileges or Advantages, that do or may belong to the Subjects of either Kingdom. So that, as a *Scots* Man may vend the Commodities of *Scotland* in *England*, an *Engliſh* Man may do the like here; and conſequently may import *Engliſh* Ale into *Scotland* free of Duty. For albeit private Rights not interfering with the ſaid Article be reſerved by the Treaty, as the Right of *Scavage* and *Portage* in *London*, the Two Penies on the Pint, and Merk upon the Pack in *Edinburgh*, which do equally burden the Subjects of either Kingdom: If more be exacted upon the Pint of *Engliſh* Ale imported to *Edinburgh*, than upon the Pint of *Scottiſh* imported Ale, the abſolute Equality deſigned by the Treaty is broke. Now that the Duty of *Package* and *Scavage* belonging to *London* is equally exacted from *Engliſh* Men, not being Burgeſſes of the City, as from *North Britains* or Perſons living in *Scotland*, appears by a Certificate from the Mayor and Aldermen of *London* under the Seal of their City, dated at *Guildhall, May* 6, 1712.

In Reſpect it was anſwered for the Defenders. Private Rights of the Subjects of either Kingdom remain in the ſame State after the Union, as they were before, conform to the Eighteenth, Twentieth, Twenty fifth Articles. Upon which Account it was thought neceſſary to reſcind expreſly by the Sixth Article, the Duty impoſed upon *Scottiſh* Cattel carried into *England*, belonging to Sir *Chriſtopher Muſgrave* and the Town of *Newcaſtle*, who got an Equivalent for it from the Parliament: Since otherwiſe that private Right would have remained after the Treaty, as before. So the Manufactures of Sugar at *Glaſgow*, Aquavitæ in the North, and ſeveral others maintain their private Rights againſt Exactions of the Duties of Exciſe and Cuſtoms. The City of *London* has by their Charter the Duty of Package and Scavage which is exacted to this Day off *Scots* Men ſince, as before the Union; and ſo the Duty of a Merk upon the Pack of foreign Goods imported to *Edinburgh*, hath been exacted off *Engliſh* Goods ſince the Union as well as before, conform to the Opinion of Sir *James Montague* then Attorney General, which was entred in the Records of the Treaſury. As to the Certificate from the Mayor and Aldermen of *London*, that is a Demonſtration that the Exemptio in Favours of the free Men of that City, is not look'd upon to be *inconſiſtent* with the Equality of Trade eſtabliſhed in *England* before the Union, or i *Britain* ſince; and that *Scots* Men have no Benefit or Eaſe of the Duty o Package and Scavage by the Articles of Union, more than they or any Strangers or *Engliſh* Men not being Burgeſſes of *London*, had before. Conſequentl the Duty upon *Engliſh* Ale granted to the Town of *Edinburgh*, as a privat Right, can as little be quarrelled. Albeit *Engliſh* Men and *Engliſh* Commoditie dities cannot be reckoned ſince the Union Foreigners, or foreign ſimply, or with Regard to the publick State: Yet there is no Alteration by uniting the Two Kingdoms into One, in Matters of private Right or Law; *Viz.* Perſons reſiding in *England* can be cited only upon Sixty Days, and no Advocate can compear for them more than if they were ſtill out of the Kingdom, as before the Union. Again, If the Fourth Article containing a Communication of Privileges, intended an abſolute Equality, it would confound the Rights of all Incorporations, which is not to be ſuppoſed: The Equality introduced by the Union being only with Reſpect to the common Rights of Subjects, as Subjects. And here the *Scots* and *Engliſh* are upon an equal Foot; both being liable to the ſame Duty for importing *Engliſh* Ale.

Eodem Die. Archibald Crawford *Grandchild to the deceaſt* James Crawford *of* Ardmillan, *deſcending by* William Crawford *his eldeſt Son, againſt* John Crawford *Grandchild to the ſaid* James Crawford, *deſcending by* James Crawford *his ſecond Son, and* Jean Crawford *Tutrix to the ſaid* John.

IN the Reduction, Improbation, and Declarator at the Inſtance of *Archibald Crawford*, as Heir to *James Crawford* his Brother, againſt *John Crawford*, as Heir to *James Crawford* his Father, upon this Ground; That the Defender's Father had defrauded the Purſuer of his Grandfather's Eſtate, by cutting away a Part of the laſt Sheet of a Diſpoſition of Tailzie, made by the Grandfather in Favours of *James Crawford*, whom the Purſuer repreſents, and paſting thereto three new Sheets, containing a Clauſe of Redemption; and then prevailing with the Grandfather to ſideſcribe the Margin, uſe the Order, and by Virtue thereof diſpone irredeemably to him the Lands of *Ardmillan*.

Alledged for the Defender. He being Minor, *non tenetur placitare de Hæreditate Paterna*, conform to *Stat. K. Will.* 1. *Cap.* 39. §. 15. *Reg. Maj. Lib.* 3. C. 30. §. 3. C. 32. Which Rule admits but of one Exception. *Lib.* 2. *Cap.* 42. §. 9. *Viz.* Where a Superior having the Cuſtody of his Vaſſal is Minor, when the Vaſſal attains to Majority; and *Exceptio firmat Regulam in Caſibus non exceptis.* So by the Law of *England*, *generaliter verum eſt, quod de nullo placito tenetur reſpondere is qui infra Ætatem eſt, per quod poſſit exhæredari*, *Skene. Not.* upon the Thirty ſecond Chapter of the third Book of the *Majeſty*, 8. *R.* 2. *Cap.* 4. *Coke* 2. *Inſtit.* 291.

Replyed for the Purſuer. The Brocard doth not hold, *Ubi agitur aut de Dolo*, as in Recognitions and Forfeitures; *aut de Obligatione Defuncti*, as in the Caſe of Diſpoſitions and Contracts, *Stair, Inſtit. Lib.* 1. *Tit.* 6. §. 45. *Dirletoun*'s *Doubts, Pag.* 126. *Mackenzie, Inſtit. Lib.* 1. *Tit.* 7. *Spotſwood*'s *Pratt. Pag.* 211. It's true, that *Minor non tenetur placitare in Brevi de Recto*, That is, where his Predeceſſor was in peaceable Poſſeſſion, and had or might have had the Benefit of a poſſeſſory Judgment. But if either his Predeceſſor was obliged by his own Deed or Fraud, it had been contrary to Senſe and Reaſon to defend his Heir, becauſe a Minor in his unrighteous Poſſeſſion: Since that were to grant an Indulgence for a Crime. It's in vain to limit the Exception againſt this Brocard, to the Caſe where a Superior having the Cuſtody of his Vaſſal is Minor, and the Vaſſal attains to his Majority, when our Lawyers and Deciſions have noted and authorized ſeveral Exceptions, as in the above cited Caſes, and is further cleared from that betwixt the Maſter of *Jedburgh* and the Earl of *Hume*, *February* 15, 1628, where the Brocard was repelled in a proving the Tenor of a Charter, that did exclude the Minor's Right: Now this Caſe is in Effect a making up the Tenor of the Purſuer's Right.

Duplyed for the Defender. The Brocard extends to Caſes of Fraud as well as others, thoſe being Matters of the greateſt Intricacy, where the Omiſſion or Addition of a ſmall Circumſtance, alters the whole, and ſupports or elides the Concluſion. Yea, the Lords have ſometimes extended it beyond the letter, to Caſes where the Minor's Right fell only in Conſequence of that craved to be reduced, *November* 25, 1624, *Hamilton* contra *Matthieſon.* They tacitely ſuſtained it in a Reduction *ſuper Dolo & Metu, January* 31, 1665, *Kello* contra *Pringle*: In ſo far as they allowed Oaths to be taken to ly *in Retentis* till the Minors were of perfect Age; which argues their being of Opinion, That the Cauſe could not be inſiſted in till that Time. It was found to exclude a Reduction *ex Capite Inhibitionis, January* 18, 1667, *Chapman* contra *White*, which imply'd a legal Fraud. The Lord *Stair, Inſtit. Pag.* 58, ſays, That the Brocard muſt defend againſt Improbations, which are founded upon the ſpecial Reaſon of Fraud and Falſhood. What his Lordſhip, *Dirletoun*, and Sir *George Mackenzie* ſay about Forfeitures and Recognitions, ſeems founded on a Speciality, which brings it under the Exception contained in the Book of the Majeſty: For this being a feudal Privilege, 'tis nothing ſtrange, that Superiors, who gave their Vaſſals Lands *gratis*, ſhould not be prejudiced by the Maxim; Eſpecially ſeing, the Superior could not make uſe of it againſt his Vaſſal. Beſides, admitting that the Opinion of theſe Authors were full on the Purſuer's Side, whatever Reſpect be due to their Authority, it is not ſo ſtrong *ut vincat Legem.* Nor was the allowing the Tenor of a Charter to be proved, *February* 15, 1628, Maſter of *Jedburgh* againſt the Earl of *Hume*, an Exception from the Brocard: For tho' the Maſter of *Jedburgh* had, after making up the Charter inſiſted in a Reduction, the Brocard would have taken Place: Becauſe, making up the Tenor did put him in no better Caſe, than if the Writ had never been loſt; in which Caſe he could not inſiſt in his Reduction. So that the Prattick is not to the preſent Purpoſe, where the firſt Thing craved, is to tear or deſtroy a Writ ſubſiſting.

The Lords found, That the Brocard, *Minor non tenetur placitare de Hæreditate Paterna*, doth not take Place in this Caſe.

Eodem Die. *Mr.* Robert White *of* Bennochie *Advocate, againſt* John Knox *Tenant in* Cartmore.

IN a Proceſs at the Inſtance of Mr. *Robert White*, againſt *John Knox*; The Lords found a Tack granted by a Perſon who could not write null: In Reſpect it was not ſigned by two Notaries and four Witneſſes preſent at the Time, in the Terms of the *Act* 80. *Parl.*6. *Ja.*6. But was only ſigned at firſt by one Notary and two Witneſſes, and at ſometime thereafter by another Notary and other two Witneſſes. Albeit it was alledged, That the Act of Parliament requires only the Witneſſes to be preſent at the Time when the Notaries ſubſcribe, whether *unico Contextu*, or *ex Intervallo*. In Reſpect it was anſwered, That Law doth no more truſt Notaries ſubſcribing ſeparately in ſuch Matters, than it doth the Teſtimony of ſingular or not concurring Witneſſes. This is clear from the Statute requiring Writs of Importance granted by Perſons who cannot writ, to be ſubſcribed by two Notaries before four Witneſſes preſent at that Time, which implyes, That both the Notaries muſt ſubſcribe before the Witneſſes then preſent, whence they are called Co-notaries. So it was decided *January* 28, 1662, *M'morran* contra *Black, March* 20, 1633, *Cowie* contra *Craig, December* 24, 1709, *Anderſon* contra *Cook.* The ſame is alſo confirmed by the Authority of *Craig Feud. Pag.* 156, and from the common Law, *Nov.* 73. *Cap.* 8.

Eodem Die. *The Lady* Enterkin *Supplicant, againſt* John Cuningham *of* Enterkin *her Son.*

THE Lady *Enterkin* having complained of her Son, for unwarrantably diſpoſſeſſing her, by a Decreet of his own Baron Baillie, of certain Lands ſhe had peaceably poſſeſſed more as ſeven Years: The Lords reponed the Complainer ſummarly to the Poſſeſſion; upon her finding Caution before Extract for her Intromiſſions. Albeit it was alledged for *Enterkin*, That the Complainer's Poſſeſſion had a clandeſtine and precarious Entry in the Time of his Minority, wanting a ſufficient Title to ſupport it, and ſhe was diſpoſſeſſed *Via Juris*, by Decreet of a lawful Court. For tho' a Baron may by his Baillie give Decreet againſt his Tenants, for Payment of their Rents, if the Intereſt of no Third Party in Poſſeſſion interfere: Yet, a Decreet againſt the Tenants, tending in the Conſequence to overturn the Right and Poſſeſſion of a Third Party, is but *Color quæſitus* to cover Oppreſſion.

Eodem Die. William Ferguſon *of* Auchinblain, *againſt* Hugh Mure *of* Auchindrain.

H*ugh Mure* having, as Factor to *Robert Baillie* Indweller in *Glaſgow*, ſet a Tack of the Lands of *Craigſkean* to *William Ferguſon*, for a certain Tackduty payable to the ſaid *Hugh Mure*; And *William Ferguſon* having charged *Hugh Mure* for Payment of Three hundred Merks of Principal, with Annualrent and Penalty, contained in a Bond granted by the latter to the former: Compenſation was not ſuſtained againſt the Charger upon the ſaid Tackduty, In Reſpect *Hugh Mure* was not Heretor of the Lands ſet, but only Factor, and the Conſtituent could uplift and diſcharge the Tackduty, albeit payable by the Tack to his Factor.

January 2, 1712. John M‘reoch, *Son to* John M‘reoch *in* Glen, *againſt* Thomas Alexander *of* Meikle Kirkland.

THE deceas'd *John M‘reoch* of *Mackilſtoun* having no Children, but a natural Daughter married to *Thomas Alexander*, who had by her a Daughter called *Mary Alexander*, did, for Love and Favour to *John M‘reoch* and *Mary Alexander* then Infants, under the Conditions after mentioned, *diſpone his Lands to them, who were appointed to marry together, and the Heirs Male to be procreated of their Bodies; Which failing, or being and deceaſing, to* James M‘reoch *in* Glen *his neareſt Heirs Male; Which failing to* Mary Alexander, *ſhe ſurviving her own neareſt Heirs Male or Female, their Heirs and Aſſignies; And for the Cauſes, and under the Conditions foreſaid, conſtituted the foreſaid Perſons in Manner, and conform to the Deſtination above written, his Aſſignies to the Mails and Duties of the Land after his Deceaſe. John M‘reoch,* when he was paſt Fourteen Years of Age, purſued *Thomas Alexander*, who, as Heir of Line ſerved to the Diſponer, had intrometted with the Rents of the Lands diſponed, to pay to him the Half thereof ſince the Diſponer's Death.

Alledged for the Defender. The Purſuer hath no Intereſt to call for the Rents, the Diſpoſition being granted upon a ſuſpenſive Condition, That he and *Mary Alexander* marry together; which can take no Effect till the Condition be fulfilled by their Marriage.

Replyed for the Purſuer. No Period of Time being aſſigned for his marrying *Mary Alexander*, it muſt be underſtood in a rational and prudent Senſe, *Viz.*

When he ſhould come to that Maturity of Age and Habit of Body which fits him for Marriage: And he is moſt willing to marry her, when in a Capacity to do it. Now, 'tis not to be thought, that the Diſponer intended the Mails and Duties to remain with his Heir, until the Purſuer were capable to marry: But that *Mary Alexander* and he ſhould enjoy them *medio Tempore*, for their Aliment and Education.

The Lords found, That the Purſuer had Right to the Half of the Mails and Duties of the Lands diſponed, ſince the Death of the Diſponer: Reſerving to their Lordſhips Conſideration, the Import of the Diſpoſition, in Caſe the Purſuer ſhould refuſe or decline, when he comes to Age, to accept of *Mary Alexander* for his Wife.

Eodem Die. William Reoch *Wright in* Edinburgh, *againſt* Katharin Young *Relict of* Alexander Crawford *Reſidenter there.*

JEan *Telfer* Madam *Steuart*, who lodged in the Houſe of *Katharin Young*, having, when ſhe was dying, upon *Thomas Mackie*'s coming in to ſee her, deſired *Katharin* to bring her a Napkin, wherein ſhe ſaid there was a Twenty ℔. *Sterling* Bank-note, which ſhe deſigned to give to Mr. *Mackie*, as a Token of her Kindneſs; and ſeeming to be in Paſſion, and diſturbed to find the Napkin brought to contain nothing but a blank Piece of Paper: *Katharin Young* ſaid to Mr. *Mackie*, That ſhe would make up the Twenty ℔. to him, in Caſe it was not made up another Way. *William Reoch*, to whom Mr. *Mackie* aſſigned his Claim, purſued *Katharin Young* for Payment of the Twenty Pound, conform to the Promiſe, which was referred to her Oath. She acknowledged the above Matter of Fact, but alledged, 1. The Words uttered by her do not amount to an obligatory Promiſe, which *dat Jus tertio*; but only to a Promiſe called in Law, *Pollicitation* or *Offer*, which doth not bind unleſs accepted, *L.* 3. *ff. De Pollicit. Grotius de Jure* Belli, *Lib.* 2. *C.* 11. §. 3 *&* 4, *Stair*, *Inſtit. Tit. Oblig.* Conv. §. 3, *June* 9, 1664, *Allan* contra *Collier*. And reſolves only in a Promiſe to gift, or to give Charity, which cannot produce Action. 2. The Words ſpoke by the Defender were meerly *Verba jactantia*, paſſing Words, uttered, not *Animo deliberato*, or for any onerous Cauſe, but from a ſudden Motion of the Affections, to prevent the Trouble of a dying Lodger, which cannot oblige the Speaker; otherwiſe Men ſhould be inſnared with the Words of their Lips. 3. The Promiſe being acceſſory to the Gift or Legacy deſigned for Mr. *Mackie*, and importing only, That he ſhould loſe nothing thro' the Bank-note's being away: The Purſuer who got no Right to that Bank-note from the Defunct, and tho' it were on the Table, could not touch it, as belonging to the Defunct's Executors, to whom thereafter ſhe conveyed her Means, without any expreſs Burden of ſuch a Legacy, cannot claim Twenty Pound from the Defender, whoſe acceſſory Obligation falls in Conſequence with the principal Right.

Replyed for the Purſuer. He is not concerned to inquire into the Motives that induced the Defender to make this Promiſe, theſe ſhe her ſelf can beſt account for: 'Tis enough for him to found on a plain and ſolemn Promiſe made to a dying Woman; And Promiſes made at ſuch Times being moſt ſerious and binding, are not revocable, *November* 12, 1674, *Gordon* contra *Pitſligo*.

The Lords found the Oath prov'd the Promiſe, and that the Defender is liable for the Twenty Pound *Sterling*, unleſs ſhe can inſtruct that *Mackie* recovered Payment ſome other way.

Eodem Die. Robert Ferguſſon *Writer in* Edinburgh, *againſt* Thomas Irving *of* Gribtoun.

WIlliam Lord *Herries* having diſponed the Lands of *Gribtoun* to Sir *William Maxwell* his Son, and to his Heirs Male, as appeared by a Charter of Confirmation granted by the Sovereign to Sir *William* in the Year 1609: Which *Thomas Irvine* appriſed the Lands from *John Maxwell*, who was ſerved *legittimus & propinquior Hares* to Sir *William* his Father, and infeſt, and upon this Appriſing *Thomas Irvine* got Poſſeſſion. *Robert Ferguſſon* Adjudger of the ſame Lands from *John Charters*, as charged to enter Heir to *John Maxwell* his Mother's Father, purſued Maills and Duties. *Thomas Irvine* compeared and objected againſt the Purſuer's Title, That his Adjudication is null, being led againſt the Heir of Line; whereas it appeared from the Charter 1609, and a Precept of Seaſin thereon in the ſame Year, That the Lands were tailzied to Heirs Male.

Alledged for the Purſuer. *John Maxwell* being ſerved Heir and infeſt in general Terms, is preſumed Heir of Line, as the moſt natural Title of Succeſſion: unleſs it could be proved, That Sir *William* was infeſt upon the Precept and Charter in Favours of Heirs Male. Conſequently *John*'s Service and Infeftment was a ſufficient Warrant for the Purſuer to adjudge from his Heir of Line: Seing an Adjudger (who cannot know the private Conveyances of his Debtor's Eſtate) is not bound to look farther back than the laſt Inveſtiture. 'Tis true *John*'s Service as Heir to his Father, doth evince that the Father was infeſt, but not that his Infeftment was conceived in Favours of Heirs Male. Nor is it neceſſarly to be concluded, That Seaſin followed on the foreſaid Charter: For Sir *William* might afterwards, changing his Mind, have provided his Eſtate to Heirs whatſoever, and been infeſt accordingly. Which probably he did: Becauſe, had a Seaſin upon that Charter been produced to the Inqueſt who ſerved his Son, they would certainly have ſerved him Heir Male.

Anſwered for the Defender. That Sir *William* was infeſt, cannot be controverted by the Purſuer, whoſe Title depends alſo upon his Seaſin: And the ſerving *John Maxwell* (who was both Heir-male and Heir of Line) lawful and neareſt Heir indefinitely, muſt be underſtood *applicando* to the Father's Seaſin, otherwiſe the Inqueſt ſhould be guilty of Perjury, *qui jurati dicunt*, &c. Now, it's preſumed, That the Father's Infeftment proceeded upon the Charter to Heirs-male, until the contrary be inſtructed. And tho' the Seaſin upon ſuch a Charter had been laid before the Inqueſt, they might have ſerved *John Maxwell* lawful neareſt Heir to his Father, ſince that might be applyed to the Father's Charter.

The Lords ſuſtained the Defender's Objection againſt the Purſuer's Title, and found the Charter ſufficient without the Seaſin to inſtruct and prove it: No Right to Heirs whatſoever being *in Campo*.

January 4, 1712. John Murray *eldeſt Son to the deceas'd* Gilbert Murray *of* Conheath, *againſt* James Murray *his younger Brother.*

IN the Compt and Reckoning at the Inſtance of *John Murray* againſt *James Murray*, mentioned *ſupra June* 16, 1710: The Lords found, That the Defender having acquired a Right to the Lands of *Conheath*, from *Elizabeth Maxwell* his Mother, before the Purſuer granted to him the Factory, and entred to the Poſſeſſion by Virtue of an Appriſing acquired by him during the Factory; he could not alter or change the Title of his Poſſeſſion, but muſt be underſtood to poſſeſs by Virtue of the Appriſing, and be comptable to the

Purſuer for his Intromiſſions, ay and while the ſaid Right be extinct, or he denuded thereof in Favours of the Purſuer. But found, That after the ſaid Appriſing is extinguiſhed, or the Defender denuded thereof, as aforeſaid, he may compete for the Poſſeſſion.

Eodem Die. *The perſonal Creditors of Sir* William Forbes *of* Monimusk, *againſt the real Creditors on his Eſtate.*

IN the Reduction and Declarator at the Inſtance of Sir *William Forbes*'s perſonal Creditors, for reducing upon the *Act* 5. *Seſſ.* 6. *Parl. K. W.* ſuch real Rights as had been granted to their Prejudice, at, after, or Sixty Days before his becoming Bankrupt: The Purſuers alledged, That the common Debtor's Inſolvency, one of the requiſite Overt Acts of notour Bankrupt in the Statute, is not to be calculated at the Time of the Concurrence of theſe Requiſites. For tho' a Debtor is conſtrued to be Bankrupt from that Time, his Inſolvency is to be conſidered with Reſpect to his after eventual Condition, when his Creditors come to affect his Eſtate for Debts contracted before his Impriſonment, retiring, abſconding, flying, or forcibly defending himſelf: As is clear from the Words of the Act, *If any Debtor under Diligence by Horning*, &c. *be either impriſoned or retire*, &c. *and be afterwards found by Sentence of the Lords to be inſolvent, ſhall be holden and repute*, &c. So that Penalties and Accumulations muſt be reckoned as much a Part of the Bankrupt's Debt, as if they had been actually conſtituted before his Impriſonment, Retiring, &c. For theſe do not ariſe from any new Deed or Obligement of the Debtor, but are a neceſſary Conſequence of the original Debt, and when fallen due become, *Fictione Juris*, as much a Part thereof, as if they had been added thereto at the Beginning. Can therefore any Thing appear more abſurd, than to ſuppoſe that a Man's being Bankrupt ſhould not be reckoned from the Extent of his Debt, but depend upon the Accident of the Creditors charging or not charging him? Tho' a Bankrupt (according to the Import of the Word) be one who hath more Debt than Gear, the Lords underſtand a Man to be Bankrupt in a Proceſs of Sale, who (tho' his Debts exceed not the Value of his Eſtate) is yet ſo incumbred, that he cannot ſatisfie his Creditors without ſelling his whole Eſtate together. And in the Competition betwixt the Creditors of *Langtoun* and *Cockburn*, one was found Bankrupt, who was only *obæratus*, burdened with great Debts, and beginning to be diſtreſs'd by ſeveral Diligences: Albeit he did not at the Time appear, or prove in the Event to be altogether inſolvent. Seing the Circumſtances of the common Debtor's Incarceration, Retiring, *&c.* (which the Creditors could not foreſee) do but alarm and puſh them on to do Diligence for their Security: At which Time, if his Eſtate ſufficeth not to pay his Debt, he is inſolvent in the Senſe of Law, which eſtabliſheth the Preſumption, That anterior voluntary Rights granted by him to ſome of his Creditors within Sixty Days of his foreſaid Impriſonment, Abſconding, &c. are fraudulent in Prejudice of others.

Anſwered for the real Creditors. The Act 1696, in ſo far as it contains a Retroſpect, or looks back to Deeds within Sixty Days, and brings them to the Date of the Infeftments, is new and correctory, and to be ſtrictly interpreted. Now, the Word *Afterwards* refers not (as the Purſuers would have *it*) to the Word *Inſolvent*, but *to the Sentence of the Lords of Seſſion*, which muſt find, That the Debtor was inſolvent, at the Time of ſome one or other of the Circumſtances of Impriſonment, Retiring, *&c.* required by the Act. So in the civil Law, *Actio Pauliana*, reſcinds what is done in Prejudice of Creditors by one inſolvent at the Time of the Deed, or who thereby became inſolvent. And if it were otherwiſe, no Creditor could ever be in any Manner of Security:

Seing the Debtor, tho' ſolvent at the Time of his borrowing the Money, might by granting gratuitous Deeds or Securities within ſixty Days, or granting Bonds for Debt contracted any Time before Declarator of Bankrupt, turn inſolvent; and thereby overturn heretable Debts contracted while he was ſolvent. At which Rate, the Statute deſigned for a further Security to the Liedges againſt the Fraud of Bankrupts, would turn to their Prejudice, and a Door be caſt open to all imaginable Fraud: It being always in the Power of a common Debtor, to evacuate the moſt onerous and beſt ſecured Debt, by after contracting.

The Lords found, That *Monimusk*'s Inſolvency, he being under Diligence by Horning and Caption, joined with any of the Alternatives of Impriſonment or retiring, or flying or abſconding, or forcibly defending, in Order to make him notour Bankrupt in the Terms of the Act of Parliament 1696, muſt be reckoned at the Time of the Concurrence of the above Qualifications of Bankrupt in the Terms of the ſaid Act of Parliament, and not at the Time of purſuing the Declarator of Bankrupt. And found, That in proving the Inſolvency, there muſt be only brought *in Computo*, the principal Sums, Annualrents due and reſting thereupon, Penalties incurred, and Accumulations eſtabliſhed the Time foreſaid of the Concurrence of the above Qualifications of Bankrupt.

Eodem Die. William Wilſon *Merchant in* Edinburgh, *againſt* Elizabeth, Anna, *and* Catharin Shorts *Daughters to the deceaſt* Alexander Short *in* Stirling.

IN the Reduction, Improbation, and Declarator at the Inſtance of *William Wilſon*, as having Right by Progreſs to an Appriſing of a Tenement in *Stirling*, and ſome adjacent Acres belonging to the deceas'd *Alexander Short*, with Infeſtment thereon, for Payment of 2300 Merks contained in a Bond granted by him to the Purſuer's Author, againſt *Elizabeth*, *Anna*, and *Catharin Shorts*, for reducing a Diſpoſition and Infeſtment of the Lands granted by *Alexander Short* to the Defenders Author; and for declaring the Property of the Lands to belong to the Purſuer: The Defenders offered to exclude him by the ſaid Diſpoſition and Infeſtment produced.

Alledged for the Purſuer. The Defenders cannot exclude him by the Right in their Perſon, in Regard they, as Heirs to *Alexander Short* the Purſuer's Debtor, are perſonally liable, as he was, for the Debt in the Appriſing: For *quem de Evictione tenet Actio, eundem agentem multo magis repellit Exceptio*. And this Proceſs being *mutua Petitio*, or a Competition, if the Defenders ſhould be preferred, the Purſuer would have Action upon *Alexander Short*'s Warrandice againſt them as repreſenting him.

Duplyed for the Defenders. 1. A paſſive Title is not a Title in a Reduction of real Rights, but a *Medium concludendi* in a perſonal Action for Payment. 2. Were the Purſuer's Right a Diſpoſition, which the Granter or his Repreſentatives are obliged to warrand, the Defenders, did they repreſent the Granter, could not indeed exclude it by any Right in their Perſon. But albeit a Compriſing doth carry all Right that was in the Debtor's Perſon at the Time, and he and his Repreſentatives are liable for the Debt therein-contained: Yet they are not liable to warrand the Appriſing, nor tied up from excluding the ſame by preferable Rights in their Perſon. For an expired Appriſing might carry the whole Subject appriſed: Whereas an Action for Payment of the Debt therein, doth only make the Debtor's Repreſentatives liable to the Extent thereof.

Anſwered for the Purſuer. Albeit regularly no Recourſe of Warrandice is competent to an Appriſer, nor any *Jus ſuperveniens Authori* doth accrew to him:

Yet he hath *Exceptionem Doli* againſt his Debtor, pretending by Virtue of poſterior Titles, to poſſeſs the Lands appriſed, and may make uſe of that Exception by Way of Reduction, in Order to declare his own Right of Property againſt the Debtor, or his Heirs. The paſſive Title is not here the immediate *concludendi Medium*; but comes only in by Way of Reply, when the Defenders found upon their Rights.

The Lords found it not competent to the Purſuer to reply to the Defenders, upon a paſſive Title, That they were Heirs to *Alexander Short*, in this Reduction, without Prejudice to his Right by Way of Action as accords.

January 5, 1712. Margaret, Elizabeth, Anna, *and* Iſobel Eliſes *Daughters to the deceas'd Mr,* James Elies *of* Stenhouſemills, *againſt* James Watſon *of* Saughtoun *and his Curators.*

THe deceas'd *Watſon* of *Saughtoun* having deponed in a Furthcoming againſt him, at the Inſtance of Mr. *Robert Blackwood*, as Executor Creditor to the deceas'd Mr. *James Elies*, that Oath was, in a Compt and Reckoning at the Inſtance of *Margaret*, *Elizabeth*, *Anna*, and *Iſobel Eliſes* (aſſigned by Mr. *James* their Father to what *Saughtoun* owed him) againſt *James Watſon* his Son and Heir, found not to be *Res jurata* as to the Purſuer; in Reſpect the Oath was not emitted *iis deferentibus*. Albeit they compeared in *Blackwood*'s Proceſs, competed upon their Intereſt, oppoſed the referring to the Defender's Oath what he owed to their Cedent, and craved a Term to ſearch for the Inſtruction of the Debt.

January 10, 1712. John White *late Baillie of* Kirkaldie, *againſt* Daniel Reid.

IN a Competition for the Mails and Duties of the Lands of *Birkhill*, betwixt *Daniel Reid*, as having Right by Progreſs to Sir *David Arnot*'s ſingle and Liferent Eſcheat, obtained by Sir *Patrick Scot* of *Ancrum* in *Anno* 1691, and aſſigned to Sir *William Bruce Daniel Reid*'s Author in the Year 1704, and Baillie *White*, as having Right by Diſpoſition and Aſſignation from Sir *David* to an Adjudication of the Eſtate after the Gift was declared.

Alledged for Baillie White. The Gift of Eſcheat was ſimulate, and null by the *Act* 145. *Par.* 12. *J.* 6. In ſo far as, tho' the Gift was obtained in *Anno* 1691, and declared in the 1693, Sir *David* is ſuffered to remain in the peaceable Poſſeſſion of his Lands of *Pitlethies* till this Day. Which Nullity is competent to be proponed by the Rebel's Creditors, and others deriving Right from him, *March* 28, 1637, *Hamilton* contra *Tenants*, *January* 6, 1666, *Oliphant* contra *Drummond*, *December* 20, 1676, *Pallat* contra *Vetch*, obſerved by *Dirletoun*, *December* 17, 1670, *Langtoun* contra *Scot*, *June* 19, 1669, *Scot* contra *Langtoun*. Nothing being more contrary to Law and Reaſon, than to cover a Rebel by a colluſive Gift of Eſcheat, and maintain him in the peaceable Poſſeſſion of his Lands, to the Loſs and Ruin of his Creditors, and Purchaſers from him. 2. Sir *David* acquired not the foreſaid Adjudication till after the Gift, and Gifts of Eſcheat extend not *ad acquirenda*: Therefore the Rents of the Lands adjudged can never fall under the Gift, *Hope Prat.* 25, and 28, *June* 1622, *L. Clapperton* contra *Inglis*. So Gifts of ſingle Eſcheat extend only to Goods pertaining to the Rebel, the Time of the Gift, and a Year thereafter, 23 *June* 1684, *Wilſon* contra *Kennedy*. And there is more Reaſon for ſo reſtricting Gifts of Liferent Eſcheat granted by the Sovereign(as this is) that there may be Place for other Donatars *quoad* Lands acquired thereafter: For no Gift may be granted by the Queen, or her Officers, except where ſome Knowledge may be had of the Value and Extent of the Subject falling under the Gift. 3. Rents of Lands adjudged can never fall under Liferent Eſcheat, till the Adjudication be expired: Becauſe, the Rebel cannot be ſaid to have Right to theſe during his Lifetime; and one or two Years Rent may perhaps ſatisfie his Debt and extinguiſh his Adjudication. Now this Adjudication was not expired when diſponed to Baillie *White*. And however the Donatar might have pretended to the Rents of the Lands, had the Adjudication expired in the Perſon of Sir *David*; yet he being denuded before Expiration, the Donatar's Pretence is excluded. Again, as when Infeftments are granted for Payment or Security of a Sum, neither the Rents of the Lands in the firſt Caſe, nor the Sum burdening in the ſecond, can fall under the Liferent Eſcheat: So neither do the Rents of Lands adjudged before Expiration of the Legal.

Replyed for Daniel Reid. 1. The Act of Parliament 145, being conceived only in Favours of the Sovereign, and Her Majeſty's Donatar, cannot be founded on againſt them by the Rebel's voluntary Aſſigny. All the Deciſions cited proceed upon poſitive Proof of Simulation, by the Rebel's acquiring the Gift with his own Means; and not upon the preſumptive Simulation, by allowing him to continue in Poſſeſſion. No doubt the Rebel's Creditor before the Gift may competently inſiſt upon the Ground of Simulation; But an Aſſigny after the Gift, as here, cannot propone that Alledgeance. 2. By the Terms of this Gift, the Sovereign has aſſigned all the Mails and Duties, Annualrents, *&c.* that belong'd to the Rebel the Time of the Rebellion, or ſhould belong to him at any Time during his Life. 'Tis ſingular, that the Rebel himſelf, or any claiming under him after the Rebellion, ſhould compete for the Mails and Duties of his Lands with the Donatar. But the Adjudication being led upon a Bond bearing Annualrent that ſtood in the Perſon of Sir *David* the Time of the Denunciation and Gift, this Liferent Eſcheat muſt carry either the Annualrent of the Mony, or Rents of the Lands adjudged during Sir *David*'s Lifetime. 3. The Annualrent of the Sums for which the Adjudication was led fell under the Liferent Eſcheat, and conſequently the Rents of the Lands during the not Redemption, and, upon expiring of the Legal of the Adjudication, belonged to the Donatar during the Rebel's Lifetime: For there could be no Redemption after expiring of the Legal.

The Lords repelled the Alledgeance founded upon Simulation of the Gift, by the Rebel's poſſeſſing the Lands after the Gift, as not competent, to the Rebel's Aſſigny; And repelled the Ground of Baillie *White*'s Preference founded on the Adjudication, in Reſpect the Bond whereon that Diligence followed, was in the Perſon of the Rebel or his Truſtee before the annual Rebellion; and found the Donatar had Right to the Annualrents of the Sum for which the Adjudication was led, and conſequently to the Rents of the Lands.

January 11, 1712. *Mr.* Roderick Mackenzie *of* Preſtounhall, *againſt* Jean Fletcher *and Captain* Henry Straiton *her Huſband.*

MR. *Roderick Mackenzie* of *Preſtounhall*, one of the Senators of the College of Juſtice, having 20 *January* 1699, obtained an Adjudication againſt the Repreſentatives of *James Fletcher* of *Cranſtoun*, upon 1000 *Lib.* Bond granted by him as Principal, and *Kenneth* Earl of *Seaforth* as Cautioner, to the deceas'd Sir *George Lockhart*, 5 *February* 1678, and aſſigned by Progreſs to the Adjudger, who thereupon did charge, denounce, and regiſter *James Fletcher* at the Horn in *December* 1680. *Preſtounhall* raiſed a Reduction againſt *Jean Fletcher* and her Huſband upon the Act of Parliament 1621, of a gratuitous Bond of 8000 Merks granted by *James Fletcher* to the ſaid *Jean* his Siſter, *February 6*, 1678, And of a Diſpoſition granted by him in *Auguſt* 1681 of the Lands of *Kilgirſtoun* to her and *John Graham* Poſt-Maſter then her Huſband, in Conjunct-fie and Liferent, in Satisfaction of the gratuitous Bond, clothed with Infeſtment in *September* 1682. In Reſpect, 1. The Bond quarrelled was of a Day's Date after the Bond granted to Sir *George Lockhart* the Purſuer's Author, and being a Deed for Love and Favour *inter conjunctas Perſonas*, could not prejudice a prior onerous Creditor, by the firſt Part of the ſaid Act of Parliament, the Granter having *in Eventu* prov'd inſolvent: And the Diſpoſition *inter conjunctas* could not be ſupported by the Oneroſity of the precedent gratuitous Bond. 2. The Diſpoſition was quarrellable upon the ſecond Clauſe of the Statute, whereby no voluntary Right by a Debtor to his Creditor can prejudice the more timely Diligence of a Cocreditor.

The Lords ſuſtained this Anſwer to the Reaſon of Reduction upon the firſt Part of the Act of Parliament 1621, That *James Fletcher* had at the Time of granting the Bond to his Siſter a ſufficient ſeparate unincumber'd Eſtate for Payment of all his Debts: And alſo ſuſtained the Anſwer to the Reaſon on the ſecond Part of the ſaid Statute, That the Diligence, by ſimple Horning and Denunciation, was not habile to reduce the Diſpoſition, not being duly proſecuted for many Years by real Diligence.

Albeit it was alledged for the Purſuer. 1. Mens Circumſtances are known very quickly to alter, and if the ſuch Debtors prove eventually inſolvent, the juſt Creditor is equally diſappointed, as if his Debtor had been Bankrupt from the Beginning. 2. It's no Novelty in our Law for a Conveyance that was good when firſt made, to fall under the Act of Parliament 1621, thro' the Granter's ſupervenient Inſolvency: More than for a Diſpoſition within the half of Ward lands without Conſent of the Superior, tho' valid, when granted, to become thereafter null by more of the Lands being diſpoſed. 3. By the civil Law, all Deeds and Rights in Prejudice of Creditors are null, at leaſt may be reduced *Actione Pauliana*, if prejudicial to them *ex Eventu et Re*, tho' not fraudulent *Conſilio*, which being *in Animo* is *perdifficilis Probationis. L. 6. § 11. ff. quæ in Fraud. Credit. L. 5. C. de Revoc. his quæ in Fraud. Cred.* How hard is it to put Creditors to diſpute their Debtor's Condition the Time of making Donations: Men of the beſt Credit being frequently found to manage moſt cloſely? Is it not more juſt, that, in the Caſe of eventual Inſolvency, a Donatary who hath but a lucrative Title, ſhould ſuffer rather than a juſt anterior Creditor? 4. As it cannot be pretended in Reductions *ex Capite Inhibitionis*, that the Party inhibited did nothing in Prejudice of his Creditor, in Reſpect the Time of the Alienation he had Sufficiency of Eſtate beſide: So *a pari*, the like Alledgeance ought not to be ſuſtained to take off or enervate the Effect of the Act of Parliament 1621.

In Reſpect it was anſwered for the Defender. 1. It were more unreaſonable that a Right good from the Beginning ſhould depend upon after Events; than that a Creditor ſhould loſe thereby who had it in his Power to prevent the ſame by calling for his Mony, or ſecuring the ſame by Diligence. 2. The Purſuer's Parallel from Recognitions, where partial Alienations good *in Initio* may *ex Eventu* become void, ariſeth from the Nature of the Feu, which every partial Purchaſer or Creditor taking Security out of it, is bound to know, and contracts with his Hazard: But no ſecond Creditor tho' gratuitous is bound to conſider any Thing, but that his Debtor at the Time has Sufficiency of Means to pay all former Debts. 3. All Commentators upon the *Actio Pauliana* allow *Conſilium fraudandi*, that is where the Debtor was inſolvent when he made the Deed, to be a Ground of Reſtitution in all Caſes, and *Fraudem in Eventu abſque Conſilio*, that is when he became inſolvent by the Deed, to take Place *in Cauſis lucrativis*, §. 3. *Inſt. qui et ex quib. Cauſ. man. non poſſ.* So *an fraudentur* in the *L. 6.* §. 11. *ff. quæ in Fraud. Cred.* imports only, That either the Debtor is actually inſolvent when he does the Deed, or becomes ſo by doing it. 4. Inhibitions are legal Remedies ſtricking againſt all poſterior voluntary Alienations, according to the expreſs Will of the Letters iſſued out from Sovereign Authority, whatever be the Debtor's Circumſtances: Whereas the Act of Parliament is calculated only againſt Alienations of Perſons in certain Circumſtances, which therefore muſt be ſubſumed.

January 15, 1712. John Woodcroft *and his Factor, againſt* William *Earl of* Strathnaver.

IN the Proceſs of Furthcoming at the Inſtance of *John Woodcroft* and his Factor, againſt the Earl of *Strathnaver* as Debtor to the Earl of *Sutherland* his Father, the Purſuer's Debtor; the Defender being interrogated upon Oath if he had intrometted with the Rents of certain Lands belonging to the Earl of *Sutherland* in Liferent, and in what Manner he had paid the ſame, acknowledged his Intromiſſion with theſe Rents; but that at the Time of the Arreſtment he was not Debtor for the ſame, but had made Payment to the Earl, or his Order at ſeveral Times before the Arreſtment.

Alledged for the Purſuer. The Defender ought to depone when theſe Orders from the Earl of *Sutherland* were drawn, to whom payable, for what Cauſe, and to what Extent, that the Lords may judge if the ſame be relevant to Aſſoilzie or not: For he is not to be Judge of the Relevancy of his own Payment, *Stair Lib. 3. Tit.* 1. §. 41. and theſe Orders might perhaps have been for Payment of Debts, which the Defender himſelf was bound to clear, or the Date of the Orders might have been before; and the Payment after the Arreſtment, which would not be relevant to aſſoilzie the Defender.

Anſwered for the Defender. Tho' a Debtor by Writ called in a Furthcoming ſhould be ſpecial; yet it ſufficeth that the Defender (whoſe Intromiſſion is probable only by his own Oath) depone, without deſcending to Particulars, That he paid all before the Arreſtment, which implies *naturalem Præſtationem*: Albeit extrinſick Qualities, inferring a Ground of Compenſation or Payment in Goods deponed upon muſt be proved *aliunde*; *June* 26, 1675, *Gilchriſt* contra *Murray* obſerved by *Dirletoun*.

The Lords ordained the Defender to depone, ſpecially what Payments were made by him to his Father, and by his Order to the beſt of his Memory.

January 16, 1712. John Lyon *of* Brigtoun *and his Curators, againſt* Elizabeth Gray *Lady* Carſe, *and* Cicilia Denmure *Lady* Allantoun.

J*Ohn Lyon* of Brigtoun, apparent Heir-male to *Patrick Lyon* of *Brigtoun* his Grand-uncle (who came to Poſſeſſion of the Eſtate as a Creditor by ſingular Titles, tranſmitted to him by his Grand-father) finding the ſame exhauſted by Debts and two Liferents, *Viz.* One to *Elizabeth Gray* Lady *Carſe* his Grand-uncle's Relict, and another to *Cicilia Denmure* his Mother, purſued an Aliment againſt theſe Liferenters.

Alledged for the Lady Carſe. Abſolviture, becauſe the Purſuer doth not poſſeſs the Eſtate as Heir to his Grand-uncle her Husband, but as Heir to his Grand-father, who did not only renounce to be Heir to his Brother the Grand-uncle, but acquired ſingular Titles and poſſeſs'd *tanquam quilibet.* For Aliment provided by Law muſt go to the Heirs of Law, and not to Heirs of Tailzie or Proviſion; and far leſs to the Purſuer who is only Heir to a Creditor, and not Heir of the Family or Blood. Seing his accidental Title of apparent Heir-male, is cut off by upwards of Fourty Years Poſſeſſion of the Eſtate by ſingular Titles as *Feudum novum* or Conqueſt.

Replyed for the Purſuer. His Grand-father having been undoubted apparent Heir-male to the Defender's Husband, the Neceſſity he was under to ſucceed by Appriſings and Adjudications for Fear of Debt, ſhould not wrong the Purſuer's natural Claim of an Aliment: Which, tho' commonly aſcribed to the Act of Parliament, appointing Wardatars to aliment their Wards, ſeems rather to have ariſen from the Civility of our Law, that judg'd it hard for Liferenters to cut off, as it were by ſtarving, the Heir from any Hope of Succeſſion. Upon which Ground it may be gathered from the Strain of our Pratticks, that a Fiar having the Right of Blood, debarred by Liferents, ought to be alimented by the Liferenters whether he came to the Succeſſion by Service, or ſingular Titles: Albeit the Heir of a ſtranger Purchaſer could have no Recourſe to an Aliment off a Liferenter, whoſe Right affected the Purchaſe. Yea, the Intereſt of Blood entitled an apparent Heir to aliment, even againſt his Grand-father's ſecond Wife, to whom he had no Blood-relation, *December* 12, 1677. *Preſton* of *Ardrie* contra his *Liferenter.*

Duplyed. It being abſurd to pretend, That the Purſuer can both enjoy the Eſtate as a Creditor, and claim Benefit as Heir to the Perſon whom his Diligence and ſingular Titles diveſted: Aliment can no more be decerned upon that Account, than it could be decerned at the Inſtance of the Heir of a Ward vaſſal againſt the Superior, when the Ward-lands are poſſeſs'd by an Appriſer. The Caſe of *Ardrie* is a ſingle Deciſion; beſides it doth not appear, That there the Eſtate was enjoyed by ſingular Titles.

The Lords found the Defence for the Lady *Carſe* relevant, That the Purſuer poſſeſſeth not as Heir to her Husband, but as a Creditor by ſingular Titles.

January 17, 1712. *Sir* William Meinzies *and* Alexander Clerk, *contra* William Moriſon *of* Preſtoungrange.

UPon Report of the Lord *Bowhill,* The Lords allowed *Marini* a Jew to be received a Witneſs. Becauſe his Religion doth not hinder him to ſwear our Formula *by God himſelf, &c.* Unleſs he were a Sadducee who denys the Reſurrection, and ſo could not depone *as he ſhall anſwer to God at the great Day.*

January 18, 1712. Mitchel *of* Bredhead *contra* Andrew M‘Adam *Writer in* Edinburgh.

MItchel of *Bredhead* purſued *Andrew M‘Adam,* for Exhibition and Delivery of his Writs, who pretended to *Jus detinendi,* till he be paid of his Fees as Agent for the Purſuer in his Buſineſs, conform to an Accompt given in.

Alledged for the Purſuer. The Accompt is preſcribed *quoad Modum Probandi;*

bandi; except as to his Oath, not being ſued within three Years; which Preſcription is not hindered by a Writer's having his Client's Papers in his Hand to which his Accompt related, *November* 29, 1709. *Meaſſon* againſt Earl *Aberdeen*.

Anſwered for the Defender. The Deciſion cited doth not meet: For the Earl of *Aberdeen* was purſued *per Modum Actionis* for Payment of a Writer-Accompt; whereas here the Defender purſued to deliver up his Client's Writs, ſays only by Way of Defence, He cannot be obliged to do it till once the Accompt be paid. Which Defence is perpetual, and doth not preſcribe: Tho' Action upon the Accompt be preſcribed as to the Manner of Probation. The Lords found, That the Exception or Defence, whereby *Andrew M'Adam* claims Payment of his Accompt, doth not preſcribe while the Papers are in his Cuſtody.

Eodem Die. Inglis *contra* Fuller.

THe Lords upon Report of the Lord *Cullen*, found that one's Procurator before an inferior Court, could not defer the verity of a Point to the other Party's Oath, *etiam in Re minima*.

Eodem Die. *Mr.* John Montgomery *of* Wrae *and Comiſſary* William Alves, *contra* William Marqueſs *of* Lothian.

IN the Action at the Inſtance of Mr. *John Montgomery* and *William Alves*, againſt the Marqueſs of *Lothian*, for Payment of 140 *lib. Sterling* contained in his Obligement dated 25 *March* 1697; whereby *he obliged himſelf to procure to Major* William Burnet *Precepts from or upon the Receivers for the ſaid Sum before his Departure from* Edinburgh, and in Caſe the Major ſhould make Intereſt with the *Receivers or any other Merchants or Perſon whatſoever, he obliged himſelf to allow it to the Receivers out of the firſt and readieſt of any Precepts drawn by the Treaſury for the Regiment*; to which Obligement the Purſuers have Right by Progreſs from the now deceas'd Major *Burnet*: The Lords found that the Acts of Parliament requiring Writer's Name and Witneſſes in probative Writs, take no Place in this Writ; the ſame being a Writ betwixt Officers concerning their Pay, and of the Nature of a Letter of Credit.

Albeit it was alledeged for the Defender. The Act of Parliament 1681, having expreſly required the deſigning of the Writer and Witneſſes, as an indiſpenſable Solemnity in all Writs, the Exceptions from that Rule ought to be eſtabliſhed by an equal Authority. And Deciſions made Uſe of to prove a Deſuetude of this Solemnity in any particular Writ, as Bills of Exchange, Precepts, Receipts betwixt Maſter and Tenants, Receipts of Ceſs, Exciſe and the like Duties, are not to be extended beyond the Particulars decided: Seing all Lawyers agree that Rules ought to be largely interpreted, and Exceptions or Derogations from Rules ſtrictly. Beſides, Cuſtom founded upon the *Authoritas Rerum perpetuo ſimiliter judicatarum*, requires a Frequency of Deeds and Length of Time, eſpecially when pleaded to abrogate or reſtrict poſitive Law: For ſingle Deciſions as to ſeparate Points are at moſt but Arguments of Authority in Caſes preciſely the ſame. It's true that Souldiers by the civil Law were indulged a great many Privileges denied to others, as in the making of their Teſtaments, that their Courage might not be blunted with Anxiety about their Families: But that was reſtricted to the Time they were *in Procinctu*, when they could not have Advice and Aſſiſtance. And modern Lawyers, particularly *Voet. de Jure militari, Cap. de Privilegiis Militum*, doubt mightily, if theſe Privileges be competent to Souldiers now a Days, even in thoſe Countries where the *Roman* Law prevails. It's acknowledged that Orders by general commanding Officers to Subalterns, or Orders that paſs according to the common Courſe of Buſineſs among Souldiers, ſuch as Warrants directed to a Paymaſter or Pay Office, need no Solemnities: But that cannot be extended to the ordinary Obligations of Souldiers, eſpecially ſuch as are made by them at Home or in Gariſon, where they may have Acceſs to Advice, and are not diſturbed with the Noiſe and Toils of War. If every Contract in Relation to a Souldier's Pay, be allowed a Diſpenſation from the ordinary Solemnities; the ſame Privilege might be pleaded in Favours of a Writ, whereby one Souldier buying a Commiſſion from another, aſſigns the Seller to his Pay till the Price be paid. To make an Obligement granted by a Souldier ſubſiſt againſt him, that would be null as to any other Obligant, were to make Souldiers more eaſily and ſtrictly obliged than others: Whereby *Privilegium militare* introduced in Favours of Souldiers, would turn to their Prejudice. This Obligement cannot be conſidered as a Letter of Credit; ſeing Letters of Credit have a different fixed Stile and Tenor, and take Place only among Merchants. Nor can it be reckoned ſuch, from it's affording a Fund of Credit; more than Bonds, eſpecially Bonds of Relief of Debts to be contracted for the Uſe of the Granter, might be reckoned Letters of Credit. If the Obligement in Controverſie import any Thing, it imports a direct Action to Major *Burnet* or his Aſſignies, againſt the Marqueſs of *Lothian*: Whereas a Letter of Credit furniſheth no Action to the Obtainer againſt the Granter, unleſs the former can inſtruct that he lodg'd Mony in the Hands of the latter, equivalent to the Sum for which the Credit was given; or that he ſuſtained Damage thro' it's not being honoured. Beſides, it may be obſerved that our late Act of Parliament extending the Privileges of foreign Bills to inland Bills and Precepts, takes no Notice of Letters of Credit, as not ſo neceſſary for inland Trade.

In Reſpect it was Replyed for the Purſuer. The Statute 1681 and other Acts it relates to, concern only formal Writs that uſed to have Writer's Name and Witneſſes adhibited before theſe Statutes; and confirm by Law what was formerly cuſtomary, tho' not neceſſary. But do not concern curſory Obligations, (as this) written, without previous Concert, *pro Re nata*, according to the Exigence of the ſubject Matter: As is clear not only from Precepts, obligatory Notes and Receipts betwixt Maſter and Tenants, Managers and Servants of Manufactories, and Writs us'd in expediting the Buſineſs of all publick Offices and Societies; but even from Writs otherways formal, as Inſtruments of Seaſin and holograph Bonds not bearing to be written and ſubſcribed by the Granter. Now, Precepts or Notes among Souldiers relative to the Pay of the Regiment, are as little to be regulated by nice or rigorous Form, as any other privileged Writs. For as, by the *Roman* Law, *Ignorantia Juris non nocet Militibus, qui Arma magis quam Leges ſcire debent*: So in Writs among them no Solemnity is required *quæ Subtilitatem magis quam naturalem Rationem ſapit*. They were not only privileged in the Manner of making their Wills, but exempted from moſt of the publick Statutes: Particularly they could not be impriſoned for Debt, and were no further liable than they were able to pay; they were not obliged *cedere Bonis* in Favours of Creditors, nor could their Goods be adjudged to Creditors, or diſtrained, *cum Reipublicæ Defenſionem ſuſtinebant*; they were excuſed from Tutory and moſt other publick Offices; they were convenable only *coram Magiſtro Militum*; and could not be forc'd to bear Witneſs. By the Practice of *Scotland*, and other civilized Nations, Notes and Orders for military Diſcipline, or circulating the Pay of a Regiment, require no Solemnity of Writer or Witneſſes. The Inſtance of an Officer buying a Commiſſion, and aſſigning to the Pay till the Price be paid, is quite Foreign: Seing there the Seller ceaſeth to be a Souldier, and is *tanquam quilibet* to the Paymaſter; and the Agreement is not Curſory, but hath *Tractum Temporis* which requires a more formal Settlement. But after all it may be argued, That an Obligement by one Officer to another, for the Value of his Commiſſion, aſſigning to the Pay of the Regiment, would be effectual without Writer's Name and Witneſſes, to make the Buyer liable perſonally, if he upliſted the Pay after the Aſſignation, tho' never intimated: And how can the Marqueſs pretend Exemption from Warrandice from Fact and Deed, after he hath uplifted the Mony deſtin'd for the Purſuers Payment? 2. It cannot be controverted, without cavilling, That a Writ of this Tenor, whereby the Granter becomes obliged to all Perſons who ſhall advance Mony upon the Faith thereof, is of the Nature of a Letter of Credit; tho' it be not a formal Letter of Credit: And by the by, our Cuſtom knows no fix'd Form or Tenor of a Letter of Credit. Is there any Thing more uſual, than to give Credit by miſſive Letters, or upon any emergent Occaſion? And the Variety of humane Affairs makes it ſimply impoſſible, to reduce Letters of Credit into any certain Form: Since Credit is deſired and given *pro Re nata* according to the preſent Exigency.

Eodem Die. Robert Herries *in* Forberliggit, *againſt Sir* George Maxwell *of* Orchyardtoun.

IN the Action at the Inſtance of *Robert Herries*, againſt Sir *George Maxwell*, as repreſenting Sir *Robert Maxwell* his Father, for Payment of 260 Pound of Principal, with Penalty and Annualrent contained in a Bond granted by him to *Janet Affleck* in *Midtoun* of *Spots*, and aſſigned by her to the Purſuer her Son: The Defender proponed Compenſation upon this Ground, That he offered to prove by the Purſuer's Oath, that his Cedent poſſeſs'd the Lands of *Spots*, as Tenant to the Defender's Father, for more Years than the Rent thereof would ſatisfie the Bond.

Alledged for the Purſuer. It being more as Thirty Years ſince his Cedent poſſeſs'd theſe Lands, the Defence of Compenſation upon her Poſſeſſion ought to be repelled: Unleſs it be offered to be proved by the Purſuer's Oath, That theſe Years Rents of the Lands poſſeſs'd by his Cedent are ſtill reſting owing; they being preſcribed *quoad Modum Probationis*.

Anſwered for the Defender. From the very Terms the Rents fell due, they compenſated and extinguiſhed the Bond, by the Concourſe of Debit and Credit betwixt the Parties, as effectually as if the Purſuer's Father had got a Diſcharge thereof: And tho' Action for theſe Rents be preſcribed as to the Manner of Probation, the Defence of Compenſation thereon is perpetual, and muſt be ſuſtained, unleſs the Purſuer can prove that the Rents were *aliunde* paid.

The Lords repelled the Defence of Compenſation, unleſs the Defender offer to prove by the Purſuer's Oath, That the Rents of the Lands poſſeſs'd by his Cedent are ſtill reſting, owing.

January 24, 1712. Alexander Erskin *Merchant in* Montroſe, *againſt* William Eliot *Merchant in* London.

IN a Competition betwixt *Alexander Ereskin* and *William Eliot*, Creditors to *William Scot* Merchant in *Edinburgh*, for the Share of a Ship belonging to the common Debtor: The Lords preferred Mr. *Eliot* who had a Gift of the common Debtor's Eſcheat declared in general, to Mr. *Erskin*, who after the other's Gift before Declarator had arreſted the Ship for a Debt due before the Rebellion; upon this Speciality, That the Donatar's Gift proceeded upon his own Horning, and he obtained Declarator before Mr. *Erskin* recovered a Decreet of Forthcoming.

Albeit it was alledged for Mr. *Erskin*, That as Arreſtment intervening betwixt an Aſſignation and Intimation thereof, would be preferred thereto: So an Arreſtment intervening betwixt the Gift of Eſcheat, and Decreet of Declarator, which is the Intimation thereof, is preferable to the Gift; ſo be it proceed on a Debt prior to the Rebellion, *Spotſwood, Pratt. Page* 98, *February* 19, 1667, *Glen contra Hume, March* 27, 1707, *Henderſon contra Aliſon.* For the ſame Reaſon, an Executor Creditor confirming a Subject belonging to his Debtor, after his Eſcheat was gifted to another, but not declared, was preferred to the Donatar, *November* 8, 1710, *Borthwick of Fallahill contra Arbuthnot:* And an Arreſter was preferred to an Executor Creditor, who obtained Decreet, but did not poind thereon, *January* 20, 1681, *Riddel contra Maxwell.* Yea, a general Declarator ſerves only for Intimation as to Eſcheat Goods in the Hands of the Rebel, who only is called in the general Declarator, and not as to the Rebel's Debtors who are *in bona Fide* to pay to him or his Creditors arreſting in their Hands, till they be interpelled by a Decreet of ſpecial Declarator, *ibid.* and *January* 31, 1628, *Cleghorn contra Tenants.* Nor doth it alter the Caſe, that the Eſcheat fell on the Donatar's own Horning: For the Debt contained in the Horning upon which the Gift proceeds, gives no Preference to the Gift. True, when the Donatar gets the whole Eſcheat Goods by the Benefit of another's Horning, 'tis but juſt he ſhould pay him; and when the Eſcheat falls upon the Donatar's own Horning, he acquires the Goods without any ſuch Burden. The *Act* 143, *Parl.* 12. *Ja.* 6. declaring all Intrometters by Gift, Aſſignation or otherways with any Part of the Rebel's Effects, liable to pay the Debt contained in the Horning upon which the Gift proceeded, is only to be underſtood of a Competition betwixt the Creditor upon whoſe Horning the Eſcheat fell, and the Donatar or others covering themſelves with the Gift: And cannot be ſtretched againſt other Intrometters or Creditors doing Diligence upon ſeparate Titles, who cannot be thought either perſonally liable or obnoxious thro' completing their Rights.

In Reſpect it was anſwered for Mr. *Eliot.* A Gift of Eſcheat is indeed of the Nature of an Aſſignation, in a Competition with other Gifts or Rights flowing from the ſame Granter; ſo that a ſecond Gift firſt declared will be preferred to the firſt Gift: But not in a Competition with a Creditor deriving Right from a different Author. In all the Deciſions cited for Mr. *Erskin*, the Arreſtment was before the Gift; and there is more Reaſon to prefer an Arreſter before, than one arreſting after the Gift, whereby the Donatar has *Jus quæſitum.* The Caſe of *Borthwick contra Arbuthnot*, doth not meet: There being a great Difference betwixt an Executor Creditor, whoſe legal Aſſignation needs no Intimation to complete it; and an Arreſter, who hath but an inchoated Diligence, till it be completed by a Decreet of Forthcoming, which tranſmits the Property. But where the Eſcheat gifted fell upon the Donatar's own Horning (as in this Caſe) he was preferred to one arreſting the Rebel's Goods after the Gift before Declarator, *February* 27, 1623, *Haliburton contra L. Murthills.*

Eodem Die. George Stuart *and his Tutors, againſt* John Hill *Merchant in* Greenock *and others.*

IN the Action at the Inſtance of *George Stuart* and his Tutors, againſt *John Hill* and others: The Lords found, That executing a Summons is not ſufficient to found Interruption of Preſcription; the Summons having fallen and expired thro' not being tabled or called within Year and Day.

Eodem Die. *The Juſtices of Peace of the Shire of* Air *and their Fiſcal, againſt the Town of* Irving, *and ſeveral Inhabitants of that Burgh.*

THomas Gray and other Inhabitants of *Irving* perſonally cited before the Juſtices of Peace of the Shire of *Air*, to underly the Law for the unwarrantable Importation of *Iriſh* Victual, being held as confeſt upon their not Compearance, and fined each in the Sum of a hundred Pound *Sterling*: They ſuſpended for the Reaſons following, 1. The Decreet was *a non ſuo Judice*: In ſo far as the Juſtices of Peace proceeded to give Sentence againſt them, notwithſtanding that the Magiſtrates of the Town of *Irving*, who have Power of repledging their Inhabitants by Charters from the Sovereign, ratified in Parliament, and ſuſtained in a Juſticiary Court at *Edinburgh*, *November* 16, 1586, compeared by their Procurator before Sentence, and offered to repledge. 2. The Juſtices of Peace committed Iniquity in ſuſtaining the Libel, tho' for a Crime, relevant to be proved by the Suſpenders Oaths. 3. The Juſtices had fined the Suſpenders, who are but poor Tradeſmen, moſt exorbitantly in a hundred Pound *Sterling* each.

Anſwered for the Chargers. 1. The Town of *Irving* have no ſpecial Power of repledging beyond other Burghs of *Scotland*: And whatever was the Privilege of Burrows, by the ancient Laws before the regular Conſtitution of Judicatures, it's now in Deſuetude, and other Judicatures conſtituted ſince then have a cumulative Juriſdiction with the Burrows, and Lords of Regality, according to the Extent of their Juriſdiction. So Juſtices of Peace are not only, by the *Act* 38. *Parl.* 1661, impowered, after elapſing of Fifteen Days, to convene every Perſon without Reſpect to the Privilege of any other Juriſdiction; which Exception of Fifteen Days is alſo taken away by the late Act of the *Britiſh* Parliament in the Sixth Year of Her Majeſties Reign: But alſo, they are proper Judges to puniſh the Importers of Victual, *Act* 9, *Parl.* 1703. And our Law looks upon the Magiſtrates of Burghs with ſo jealous an Eye in the Matter of Victual, that all Power of repledging Foreſtallers and Regraters is taken from them, *Act* 148, *Parl.* 12. *Ja.* 6. and committed to other Judges, in whoſe Place the Juſtices of Peace are now come. 2. By the §. 9 of the Act 1661, the Juſtices of Peace may, upon a perſonal Citation, without further Solemnity hold the Defender as confeſt, as to all Crimes and Miſdemeanours committed to their Care. 3. The Chargers ſubmit the Exorbitancy of the Fine to the Lords Modification.

Replyed for the Suſpenders. The Town's Right of repledging cannot preſcribe but by contrary Acts, where they having Occaſion to uſe their Right, were either debarred *in Judicio contradictorio*, or acquieſced to a contrary Practice for the Space of Fourty Years. And the *Britiſh* Statute giving the ſame Powers to the Juſtices of Peace in *Scotland*, as thoſe in *England* have, muſt be underſtood with a *Salvo* as to private Rights.

The Lords found, That the Juriſdiction of the Juſtices of Peace over the Suſpenders is well founded by the Acts of Parliament; and that there was no Iniquity in ſuſtaining the Libel relevant to be proved by their Oaths; and remitted to the Lord Ordinary, to modifie the Fines in the Decreet with a particular Regard to the Circumſtances of the Offence and Offenders.

January 29, 1712. James Ogilvie *Son to the deceas'd* James Ogilvie *younger of* Boyn, *againſt* David *Earl of* Levin.

JAmes Ogilvie having Right by Progreſs to a Bond granted by *William Hamilton* of *Wiſhaw*, to *Walter Boyſton*, for a Part of the Price of the Lands of *Weddersbie*, ſold to *Wiſhaw* by *James Arnot* of *Fairnie*, whereby *Wiſhaw* obliged himſelf to pay to *Boyſton* 8000 Merks at *Martinmas* 1669, provided always, That *James Arnot* did purge and take away all Inhibitions raiſed and executed againſt him before the Date of the Diſpoſition of the Lands granted by him to *Wiſhaw*: He *James Ogilvie* inſiſted in a Reduction and Improbation againſt the Earl of *Levin*, wherein he called for an Inhibition executed againſt *Fairnie* by the Earl of *Melvil* the Defender's Father.

Alledged for the Defender. Tho' Reduction of the Inhibition called for might tend to the Purſuer's Advantage, that conſequential Intereſt could not furniſh a ſufficient active Title in ſuch a Proceſs, to him who is neither Heir nor Creditor to *James Arnot* of *Fairnie*, nor hath any Pretence of Right to the Lands affected with the Inhibition: More than an apparent Heir could ſue a Reduction and Improbation for clearing the Inheritance of Incumberances, no Man having Intereſt to debar another's Right but he that hath Right himſelf. Beſides, an Abſolviture in this Action would not be *Res judicata*, to hinder *Wiſhaw* to plague the Defender again with the like Proceſs. 2. *Eſto*, the Bond had been granted for a Part of the Price of the Land, the Purſuer could be in no better Caſe, than an Aſſigny to the Price of Land contained in a Minute, who could not, by a Reduction and Improbation, purge theſe Lands of Incumberances, for Want of a Title, altho' he could not claim the Price, till Incumberances were purged. Again, if no perſonal Creditor can reduce a Diſpoſition of Lands, *June* 24, 1709, *Brown of Thornidykes contra his Brother*: Far leſs can the Purſuer, who cannot ſo much as pretend to be a Creditor, or to have any Intereſt in the Lands affected, reduce or impugn any real Diligence affecting the ſame.

Replyed for the Purſuer. Albeit a perſonal Creditor cannot reduce real Rights and Diligences affecting Lands, yet as *Fairnie* and *Wiſhaw* deriving Right from him, had each of them an unqueſtionable Title to quarrel and reduce Inhibitions affecting their Land: So by the burdening the Sum in the Bond granted to *Boyſton* with the purging of the Inhibitions, he became delegated as Debtor for the Performance; and their Right or Title is underſtood to be conveyed to him; ſince otherwiſe the Bond granted to him had been Eluſory, and of no Effect. An Abſolviture in this Proceſs would ſecure the Defender againſt all Action upon the foreſaid Bond, in whoſe Perſon ſoever it may come, but not from Purſuits upon ſeparate Titles. 2. It is contended, That an Aſſigny to the Price of Land contained in a Minute, comes in Place of the Perſon obliged to diſpone, and hath the ſame Action competent to him for diſburdening the Lands, that is competent to the principal Contracter: And for the ſame Reaſon, an Executor of a Diſponer of Lands, who hath Right to the agreed Price, could purge Incumberances.

The Lords ſuſtained the Purſuer's Title, and found the Defender obliged to take a Term to produce the Inhibition called for.

Eodem Die. *Mr.* William Steil *Miniſter at* Lochmaben, *againſt his Pariſhioners.*

MR. *William Steil* purſued the Heretors of his Pariſh of *Lochmaben* to make Payment to him of 999 ℔. 14 ſh. as the Expence of building a Manſe for the Purſuer, eſtimated in the Terms of the *Act* 21. *Seſſ.* 3. *Parl.* 1. *Ch.* 2. by Order of, and approved by the Presbytery; and for 16 Years Annualrent thereof that he had ſerved the Cure there wanting a Manſe, according to their reſpective Proportions.

The Lords found, That the Words of the 21 Act of Parliament 1663, *Viz.* That the Heretors build Manſes at the Sight of the Miniſters therein appointed, and Two or Three of the moſt knowing or diſcreet Men of the Pariſh, do impower ſuch Miniſters and Two or Three of the ſaid moſt knowing or diſcreet Men over and above the Tradeſmen named by them, to proceed in Abſence of the Heretors called by an Edict. And found, That the ſaid Miniſters and knowing and diſcreet Men may proceed not only to liquidating of the Value of the Manſe; but alſo may appoint a Place for it's Situation, and proportion the Value thereof upon the Heretors conform to their valued Rent, and name a Factor for upliſting thereof. And found, That after ſuch an Eſtabliſhment, any of the Heretors may be proceeded againſt for their Proportions, notwithſtanding that the Proceſs muſt ſiſt as to others, in Reſpect of their Privilege of Parliament. But found, That the Purſuer cannot claim any Thing for Bygones ſince his Entry, or by the Act of the Presbytery, in Reſpect it was not decerned by the Presbytery.

January 31, 1712. Archibald *Earl of* Forfar, *againſt* John Gilhagie *late Merchant in* Glaſgow.

ALexander Waddel Merchant in *Glaſgow*, having *in Anno* 1658, appriſed from the Heirs of *Gavin Rae*, a Fourty three Shilling nine Peny Land of the Barony of *Bothwell*, feued to him by a Charter from the Marqueſs of *Douglaſs*, in the Year 1629, and charged the Marqueſs to receive him: The Earl of *Forfar* (who ſucceeded to the Lordſhip of *Bothwell*, as Heir of the Marqueſs's ſecond Marriage) raiſed a Reduction and Improbation againſt *John Gilhagie*, to whom in *January* 1669 the Appriſing was diſponed by Progreſs. The Defender produced the Charter 1629, and the Decreet of Appriſing 1658, with his own Conveyance from *Waddel*; but not the Inſtrument of Seaſin upon the Charter, nor the Grounds of the Appriſing.

The Lords found, 1. That the Purſuer as Heir of Proviſion to the Granter of the Charter, is bound to warrand it, and cannot quarrel the ſame, tho' no Infeſtment had followed thereon. For tho' an Heir of Proviſion be liable to a Purſuit only after diſcuſſing the Heir of Line, whom the Purſuer ought firſt to inſiſt againſt: Yet an Heir of Proviſion purſuing the Perſon to whom he was *ſubſidiarie* liable in Warrandice, may be excluded *Exceptione* in the firſt Inſtance; ſince *Lites non ſunt multiplicandæ*. 2. The Lords found, That *John Gilhagie*'s Author having appriſed the ſaid Charter from the Heirs of *Gavin Rae*, conform to the Decreet of Appriſing and Charge produced, the Purſuer as Superior has no Intereſt to quarrel the Appriſing for Want of the Grounds and Warrants thereof: It being *Jus Tertii* to him, who is neither the Debtor, nor Debtor's Heir. And a Man can only crave Preference upon a Ground ariſing from his own Right, and not upon what ariſeth only from the Right of another. And tho' the Purſuer might come in, did the Defender produce no Right at all: Yet the latter's producing the Appriſing, which connects a Progreſs to the Charter granted by the Marqueſs, excludes the Purſuer's Claim; tho' it would not have any ſuch Effect againſt the Heirs of the Debtor in the Appriſing.

February 5, 1712. Margaret, Elizabeth, Ann, *and* Iſobel Elieſes, *Daughters to the deceas'd Mr.* James Elies *of* Stenhouſe-mill, *againſt* James Watſon *of* Saughtoun, *and his Curators.*

IN the Compt and Reckoning at the Inſtance of the Daughters of the deceas'd Mr. *James Elies*, againſt *James Watſon* of *Saughtoun*, as repreſenting

ing his Father, mentioned *ſupra January* 5, 1712: The Lords ſuſtained holograph Receipts wanting Witneſſes granted by Mr. *James Elies*, to extinguiſh *pro Tanto* a Bond granted to him, his Heirs and Aſſignies, ſecluding Executors, by the Defender's Father. Albeit the Bond was heretably conceived, and the Receipts not proving their Date, were preſumed to have been granted on Death-bed. Becauſe, tho' one be reſtrained from conveying an heretable Debt on Death-bed in Prejudice of his Heir, he may take Payment thereof on Death-bed; and ſo diſſolve the Obligation, he could not tranſmit by Aſſignation.

February 7, 1712. *Mr.* James Stuart *of* Carſwell *Advocate, againſt the Earl of* Bute.

MR. *James Stuart* having purſued the deceas'd *James* Earl of *Bute*, as repreſenting Sir *Dougal Stuart* of *Kirktoun* Sheriff of *Bute* his Father, for Payment of a Debt owing by him to the Purſuer's Predeceſſor; The Purſuer amended the Title of his Libel, after the paſſive Titles were by a ſigned Interlocutor of the Ordinary admitted to Probation. The Defender having died before any Act of Litiſconteſtation was extracted; the Purſuer craved the Proceſs might be transferred againſt this Earl of *Bute*, as Heir to the laſt Earl his Father, who repreſented the Grandfather by Behaviour as Heir to him, or vitious Intromiſſion with his Effects.

Alledged for the Defender. Thoſe penal paſſive Titles cannot be transferred againſt him, as Heir to his Father: Becauſe the Action was not litiſconteſtat in his Father's Lifetime, by extracting an Act of Litiſconteſtation upon the foreſaid Signature, *Stair*, *Lib.* 4. *Tit.* 39. For ſo long as nothing was extracted, the Defunct might have been reponed againſt the Interlocutor. Yea, it was tacitly paſt from and opened, by the Purſuer's amending his Libel after pronouncing thereof.

Anſwered for the Purſuer. Lis erat conteſtata cum Defuncto by the ſigned Interlocutor. For by the civil Law, a ſimple repeating the Libel, and tabling the Defence, made Litiſconteſtation. Beſides, there are many Courts where no Acts uſe to be extracted, but ſimple Interlocutors have the Effect of Litiſconteſtation, for examining Parties and Witneſſes, and circumducing the Term. Nay, even in the Seſſion, the main Deſign of extracting Acts, is in Order to compt with the Clerks for their Dues: Seing extracted Interlocutors are frequently helped, and Parties reponed againſt them ſummarly, upon new Application.

The Lords found, There is not ſuch a Litiſconteſtation in the Proceſs, as to preclude the Defender from proponing this Defence, That the Action being penal, cannot be tranſmitted againſt him, as Heir to his Father: Eſpecially ſeing the Purſuer hath amended his Libel, ſince pronouncing the Interlocutor upon which he founds the Litiſconteſtation.

Eodem Die. Margaret Hamilton *and Mr.* David Orem *her Huſband, againſt* Robert *Lord* Burleigh, *and* James Wright.

IN the Action at the Inſtance of *Margaret Hamilton* and her Huſband, as having Right from the late Marqueſs of *Athol*, to certain Feuduties out of the Lands of *Newtoun* and *Freuchy*, againſt the Lord *Burleigh* and *James Wright* the preſent Heretors, for Payment of bygone Feuduties reſting for Years that their Authors poſſeſſed theſe Lands.

Alledged for the Defenders. They being ſingular Succeſſors, cannot be liable by a perſonal Action to pay Feu-duties due for Years before they had Right to the Lands, *March* 29, 1636, *Cowan* contra *Elphinſton*, *March* 26, 1629, *Roſs* contra *Murray*, *January* 30, 1639, *Cockburn* contra *Trotters*, *July* 19, 1665, *Winrham* againſt the Lady *Idington*. Becauſe feudal Contracts are now very rare, and cannot be pretended in the preſent Caſe. The *Reddendo* in Charters is not a perſonal Obligement, but a real Right to the Superior, to poind the Ground for his Feuduties. 'Tis true that Annualrenters, who in their Infeftments of Annualrent have an implyed Aſſignation to Mails and Duties, may by a perſonal Action recover the whole bygone Annualrents due to them from one who hath had but one Year's Intromiſſion with the Rents of the burdened Lands: But it's not eaſie to conceive, how a Superior can pretend to have ſuch an Aſſignation to Mails and Duties implyed in his Right of Superiority.

Replyed for the Purſuers. Seing the Rents of Lands are liable to be poinded for all bygone Feuduties reſting owing, Intrometters with theſe, which are the Subject of the Superior's Payment, ſhould be perſonally liable: As Annualrenters may by a perſonal Action recover their whole bygone Annualrents from any one who hath intrometted with as many of the Rents of the burdened Lands, *March* 15, 1637, *Guthrie* contra E. *Galloway*. For however Feus be generally now conſtituted by Charter and Seaſin, or a Writ flowing only from the Superior, without any formal Contract ſigned by both Parties: There is yet a mutual Obligation implyed in the Conſtitution of every Feu, importing mutual Preſtations both upon the Superior and Vaſſal. And the Superior as *Dominus directus*, hath a more direct Title to Mails and Duties, than any Annualrenter: Eſpecially in Feuholdings, which are generally conſidered only as *Emphyteuſes*, and the Vaſſal as *Emphyteuta*, or a kindly Tenant.

The Lords found, That the Defenders are not perſonally liable, tho' it were inſtructed, That they had intrometted with as much of the Rents as would ſatisfie the bygone Feuduties acclaimed.

February 8, 1712. *The Lord* Minto *againſt* John Marſhall *Writer in* Edinburgh.

IN a Competition betwixt the Lord *Minto* as Donatar to the ſingle and liferent Eſcheat of *Henry Mein* Merchant in *Kelſo*, and *John Marſhall*, who had arreſted in the Hands of *John Thomſon* Debtor to the ſaid *Henry Mein*: The Lord *Minto* craved to be preferred, becauſe his Gift and Declarator thereon, were both prior to the Arreſtment.

Anſwered for Marſhall. The Debt owing by *Thomſon* to *Mein* being Twenty Pound *Sterling*, as two Years Fees due to him many Years after the Rebellion, doth not come under either the ſingle or liferent Eſcheat: Not under the ſingle Eſcheat, becauſe nothing but the Moveables belonging to the Rebel, the Time of the Rebellion, or accrewing to him within Year and Day thereafter, did fall under the ſingle Eſcheat; Nor under the liferent Eſcheat, becauſe that comprehends only Rents and Profits belonging to him by liferent Right. Therefore the Subject in Queſtion is only affectable by Arreſtment, or by a ſecond Gift of Eſcheat, *Stair, Inſtit. Lib.* 3. *Tit.* 3. §. 19. Conſequently the Arreſter in this Caſe is preferable to the Donatar.

Replyed for the Lord Minto. That his Gift carries not only what pertained to the Rebel the Time of the Rebellion, but what had fallen or ſhould fall and accrew, pertain or belong to him in Time coming during his remaining at the Horn: And as my Lord *Stair, Inſtit. Lib.* 3. *Tit.* 3. §. 15. *Pr.* obſerves, the whole moveable Goods and Debts of Parties denounced are Eſcheat and

Confiſcate, and all that they ſhall acquire thereafter till they be relaxed. For whatever doth not fall under the liferent Eſcheat after the annual Rebellion, falls under the ſingle Eſcheat. Where the Lord *Stair* reſtricts the ſingle Eſcheat to what ſhall belong to the Rebel within Year and Day, that is in Relation to the Rents or Product of an heretable Subject. And the Prattick betwixt *Somervell* and *Stirling* is not to the Purpoſe; for there the Gift bore only what belonged to the Rebel the Time of the Rebellion.

The Lords preferred the Arreſter.

Eodem Die. *The Lord* Elibank *againſt* Elizabeth Adamſon *and* Edward Callender *her Husband.*

IN the Competition betwixt the Lord *Elibank*, and *Elizabeth Adamſon* and her Husband: The Lords found, That an Uncle and Nephew in Law are not conjunct Perſons in the Senſe of the Act of Parliament 1621, concerning Bankrupts. Becauſe an Uncle and Nephew by Affinity, are not hindered to judge in one another's Cauſe, *Act.* 13. *Parl.* 3. *Ch.* 2.

February 12, 1712. Mary Scot *Spouſe to* Patrick Scot *of* Halkſhaw, *againſt* Ann *Dutcheſs of* Buccleugh.

THE deceas'd Captain *William Scot* as Principal, *Walter* Earl of *Buccleugh*, and *John Scot* of *Sintoun* as Cautioners, having granted Bond to Sir *William Dick*, for One thouſand Pound *Scots*, with Annualrent and Penalty, which Sir *William* aſſigned to Sir *John Scot* of *Scotſtarbet*, in ſo far as might be extended againſt the principal Debtor and *John Scot* of *Sintoun*: This Bond and Aſſignation came by Progreſs in the Perſon of *John Smith* of *Falla*, who purſued *Mary Scot* Heir by Progreſs to *John Scot* one of the Co-cautioners in the principal Bond for Payment. She intimated the Diſtreſs to the Dutcheſs of *Buccleugh*, who repreſented the Earl the other Co-cautioner, and being decerned to pay, and having paid upon Diſtreſs the whole Debt, and got a Diſcharge thereof, purſued the Dutcheſs of *Buccleugh* as repreſenting the Earl the other Co-cautioner, for Relief of the one Half.

Alledged for the Defender. She can be liable in no Relief to the Purſuer; Becauſe, 1. The Bond, which is the Ground of the Proceſs, was aſſigned by the original Creditor to Sir *John Scot*, only in ſo far as might be extended againſt the principal Debtor, and not againſt the Earl of *Buccleugh*; Whereby the Earl was free from any Action that could follow upon the reſtricted Aſſignation, as effectually as if the Creditor had diſcharged him. 2. The Obligement of Relief is preſcribed *non utendo*, in ſo far as the Bond was not only regiſtred againſt *John Scot* of *Sintoun* in the Year 1625, but a Decreet thereon recovered againſt his Heir in the Year 1658, which was a ſufficient Diſtreſs to found Action of Relief, *March* 26, 1628, *Vans* contra *Law*; and Actions of Warrandice or Relief preſcribe by elapſing of Fourty Years after *Diſtreſs* or Eviction.

Replyed for the Purſuer. The Reſtriction in the original Conveyance did indeed bind up the Aſſignies from direct Action againſt the Earl of *Buccleugh*, and his Repreſentatives: But the Purſuer founds her Action of Relief againſt the *Dutcheſs*, not upon the original Obligation and Conveyance thereof, which are fully extinguiſhed by the *Diſcharge*; but upon the common Ground of Law, which affords Relief from one Cautioner to another upon Payment *ex Natura Rei*, as *Negotium utiliter geſtum* for both. Tho' the Creditor by diſcharging, or granting a limited Aſſignation, could have exonered any of the

Cautioners of their Obligation to him or his Aſſignies, he could not by any Deed of his extinguiſh the implyed Obligation ariſing from Law betwixt the Cautioners, or betwixt them and the principal Debtor. 2. Albeit the Bond might preſcribe in Fourty Years as to the Creditor; the Obligement of Relief could not preſcribe againſt the Cautioner, till the Action it ſelf was competent, *That is*, when Payment was made. Where there is an expreſs Obligement to relieve, the Preſcription runs from the Time the Receiver could purſue, *Viz.* from the firſt appearance of Diſtreſs, and he is not to wait for his own Trouble: But a Cautioner having no Relief written or implyed againſt the Co-cautioner, could not purſue till actual Payment.

The Lords repelled the Dutcheſs's Defences founded on the Reſtriction of the Aſſignation, and Preſcription.

February 14, 1712. *Mr.* Alexander Orr, *Son to the deceas'd Mr.* Alexander Orr *Miniſter of the Goſpel at St.* Quivox, *againſt* John Wallace *of* Camſeſcan.

A Bond was granted to the deceas'd Mr. *Alexander* Orr, in the Terms following, *I Mr.* John Hannay *Miniſter at* Craigie, *grants me to have borrowed and received from Mr.* Alexander Orr, *the Sum of One hundred Pound* Scots, *which I as Principal, and* John Wallace *of* Camſeſcan *as Cautioner, bind and oblige us conjunctly and ſeverally*, &c. Which Bond, after the Clauſes of Relief and Regiſtration, concludes thus, *In witneſs whereof, I have written and ſubſcribed theſe Preſents at* Air *the Thirty one Day of* May, *One thouſand ſeven hundred and five Years, before theſe Witneſſes,* Robert Wallace *of* Cairnhill, *and* James Ferguſon *Doctor of the* Grammar *School at* Air; And the Bond is ſigned by the Principal and Cautioner, and the foreſaid two Witneſſes. Mr. *Alexander* Orr, as having Right to this Bond from his Father, purſued *John Wallace* now of *Camſeſcan*, as repreſenting his Father the Cautioner, for Payment: Who alledged the Bond to be null, in ſo far as concerns the Cautioner. Becauſe it doth not bear, That the Witneſſes inſert are Witneſſes to his Subſcription, but only to the Subſcription of Mr. *Hannay* the principal Debtor. For, tho, the plural Number may be made Uſe of to demonſtrate a ſingle Perſon, as *More Magnatum*, *We* is put for *I*; yet it was never pretended, That either in good *Grammar* or Senſe, *I* was ever uſed for *We*: And therefore the Rule, *Et de me ſolo*, &c. takes no Place here.

The Lords repelled the Nullity, and ſuſtained the Bond. For theſe Words, *We bind and oblige us*, in the Obligatory Part of the Bond, might well connect with the Words, *Before theſe Witneſſes:* And both Writer and Witneſſes being deſigned, tho' the Words, *And have ſubſcribed*, had been left out, the Bond would have been valid, as if it had run thus, *I Mr.* Hannay, *and with me* Camſeſcan, *bind and oblige us to pay*, &c. *In witneſs whereof, written by the ſaid Mr.* John Hannay *before theſe Witneſſes.* Again, tho' the Words *and ſubſcribed* may at firſt View ſeem to relate to *I have written:* Yet they may be read diſjointly, ſo as the Words *and ſubſcribed* may relate to the whole Tenor of the Writ; That is, I as Principal, and with me *Camſeſcan*, have ſubſcribed. Beſides in every ambiguous Interpretation, that Senſe is to be followed *quo Actus valeat*: And *ita comqaratum eſt ut conjuncta pro diſjunctis, & diſjuncta pro conjunctis accipiantur, L.* 53 *ff. de Verb. Sig.* for ſupporting Writs.

February 15, 1712. *The Marqueſs of* Annandale, *againſt* Janet Scot Lady Gilleſby.

IN a Proceſs at the Inſtance of the Marqueſs of *Annandale*, Superior of the Lands of *Gilleſby*, againſt the Tenants for Mails and Duties, as having

Right thereto by Reaſon of the Minority of *Jean Scot* apparent Heir to *Robert Scot* her Grandſather, the Purſuer's Vaſſal laſt publickly infeſt in theſe Lands: Compearance was made for *Janet Scot* Relict of the ſaid *Robert Scot*, who craved to be preferred to a Terce, to which ſhe was ſerved.

Alledged for the Marqueſs. Janet Scot can pretend to no Terce, becauſe her Husband was denuded of the Lands in his Lifetime in Favours of his Son; by a Diſpoſition thereof in his Contract of Marriage, whereupon the Son got a baſe Infeſtment holden of the Diſponer.

Anſwered for Janet Scot. As a Father's Diſpoſition to his Son and apparent Heir (tho' clothed with a publick Infeſtment) doth not infer Recognition; becauſe the Son in that Caſe only repreſents the Father *Præceptione Hæreditatis*: So neither could it wrong the Relict of her Terce. Far leſs could the Son's baſe Infeſtment ſtand in her Way: Seing that did not hinder the Ward to open to the Marqueſs upon the Death of the Father who ſurvived the Son, till which Time the Superior could have no Acceſs. So it is clear from *Craig, Feud. Lib. 2. Dieg. 22. Spotſwood, Husband and Wife, Pag. 157. Stair, Inſt. Pag. 309. Dirletoun, Doubts and Queſtions, Tit. Terce, Quæſt. penult.* That a baſe Infeſtment granted by one to his Son without an onerous Cauſe, doth not hinder the Granter's Relict from a Terce of the Lands diſponed, which is called *Rationabilis Tertia*, and much favoured in Law.

Replyed for the Marqueſs. Law doth not diſtinguiſh whether a Diſpoſition be gratuitous or for onerous Cauſes, as to the excluding the Relict from a Terce, except where it is granted out of a fraudulent, or at leaſt a preſumed Deſign to diſappoint her of her Terce; Which is the Caſe where the Lord *Stair* and *Craig* obſerve, That ſuch a Diſpoſition by a Father to his Son doth not exclude the Diſponer's Relict from a Terce. And the Lords allow Terces to Relicts whoſe Husbands had only ſimple Diſpoſitions, without Infeſtment in their Perſons, only where the Husbands *doloſe* omitted to infeſt themſelves, to prevent that which by Law would have fallen to their ſurviving Wives. Whereas a Father's Diſpoſition of the Fie of his Eſtate to his Son in his Contract of Marriage, (as in this Caſe) being a juſt and reaſonable Deed, cannot bear a fraudulent Conſtruction.

The Lords found, That the Marqueſs, as Superior of the Lands in Queſtion, hath not Right to the Mails and Duties thereof in Prejudice of the Relict's Terce, notwithſtanding the apparent Heir's Infeſtment in the Property of the ſaid Lands, and preferred the Relict to her Terce.

Eodem Die. William Boid *of* Drum, *againſt* George Hay *in* Drum.

MR. *Robert Selkrig* and *John Hamilton*, having, after the Deceaſe of *Robert Boid* of *Drum* in *Anno* 1684, confirmed his moveable Debts and Houſhold Pleniſhing, as Executors Creditors to him; and in the 1685 adjudged from his apparent Heir his heretable Eſtate, particularly the Heirſhip-moveables: *Anna Charters Robert Boid*'s Relict (who had a liferent Right *to* the Houſe of *Drum*) continued after his Deceaſe to poſſeſs the ſame with the Houſhold Pleniſhing for Eight Years ſole, and then married *George Hay*, who, for the Space of Twenty Years that ſhe lived with him, poſſeſſed the Houſhold Pleniſhing without Moleſtation. In the Year 1710, after *Anna Charters* died, *Selkrig* and *Hamilton* conveyed their Right to the Houſhold Pleniſhing *in* Favours of *William Boid* now of *Drum*, who purſued *George Hay* to deliver up the ſame to him, upon this Ground, That he the Purſuer offered to prove by Witneſſes, That theſe Moveables were in *Robert Boid*'s Poſſeſſion *the* Time of his Death.

Alledged for the Defender. He having come lawfully to theſe Goods *Jure*

Mariti (which is a legal Aſſignation) is not bound to inſtruct his Wife's Right to the ſame from the Executors Creditors: But the Property is preſumed to have been tranſmitted by Sale or otherways to the Defender's Wife, from her Twenty eight Years peaceable Poſſeſſion as her own. For it being impoſſible to clear the Progreſs of Moveables, which paſs from Hand to Hand without Writ, and often without Witneſſes; the Property of them is preſumed from Poſſeſſion: So that they cannot be recovered *Via Actionis*, from any Poſſeſſor, unleſs the Purſuer not only inſtruct that he once had Right to them, but alſo that *deſiit poſſidere* by Loan, or ſome other Way, not habile to tranſmit the Property, *Stair, Inſtit. Lib.* 2. *Tit.* 2. §. 42. *Lib.* 3. *Tit.* 2. §. 7.

Replyed for the Purſuer. Poſſeſſion of Moveables, is but a preſumptive Right, which may be taken off by contrary Evidence: Now his inſtructing them to have been in *Robert Boid*'s Houſe at his Deceaſe, clears that the Relict's Poſſeſſion was at firſt precarious, and 'tis preſumed to have continued ſo. For none can change the Cauſe of their Poſſeſſion; and *Initium Poſſeſſionis inſpiciendum eſt.* No ſupervenient Title in another can accrew to the Poſſeſſor, unleſs the Manner of Conveyance be proved: And the Executors Creditors long Neglect to proſecute their Right, cannot exclude them from it within the Years of Preſcription, nor can the Husband's Right be thought any better than his Wife's was: So in a late Caſe of *Hume of Reſtoun* contra *Jean Pitcairn*, Mr. *Ainſworth* her Husband was found liable to reſtore Moveables poſſeſs'd by her as her own, by a Conveyance to her from her firſt Husband, upon *Reſtoun*'s producing a Declaration that the Goods belong'd to him, and had only been lent to her Author.

Duplyed for the Defender. His Wife's Poſſeſſion after her firſt Husband's Deceaſe, was neceſſary & *Cuſtodiæ Cauſa*, or ſhe was *in Poſſeſſione tantum*: Which Poſſeſſion ceas'd when the Executors Creditors Title came to be made up in the 1684 and 1685. Their ſuffering her to poſſeſs thereafter, argued *poſt tanti Temporis Intervallum*, that they conveyed theſe Moveables to her. Vindication of a Parcel of Nolt poinded was refuſed, tho' the Purſuer offered to prove that they were his, and ſet a grazing to the Debtor; becauſe the Debtor had, ſome few Years before the poinding, uſed all Deeds of Property upon them; during which Time the Purſuer had been out of Poſſeſſion, *November* 24, 1624, *Turnbul* contra *Ker of Cavers*, *June* 17, 1625, *Brown* contra *Hudilſtoun*. The Prattick betwixt *Hume and Pitcairn* doth not alter the Caſe: For no preſumptive Right within the Years of Preſcription, could take Place againſt a plain Contract of Loan. But *January* 28, 1679, *Hog* contra *Hamilton*, the Lords repelled Poſſeſſion by a Relict, unleſs Confirmation were inſtructed: Conſequently, *Argumento a Contrario*, Twenty eight Years Poſſeſſion here after Confirmation, ought to be ſuſtained.

The Lords found the Defender's long Poſſeſſion ſince the Year 1684, at which Time the Defender's Wife's firſt Husband's Teſtament was confirmed, preſumes a Right thereto from the Executors confirm'd, and therefore aſſoilzied the Defender.

Eodem Die. John Buchanan *Writer in* Edinburgh, *againſt* John Menzies.

IN a Proceſs at the Inſtance of *John Buchanan* againſt *John Menzies*, for Reſtitution of ſome Bank-notes belonging to the Purſuer, which he alledged Mr. *Menzies* had unwarrantably intrometted with.

Alledged for the Defender. The Purſuer had irregularly, without any Proceſs or Intimation to the Defender, cauſed ſiſt one *John Strachan* before a Baillie of *Aberdeen*, who elicited from him a ſigned Declaration upon Oath, of what he knew concerning the Defender's having of the Notes, and how he came by them: Which extrinſick examining and precognoſcing in a civil Cauſe, is a Ground to aſſoilzie the Party againſt whom that Method was taken, and puniſhable as a Practice of pernicious Conſequence, *July* 14, 1621, *Livingſtoun* contra *Galloway*.

The Lords repelled the Defence. For they thought the Prattick, *July* 14, 1621, betwixt *Livingſtoun* and *Galloway* ought not to be ſollowed, or made a Precedent.

February 19, 1712. Iſobel Moncrieff *and her Husband, againſt* Katharin Monipenny *Relict of* George Moncrieff *of* Sauchop.

IN the Action at the Inſtance of *Iſobel Moncrieff*, as Executrix to her Brother the Laird of *Sauchop*, againſt *Katharin Monipenny* (mentioned *ſupra, July* 20, 1711) for her Intromiſſions by Virtue of a Teſtament now reduced.

Alledged for the Defender. She ought to have Allowance and Retention of 1000 Merks ſhe had expended in building a Monument to her Husband, conform to his Orders in the Teſtament; which tho' now reduced, muſt keep her *indemnis* as to all ſhe hath laid out in executing thereof. Becauſe the Teſtament was reduced upon Grounds of Law, and not by the Fault of her the Executrix therein named; *cui Officium non debet eſſe damnoſum:* And while the Teſtament ſtood, ſhe might have been compelled by the Defunct's Relations to fulfil that Part of his Will.

Replyed for the Purſuer. The Defender can have no Allowance for ſuch an Article: Becauſe the Teſtament reduced can have no Effect. Beſides, ſhe was *in peſſima Fide* to build: In Reſpect before her making any Step therein, a Reduction of the Teſtament raiſed at the Purſuer's Inſtance, made her *titubare de Jure ſuo.* And ſuppoſe ſhe had builded *bona Fide, Officium illi non eſt damnoſum:* For ſhe hath provided *aliunde* for her Indemnity, by taking a Bond from the Heir obliging him to relieve her, in Caſe of the Teſtament's being reduced.

Daplyed for the Defender. 'Tis *Jus tertii* to the Purſuer to plead upon the Obligement of Relief granted by the Heir, to whom it was optional to grant it or not.

The Lords allowed the Expence of building the Monument, not exceeding 1000 Merks, the Defender inſtructing the ſame. For albeit the Heir ingag'd to relieve the Relict, yet the Defunct's Deſire and Intention in his own Lifetime, to have ſuch a Monument built, and her cauſing build the ſame while the Teſtament ſtood unreduc'd, was thought a ſufficient Ground to burden the Executry with the Expence thereof.

2. The Defender crav'd Allowance of the Charges ſhe had been at in defending againſt the Reduction of her Husband's Teſtament: Seing the Deciſion therein proceeded *in Apicibus Juris*, upon narrow Points of Law; and ſhe was obliged both out of Gratitude to her Husband's Memory, and *ex Natura Officii*, to maintain the Teſtament ſo long as ſhe could.

Replyed for the Purſuer. There are ſeveral Laws ordaining the Loſer of a Cauſe to pay the Gainer's Expences, but neither Law nor Prattick obligeth the Gainer to pay the Loſer's Expences. If the Defender took and debated upon a null Right, ſhe did that at her Peril. 'Tis too much that the Purſuer hath been at the Trouble and Charge of reducing ſuch a Deed, tho' ſhe be not further burdened with the Expence of maintaining a Plea againſt her ſelf.

The Lords refuſed to allow to the Defender the Expence ſhe had been at in defending againſt the Reduction of the Teſtament.

February 20, 1712. Gilbert, Mary *and* Vemea Rules *younger Children to the deceas'd Mr.* Robert Rule *late Miniſter of the Goſpel at* Stirling, *againſt the Creditors of Mr.* Robert Craig *of* Riccartoun.

IN the Ranking of the Creditors of *Riccartoun*: The younger Children of the deceas'd Mr. *Robert Rule*, competed upon an heretable Bond and Infeſtment for 324 Pound *Sterling*, granted by Mr. *Robert Craig* the common Debtor to their Father in *March* 1703, to which they had Right by Diſpoſition and Infeſtment from him upon Death-bed, ratified by Doctor *Rule* the Granter's eldeſt Son and Heir.

Alledged for the other Creditors. The foreſaid Debt is extinguiſhed being conveyed by the Doctor as Heir, to *James Smart* late Servant to my Lord *Poltoun*, for *Riccartoun*'s Behoof. No Regard can be had to the Ratification: Becauſe it doth not deſign the Writer, bearing only to be written by *John Ruſſel Writer*, which is no Deſignation at all, and by *Act* 9. *Parl.* 3. *Ch.* 2. is not ſuppliable: So *July* 27, 1710, *Sir Thomas Kennedy* contra *Oſwald*, a Ticket was found null for that one of the Witneſſes therein was deſigned only Writer hereof. And *July* 14,1626, the Execution of a Horning was found null, for not deſigning the Houſe, tho' the Party was deſigned Burgeſs in ſuch a Burgh.

Anſwered. The Ratification is ſufficiently formal, becauſe, 1. *Writer*, being *Nomen Officii*, is as good a Deſignation as Preacher of the Goſpel, or Doctor of Phyſick, or Merchant Traveller in *England*, or as Maſon, Wright, *&c.* would be to an Artificer who (having no certain Habitation) goes about where he may find Work. The Deciſion betwixt Sir *Thomas Kennedy* and *Oſwald* comes not up to this Caſe, becauſe *Writer hereof*, was no Deſignation at all. 2. It's preſumed that *John Ruſſel* was Writer in *Edinburgh*, where the Ratification was ſigned. So a Writ was ſuſtained, tho' one of the Witneſſes was deſigned Merchant, and the other Chirurgion, without mentioning the Place where, in Reſpect the Witneſſes were underſtood to be Merchant and Chirurgion at *Dumfreis*, where the Writ bore to be ſigned, *June* 27, 1700; *Reid* contra *Brown of Nunland*. Now the Deſignation of Chirurgion, or Merchant, is as uncertain as that of Writer.

The Lords repelled the Objection againſt the Ratification, that the Writer was not ſufficiently deſigned.

Eodem Die. *Mr.* John Hay *Son to the late Parſon of* Peebles, *againſt* Archibald Crawford *of* Ardmillan.

IN the Action at the Inſtance of Mr. *John Hay*, as having Right by Progreſs to ſeveral Bonds granted by old *James Crawford* of *Ardmillan* to his Creditors, againſt *Archibald Crawford* as Heir to the Granter: The Defender proponed Compenſation upon the Purſuer's Authors Intromiſſion with Moveables and other Effects belonging to *James Crawford* the Debtor, to the Value of the Sums purſued.

Anſwered for the Purſuer. The Defender, who is Heir to *Ardmillan* the Debtor, cannot propone Compenſation upon the Moveables and Effects aforeſaid: Becauſe, theſe belong to *Ardmillan*'s Executors to whom the Intrometter is liable; and no Perſon can compenſate a Debt with a Subject he hath no Right to. For Compenſation operates only Extinction *ipſo Jure ſi applicetur*: And a Man cannot apply a Debt he hath no Right to for compenſating what he owes to the Debtor, more than he can exact another Man's Mony to pay his own Debt.

The Lords found, That the Compenſation that was competent to the deceas'd *James Crawford* of *Ardmillan*, is competent to his Heir.

February 21, 1712. Thomas Moncrieff *of that Ilk, againſt the other Creditors of* Thomas Campbell *Fleſher in* Edinburgh.

THomas Campbell *in Anno* 1698, granted to Sir *Thomas Moncrieff* an heretable Bond and Infeſtment in his Lands of *Towcroſs*, in Security of 6400 Pound *Scots*, containing Aſſignation to the Mails and Duties; but no Power to ſet the Lands, remove, output or input Tenants. And Sir *Thomas* having in a Competition for Mails and Duties in the 1704, obtained a Decreet before the Sheriffs of *Edinburgh* againſt the Tenants, prefering him to Sir *James Dick* and other Creditors then competing, enter'd to the Poſſeſſion: But the common Debtor within a ſhort Space thereafter removed the Tenants who were decerned to pay Sir *Thomas*, and ſet the Lands to others, from whom he uplifted the greateſt Part of the Rents. *Thomas Moncrieff*, now of that Ilk, as deriving Right from Sir *Thomas*, was, in a Ranking of *Thomas Campbell*'s Creditors, found liable to compt for the Mails and Duties of the Lands due by theſe Tenants againſt whom he obtained the Decreet of Preference: But found accomptable only for his actual Intromiſſions after Removal of theſe Tenants; becauſe he had no Power to ſet the Lands, nor ready Execution againſt the new Intrants.

Eodem Die. Suſanna Stuart *Relict of Captain* Menzies, *againſt* Menzies *of* Culdairs.

THE Lords found no Proceſs upon a Summons of Aliment, becauſe it did not contain Two Diets, and yet required a Term to prove.

February 22, 1712. *Sir* Robert Gordon *of* Gordonſtoun *and* Cuming *of* Altyre *his Curator, againſt* Alexander Dunbar *of* Moy *and Mr.* Robert Dunbar *of* Myreland *Two of his Curators.*

SIR *Robert Gordon* having ſummarly complained to the Lords of *Moy* and *Myreland* Two of his Curators, for ſeveral Malverſations in the Management of his Affairs, and crav'd that they might be ordained to conſent to the Nomination of *William Cuming* of *Craigmill* to be Factor for managing the Eſtate, upon his finding ſufficient Caution: Theſe Two Curators declined to conſent to the Factory, pleading, That in a Matter they were to act at their Peril, they muſt be allowed the Freedom of their Will and Choice. They judging it uneaſie, if not impracticable, for them to proſecute duly their Truſt, when the Minor ſo breaks in upon them, and, being totally alienated from their Counſels, forceth them to follow, and not to adviſe him, by bringing the Adminiſtration in every material Article to the Arbitrement of the Judge: Did, for their own Eaſe and Exoneration, offer a Demiſſion, craving that the Lords would appoint Sir *Robert* to chooſe new Curators; ſeing the Office of Curatory, as moſt other gratuitous Offices are of their own Nature reſignable upon ſeveral Occaſions, *Stair, Lib.* 1. *Tit.* 6. §. 36.

Anſwered for Sir Robert Gordon. Where Curators unreaſonably refuſe to interpoſe their Conſent with the Minor, the Lords ordain them to do it: And their Duty always binds them whether performed voluntarly, or by Decreet of the Judge, which ſupplies their Conſent. They may well diſcharge their Duty and Truſt, notwithſtanding there is a Factor neceſſarly appointed for the more immediate and troubleſom Part of the Management. The Curators may reſign, or refuſe to act upon their Peril: But can never expect that the Lords will receive ſuch a Demiſſion; eſpecially when given in after this Manner, before compting, or any legal Proceſs of Exoneration.

The Lords, 29 *November* laſt, found, That the Curators, having once accepted the Office of Curatory to Sir *Robert Gordon*, cannot demit, but muſt continue in the Adminiſtration, and conſent to the Nomination of a Factor for managing the Eſtate.

But Sir *Robert Gordon* having this Day given in a Nomination of Mr. *Robert Gordon* of *Cluny*, a ſufficient Perſon, to be his Curator in the Room of *Moy* and *Myreland*, The Lords did thereupon accept of their Demiſſion.

Eodem Die. *Mr.* Patrick Houſtoun *Advocate*, *againſt* Robert Muſhet *his late Servant*.

Robert Muſhet being found guilty of fraudulently abſtracting his Maſter's Papers, and propaling them to his Prejudice: The Lords pronounced againſt him the ſame Sentence, as was pronounced by Act of *Sederunt*, *July* 20, 1675, againſt *Hugh Riddel*; and farther declared him incapable of any Service about the College of Juſtice.

Eodem Die. Alexander Nairn *of* Drumkilbo, *againſt* Robert M‘lelland.

IN the Competition betwixt *Drumkilbo* and *Robert M‘lelland*, Creditors Adjudgers of ſome Lands in North *Queensferry*, belonging to *William Liddel* mentioned *ſupra*, *July* 11, 1711; *Drumkilbo* objected agaiſt *M‘lelland*'s Adjudication, That ſuppoſe it be more as Year and Day anterior to his, and the legal expired, yet it ſhould be reduced, at leaſt *Drumkilbo* ought to be brought *in pari Paſſu* with *M‘lelland*. Becauſe, the Allowance of *M‘lelland*'s Adjudication, as it ſtands recorded in the Bill-chamber, bears to be for 763 Pound *Scots*; whereas there was only due to him at the Date of the Adjudication 783 Merks, which is the Sum in the Decreet.

The Lords found the Objection not a ſufficient Ground to bring in both the Adjudgers *pari Paſſu*, but only to take off the Expiration of the Legal of *M‘lelland*'s Adjudication.

Eodem Die. *Mrs.* Margaret Robertſon *Supplicant*, *againſt* Alexander Robertſon *of* Strowan *her Brother*.

UPon a Complaint offered by Mrs. *Margaret Robertſon*, againſt *Strowan* her Brother, for violently invading her during the Dependence of a Proceſs at her Inſtance againſt him, for Payment of her Proportion of the Proviſion ſtipulated by their Father to the younger Children in his Contract of Marriage; And craving that in the Terms of the Act 219 Parl. 14. *Ja.* 6. Sentence might be given in her Favours againſt the Invader, as having thereby loſt the Plea: The Lords found, That the Act of Indemnity did not acquit *Strowan* from the Penalty of the foreſaid Act of Parliament. In Reſpect the Indemnity pardons only publick Crimes, and Penalties; and was not calculated to prejudice the Intereſt of private Parties, ſecured by Statute in their juſt Purſuits.

Eodem Die. Katharin Turnbul, *againſt* Andrew Kinneir.

Katharin Kinneir having diſponed ſome Booths and Houſes in *Edinburgh* to her ſelf and Mr. *John Dickſon* her Husband in Liferent, and the Children to be procreated betwixt them in Fie; which failing to Mr. *John*'s Children of any other Marriage; which failing, to *Andrew Kinneir* her Brother, his Heirs and Aſſignies, with this Proviſion, That, in Caſe the Husband's Children of any other Marriage ſhould happen to ſucceed to the Booths and Houſes by Virtue of that Diſpoſition, they ſhould pay 100 Pound *Sterling* to her ſaid Brother; and that *Andrew Kinneir*, if he ſucceeded by Virtue thereof, ſhould be obliged to pay ſome particular Sums to the Perſons therein-mentioned, particularly 500 Merks to *Katharin Turnbul*. The Right to the foreſaid Shops and Houſes devolved to *Andrew Kinneir* both *ab inteſtato*, and by the Diſpoſition: But he enter'd not by the Diſpoſition, Whereupon *Katharin Turnbul* purſued him for Payment of the 500 Merks.

Alledged for the Defender. He is content to hold Compt to the Purſuer, and other Perſons the Diſpoſition was burdened with Sums to, they always allowing him Retention of the 100 Pound *Sterling tanquam præcipuum*, as his falcidian or trebellianick Share, conform to the *Roman* Law, when the Heir inſtitute was burden'd with Legacies equal to the Value of the Teſtator's Eſtate, *L.* 73. *Pr. in Fin.* And ſo it is, that the Diſpoſition to the Defender, failing Mr. *John Dickſon*'s Heirs is burden'd with Sums exceeding, at leaſt equal to the Value of the Tenements diſponed. Now it is not ſuppoſable, that the Diſponer intended to put the Defender in a worſe Caſe when he repreſents her as Heir, than had he been debarred by the Exiſtence of the Perſons inſtitute before him, *Viz.* Mr. *John Dickſon*'s Children of any other Marriage: In which Caſe the Purſuer and the other Creditors or Legataries in the Diſpoſition, had no Pretence to any Thing. Beſides, he is *quaſi Hæres inſtitutus ex Re certa*, which admits of no Deduction or Defalcation, *L.* 13. *Cod. de Hæred. Inſtit.* §. 9. *Inſtit. de Fideicom. Hæred.*

Anſwered for the Purſuer. By the falcidian Law, which ſecured to the teſtamentary Heir a Fourth Part of the Heretage, and allowed only the Faculty of legating to the Extent of the Remainder, the teſtamentary Heir omitting to ſucceed *ex Teſtamento*, and claiming the Heretage as *Hæres Legitimus*, forfeited *quartam falcidiam*. 2. The Defender having entred ſummarly at his own Hand and immixed himſelf with the Heretage, by uplifting the Mails and Duties as apparent Heir, repudiating the Defunct's Deſtination; he ought to be liable to all Debts conſtituted by her, without Allowance to claim any Thing as *præcipuum*.

The Lords found, That ſince the Defender enter'd not by the Diſpoſition, he is not ſimply liable; but that the Subject diſponed being burdened with 100 Pound *Sterling* to the Defender, and 500 Merks to the Purſuer, the Defender is liable for as much of the 500 Merks as will remain in his Hands over and above the 100 Pound *Sterling* intended by the Diſpoſition for himſelf *tanquam præcipuum*.

February 26, 1712. Katharin Roſs *Relict of* David Dickſon *Supplicant*, *againſt* William Renton *Factor to the Eſtate of* Begbie.

UPon a Repreſentation made by *Katharin Roſs*, that *William Renton* had arreſted all her Effects upon the Dependence of a Proceſs of Reduction raiſed by him againſt her: The Lords found, That the depending Reduction (which concludes not the Payment of Mony, but the removing a Right out of the Way) is not the proper Ground of Arreſtment. And therefore ordained the Arreſtment uſed upon that depending Proceſs to be looſed without Caution or Conſignation.

June 17, 1712. William Ker *of* Chatto, *againſt* Walter Scot *of* Well *and other Creditors of Sir* William *and* Robert Scots *of* Harden.

THE deceas'd *Robert Scot* of *Harden* having, as Heir ſerved and retoured in general and Executor to Sir *William Scot* of *Harden* his Brother, diſponed to *William Ker* of *Chatto*, his Brother in Law, all Debts heretable and moveable, Goods and Gear owing and belonging to him: *Chatto* raiſed a Proceſs of Declarator and Payment. Wherein *Walter Scot* of *Well*, and other Creditors of Sir *William Scot*, compearing claim'd Preference to *Chatto* upon the *Act* 24. *Parl.* 1661: In Regard he derived Right only from *Robert Scot* Sir *William*'s Heir, and they were Creditors to Sir *William*, who had uſed Diligence within Three Years after his Death.

Alledged for Chatto the Purſuer. 1. The Act of Parliament 1661 (which is a correctory Law and to be ſtrictly interpreted) concerns only Rights of Lands. For as to Moveables, all confirming within Six Months of the Debtor's Deceaſe come *in pari Paſſu*. 2. Sir *William*'s Creditors can have no Preference, becauſe they have not within the Three Years uſed any complete Diligence by Appriſing or Adjudication, Poinding or Decreet of Forthcoming, *Stair, Inſtit. Page* 361. §. 29. For if inchoate Diligence within Three Years were ſufficient, if perfected thereafter, it might come to found a Preference for Thirty Years, which is abſurd. Nor doth it avail them that they were interrupted in the completing of their Diligence by *Robert Scot*'s Death: Since the Preſcription of Three Years doth run *contra non valentes agere*, *December* 19, 1678, *Paterſon* contra *Bruce*. 3. The Act concerns only the Competition of legal Diligences. For if Creditors do not ſecure themſelves by Diligence within a Year after their Debtor's Deceaſe, his Heir may diſpone as he pleaſeth: As appears from a Clauſe in the End of the Statute, annulling only Diſpoſitions granted by an Heir within Year and Day after the Predeceſſor's Death; and the Diſpoſition was made to the Purſuer after the Year and Day. Now as an apparent Heir cannot wrong his Predeceſſor's Creditors, by a voluntary Right within the Year: He may *a contrario* effectually diſpone after elapſing thereof, if the Defunct's Creditors have not conſulted their own Security, by Inhibition, a Charge to enter Heir, or Arreſtment, which might be done *intra Annum deliberandi*, *Stair*, *ibid.*

Anſwered for the Defenders. 1. The Act of Parliament is conceived in general Terms againſt the Deeds of Heirs, which Word *Heirs* comprehends the Repreſentatives in Moveables as well as Heretage: As a Bond granted to Heirs and Succeſſors would belong to the Executors and neareſt of Kin, unleſs expreſly excluded. There is equal Reaſon to extend this Interpretation to the Succeſſor in Moveables, as well as Heretage: It being no leſs unreaſonable, that the neareſt of Kin's Creditors ſhould carry off the Executry in Prejudice of the Defunct's Creditors, than that the Creditors of his Heir ſhould affect the Heretage to the Prejudice of his own Creditors. Beſides, the Diſpoſition to *Chatto* contains not only Moveables, but all heretable Sums, as to which the Act of Parliament doth unqueſtionably take Place. 2. The Act doth not require complete Diligence within the Three Years, for it may often fall out, that Diligence cannot be completed in that Time: 'Tis true the bare Commencement of Diligence within Three Years would not be ſufficient, if the Uſer of the Diligence fell *in Mora*, which is the Reaſon of my Lord *Stair*'s Opinion: But if a Creditor *in Curſu Diligentiæ* be interrupted by an Accident which could not be provided againſt (as *Chatto* was by *Robert Scot*'s dying before the Three Years were expired) the Act could not be interpreted to exclude ſuch Diligence from the Benefit thereof. Nor doth the Deciſion betwixt *Paterſon* and *Bruce* come up to this Caſe: For there Diligence was not ſo much as commenc'd within the Three Years. 3. One uſing Diligence within the Three Years may reduce Diſpoſitions or legal Diligence to his Prejudice: But Diſpoſitions of that Nature within Year and Day are *ipſo Jure* null, and may be quarrelled at all Times even by Creditors who had omitted Diligence within the *Triennium*. And it were abſurd to imagine, That Creditors of the apparent Heir who could not within Three Years affect the Defunct's Eſtate, to the Prejudice of his Creditors, might prejudice them by taking voluntary Rights from the Heir after Year and Day.

The Lords found, That the Act of Parliament 1661 doth not concern this Caſe: And therefore repelled the Ground of Preference founded thereon.

2. *Alledged for the Defenders.* The Diſpoſition *omnium Bonorum* by *Robert Scot* to the Purſuer his own Brother in Law is null, unleſs the onerous Cauſe thereof be inſtructed.

Replyed for the Purſuer. The Diſpoſition muſt ſtand good, becauſe the Diſponer had a viſible Eſtate (beſides the Subject diſponed) ſufficient to pay all his Debts.

The Lords found, That the Diſpoſition being *inter conjunctas* is reducible, unleſs *Chatto* ſhew a ſeparate unincumbered Eſtate ſufficient to ſatisfie all Sir *William*'s Creditors.

3. *Alledged for the Defenders.* They ought to be preferred, becauſe of their timely Diligence by Arreſtment before the Diſpoſition.

Replyed for the Purſuer. This can be no Ground of Preference upon the Act of Parliament 1621: Becauſe that Statute preſuppoſeth the Granter of a Diſpoſition to be Bankrupt, which *Robert Scot* was not. 2. The Arreſtment being only upon a Dependence, for an heretable Sum ſecured by Infeſtment, or at leaſt an Obligement to infeſt, it could not be the Ground of Arreſtment, unleſs made moveable by a Charge, *Stair, Inſtit. Lib.* 3. *Tit.* 1. §. 26.

Duplyed for the Defenders. 1. Tho' *Robert Scot* was not abſolutely Bankrupt, yet he had no other Subject of Eſtate which his other Creditors had ready Acceſs to affect. 2. The Arreſtment upon the Dependence became liquid by a Decreet which rendred the heretable Sum a habile Subject to arreſt for. And as the Viſcount of *Stair* obſerves, That Sums heretably ſecured without actual Infeſtment, are arreſtable: So *a Pari* heretable Bonds whereupon Infeſtment has not followed (as in this Caſe) may be the Foundation of Arreſtment. But then the Queſtion is not whether this be a preferable Arreſtment in Competition with the Diligence of other Creditors; but whether it be ſufficient in the Terms of the Act 1621, to obviate poſterior voluntary Gratifications, which an inchoate Diligence may do.

The Lords found, That the Defender's Arreſtment prior to the Diſpoſition, ought to be preferred thereto.

4. *Alledged for the Defenders.* They being Donatars to the Eſcheat of *Robert Scot*, muſt be preferred to the Diſpoſition of the Eſcheat Goods granted by him after he was denounced and regiſtred at the Horn.

Replyed for the Purſuer. 1. The Gift of Eſcheat is null: In Reſpect *Robert Scot* was charged at his Houſe of *Eliſtoun* and denounced at *Selkirk*; when he was actually reſiding with his Family at *Edinburgh*, where he had been for Sixty Days before. 2. The Diſpoſition was completed by Intimation and Citation before obtaining of the Gift, which, as it would have ſecured the Debtor's paying, ſhould afford Preference as if Payment had been made.

Duplyed for the Defenders. If the Charge or Denunciation were not orderly, the Purſuer may reduce as accords. 2. No voluntary Conveyance by one regiſtred at the Horn is valid againſt the Fisk, whether completed or not before the Gift: And there is a great Difference betwixt Payments made by Debtors *bona Fide*; and a Competition upon a null Right.

The Lords preferred Sir *William*'s Creditors as Donatars of Eſcheat: Reſerving Reduction, as accords.

5. *Alledged for the Defenders.* The Purſuer, who was Cautioner for *Robert Scot* in Sir *William*'s confirmed Teſtament, could not take a Diſpoſition to the Goods confirmed in Prejudice of Sir *William*'s Creditors, to whom his Executry was to be made furthcoming.

Replyed for the Purſuer. His getting Right to the Goods and Debts confirmed, doth not aſſoilzie him from his Cautionry: But when purſued *eo Nomine*, he will have this Defence, That he cannot be liable till the Repreſentatives of the Executor be firſt diſcuſs'd; and there is an unaffected Eſtate for Payment of all theſe Debts. And ſeing *Robert Scot*, who had Right to the Executry eſtabliſhed in his Perſon, might have diſponed it to any Stranger; What hindered him to convey it to *Chatto*?

Duplyed for the Defenders. Without determining how far an Executor could convey the Executry-goods to the Prejudice of the Defunct's Creditors; it is plain he could not do it to his Cautioner: For the Deſign of Caution is to make them furthcoming to the Creditors, Legataries, *&c. Et quem de Evictione tenet Actio, multo magis Agentem repellet Exceptio.* Conſequently 'tis needleſs to debate how far he would have *Beneficium Diſcuſſionis*: There being a great Difference betwixt a Purſuit againſt an Executor's Cautioner, and an incident Competition about the Executry, where the Cautioner claiming Preference may be debarred *perſonali Objectione*.

The Lords found, That the Purſuer being Cautioner in the confirmed Teſtament, could not accept a Diſpoſition to all the confirmed Goods, ſo as to make them his own Property.

June 18, 1712. Jacob Moor *and his Factor, againſt Sir* Alexander Maxwell *of* Monreith.

IN the Purſuit at the Inſtance of *Jacob Moor* as Creditor to the deceas'd *William Houſtoun* of *Cutreoch*, againſt Sir *Alexander Maxwell*, for Payment of *William Houſtoun*'s Debt, upon the paſſive Titles: The Lords found the Defender not liable as vitious Intrometter; albeit he had intrometted with the Defunct's Goods and Gear. In Reſpect he had, after Intromiſſion, before Citation at the Purſuer's Inſtance, confirm'd the Subject intrometted with; which purg'd the former Vitioſity. Notwithſtanding that the *Act* 20. *Parl.* *1696*, Statutes, That the Intrometters with the Moveables of any Defunct, who are not Executors confirmed to them, nor have Right from the Executor Creditor before Intromiſſion, ſhall be liable as vitious Intrometters, tho' there is a Third Party confirmed Executor in a particular Debt or Subject. Becauſe in the preſent Caſe, the Defender himſelf is confirmed Executor Creditor to the Defunct, before Citation in the Purſuer's Proceſs, tho' after the Intromiſſion; and ſo falls not within the Verge of that Statute.

June 19, 1712. *The Brewers in and about* Edinburgh *Supplicants, againſt the Sheriff-deputes of* Edinburgh.

THE Brewers in and about *Edinburgh* repreſented by Bill, That they and many other Sets of People, who make the Fiars the Rule of their Price, being much concerned in ſtriking thereof; and finding that the laſt *Candlemas* Fiars within the Sheriffdom of *Edinburgh*, were made without an Inqueſt, and exorbitantly beyond the common Price betwixt *Yule* and *Candlemas*;

which is the uſual Rule; had raiſed Reduction of the ſaid Fiars, with a Concluſion, That the Lords ſhould bring the ſame to the true Standard; and executed their Summons againſt the Sheriff-deputes who decerned theſe Fiars, and their Clerk the Keeper of their Records. Therefore the Petitioners craved, That ſince their Proceſs was very juſtly *Actio popularis*, the Lords would appoint the ſame to be ſummarly inrolled in the next Week's Roll of ordinary Actions for the Outer-houſe, with Power to the Ordinary to hear and diſcuſs the ſame; At leaſt, That the Lords would admit of their Petition, with the Extract of the Fiars produced, as a Ground for tabling the Matter before their Lordſhips, and to proceed therein with all Expedition.

To all which it was anſwered for the Sheriff-deputes. By our Law and ancient Cuſtom, the ſtriking of the Fiars is the Right and Privilege of the Sheriffs, who, for Information to the Crown of the current Prices, do yearly return to the Exchequer an Account thereof, and are accountable only to Her Majeſty for any Abuſe or Neglect therein. As the Petitioners could not compel the Sheriff-deputes to make a Fiar; neither can they quarrel them for having made one: For, if it were otherways, Why might not the Gentlemen of the Shire quarrel a low Fiar? And ſo there ſhould be no End.

The Lords refuſed the Deſire of the Bill.

Eodem Die. Margaret Dick *and* David Cubbiſon *her Husband for his Intereſt, againſt* Robert Roriſon *of* Marſculloch, *and Others.*

ALexander Gordon *of Earlſtoun*, in *Anno* 1646, granted a Wadſet of the Lands of *Culmark*, to *Robert Canon* of *Blackmark*, who diſponed the ſame to *John Canon* of *Furmiſtoun* in Liferent, and *Nathaniel Canon* his Son in Fie. This Wadſet deſcended by Succeſſion to *Margaret Dick* Daughter to Lieutenant *John Dick*, and Grandchild by the Mother to *Nathaniel Canon*. *Earlſtoun* paid the Wadſet Sum to Lieutenant *Dick*, and got from him, as Adminiſtrator in Law to his Daughter, a Conveyance of the Wadſet to *Robert Roriſon*, who had acquired the Reverſion from *Earlſtoun*. *Margaret Dick* apparent Heir to *Nathaniel Canon*, did, with Conſent of her Husband, purſue Exhibition *ad Deliberandum*, againſt *Robert Roriſon*, and *Thomas Gordon* now of *Earlſtoun*: Wherein the Purſuer called for Production of the Wadſet-right.

Alledged for the Defenders. They cannot be obliged to exhibite the Wadſet-right; becauſe the Purſuer and her Predeceſſors are denuded thereof by Lieutenant *Dick*'s Diſpoſition in Favours of *Robert Roriſon*, which is produced.

Replyed for the Purſuer. The Diſpoſition by her Adminiſtrator of Law is null; Becauſe, 1. He had no Power to alienate an heretable Subject, without the Authority of a Judge; *That is*, the Lords of Seſſion, *L.* 5. *L.* 25. *L.* 27. *C. de Admin. Tut. Stair, Inſtit. Lib.* 1. *Tit.* 6. §. 18. 2. The Right of the Wadſet was not eſtabliſhed by Infeftment in the Pupil's Perſon, as Heir to her Predeceſſor.

Duplyed for the Defenders. Tutors cannot indeed of themſelves alienate heretable Rights, where there is no antecedent Obligation upon the Pupil or his Predeceſſors ſo to do: But where there is ſuch an antecedent Obligation, they may alienate, *L.* 5. §. 3, 6. *ff. de Reb. Eor. qui ſub Tut. L.* 1. *C. quando Decreto Opus non eſt.* So that as the Reverſer might have compelled the Wadſetter to renounce and take his Mony; there was no Neceſſity to wait the interpoſing of a judicial Authority. And our Law allows Tutors in many Caſes to do Deeds of Alienation; as to grant Charters and Precepts of *clare conſtat.* 2. 'Tis of no Import that the Pupil had no Right in her Perſon: For, if once it be eſtabliſhed, That an Adminiſtrator of Law could grant a Renunciation of this Wadſet, then the Warrandice in the Renunciation or Diſpoſition, will debar the Minor from quarrelling it: As a Diſpoſition by an apparent Heir, will be good againſt him after he is ſerved.

The Lords found the Defender obliged to exhibit the Wadſet-right to the Purſuer, notwithſtanding of her Father's Diſpoſition thereof in Favours of *Roriſon*.

Eodem Die. *Sir* John Malcolm *of* Innertiell, *and* Michael Malcolm *of* Balbedie, *againſt Her Majeſty's Advocate and Sollicitours.*

JOhn *Maitland* of *Eccles*, having in *Anno* 1661, obtained from King *Charles* the Second, a Gift under the Privy Seal, of the Feuduties and other Emoluments of the Miniſtry of *Scotlandwell*, and ſome other Chaplainries and Altarages, during all the Days of his Lifetime, and after his Deceaſe to *Maitland* his Son: This Gift was conveyed by Progreſs from *John Maitland* to Sir *John* and *Michael Malcolms*, who purſued the Feuars of *Scotlandwell* for bygone Feuduties.

Compearance was made for the Queen's Intereſt by Her Majeſty's Advocate and Sollicitours, who alledged, 1. That the Gift was preſcribed, never having been clothed with Poſſeſſion by *John Maitland* the Obtainer, or his Aſſigny in the Cedent's Lifetime: And any Poſſeſſion ſince his Death, cannot come *in Computo* to hinder Preſcription; Seing the Gift died with the Cedent, the Blank therein not being filled up by him who only had Power to do it. 2. *Et ſeparatim*, This Gift being expede thro' the Regiſters, and at the Privy Seal, in Favours of *John Maitland* of *Eccles*, and after his Deceaſe to *Maitland* his Son, the Name of no particular Son of *Eccles*'s could be thereafter filled up therein. 3. *Eſto*, the recording of the Gift Blank did not take away *Eccles*'s Son's Right, this Son is preſumed in Law to be the eldeſt Son and Heir living at the Date of the Gift. Now, the ſaid eldeſt Son having died before the Father made the Aſſignment, and the Father having never filled up another Son's Name: The blank Right, which neither the Preſumption of Law, nor *Eccles*'s Election doth ſupply, is determined and expired. 4. Suppoſe the Blank could imply a Power in Favours of *Eccles* to inſert any Son therein he pleaſed, that Power of Election fell with him, and is not competent to his Aſſigny.

Anſwered for the Purſuers. Preſcription is ſufficiently interrupted by the Aſſigny's Poſſeſſion. 2. The ſecond Objection would have ſome Weight, if the Blank in the Gift were an abſolute Blank, without any Deſignation to demonſtrate the Perſon; but the Perſon being demonſtrated by the Character of Son to ſuch a Man: It is moſt probable, That, ſeing *Eccles* had ſeveral Sons at his obtaining the Gift, the King intended, by leaving the Son's Name blank, to have the Grant paſs to the longeſt Liver of the Sons. 3. Albeit the Right of Primogeniture prevaileth in Succeſſion, it hath no Prerogative in Grants of this Nature. 4. The Aſſigny, as *Procurator in Rem ſuam*, hath the ſame Power to fill up the Blank with the Name of any of *Eccles*'s ſurviving Sons, as the Cedent might have done.

The Lords found, That any Poſſeſſion by *Maitland* of *Eccles* or his Aſſigny within Fourty Years, interrupts Preſcription. And found, That the Gift in Favours of *Maitland* of *Eccles*, and his Son, became not extinct by the Father's Death without filling up the Blank: But ſubſiſteth in the Perſon of the Son now alive.

Eodem Die. *Doctor* James Garden, *againſt Mr.* David Anderſon *Profeſſor of Divinity.*

IN the Reduction at the Inſtance of Doctor *Garden*, againſt Mr. *David Anderſon* and Others, for reducing Mr. *David*'s Right to the Office of Profeſſor of Theology in the King's College of *Aberdeen*: The Lords repelled this dilatory Defence againſt the Executions, That they did not bear Copies to have been left at the moſt patent Doors of the Defender's Dwelling-places; but only that Copies were left at the Doors of their Dwelling-places ſimply, without the Addition of *Moſt patent.*

June 20, 1712. *Sir* David Arnot *of that Ilk, againſt* David *and* Andrew Greigs.

IN the Action of Spuilzie at the Inſtance of Sir *David Arnot*, againſt *David* and *Andrew Greigs*: The Lords found the Defender's poinding of the Purſuers Plough Goods the Fifteenth Day of *June* 1710, before his Beer-ſeed was ended, when there were other poindable Goods upon the Ground, to be a Spuilzie; tho' the Labouring had been over a Matter of Fourteen Days before in the reſt of the Neighbourhood. Albeit it was alledged for the Defenders, That the Act diſcharging to poind Plough Goods in the Time of Labouring, muſt not be underſtood of any particular Man's unſeaſonable Ploughing, but of the ordinary Seaſon of Ploughing in ſuch a Place of the Country, *Stair*, *Inſt. Pag.* 730, *Mackenzie Obſerv.* on the *Act* 98. *Parl.* 6. *Ja.* 4. and *November* 15, 1627, *Gullan* againſt *Drummure*. Seing otherwiſe crafty Debtors might be deſignedly ſlothfull in their Ploughing, and ſpin it out till Harveſt-time, thereby to diſappoint the lawful Diligence of Creditors.

In Reſpect it was anſwered for the Purſuer, That the Defender's Citations concern only the poinding Plough Goods ploughing in *Midſummer* or *October*, at Upſeed-time, for Fauching or the like; and ſo come not home to the Purſuer's Caſe, whoſe Labouring Beaſts were poinded, when he was labouring *bona Fide* by throwing Seed in the Ground, in Expectation of Increaſe. And as *Mackenzie* ſays, That Plough Goods may be poinded after the Debtor's Labouring is over, ſuppoſe the Neighbourhood be ſtill Labouring: Why not *a Pari*, ſhould not the Purſuer's Goods have been privileged againſt poinding, till his Labouring was finiſhed, tho' the Neighbours about had ended theirs?

Eodem Die. Iſobel Moncrieff *and her Husband, againſt* Katharin Monipenny *Lady* Sauchop.

IN the Action at the Inſtance of *Iſobel Moncrieff* and her Husband, againſt *Katharin Monipenny*, mentioned the Nineteenth of *February* laſt, the Defender craved Allowance of the Expence of confirming the reduced Teſtament: Becauſe *Nemini Officium debet eſſe damnoſum.*

Replyed for the Purſuer. No ſuch Expence can be charged upon her: Becauſe the ſame was no ways profitable to her, ſhe having been obliged to pay out the Expence of her own Confirmation, as if the Defender had not wared a Sixpence on the Head. Yea, it was plainly laid out in Oppoſition to the Purſuer's Intereſt.

Duplyed for the Defender. What ſhe expended in confirming the Teſtament, ought to be allowed, as well as what ſhe paid to her Husband's Creditors. Seing whether profitable to the Purſuer or not it was legal; and *Incommodum non ſolvit Argumentum.* It was an officious and wilful Humour in the Purſuer, to expede a new Confirmation of that which was confirm'd before: Since the Defender's aſſigning the Purſuer to the Goods and Gear confirmed, would have eſtabliſhed the Right in her Perſon without confirming.

The Lords allowed to the Defender the ordinary Expences of confirming her Husband's Teſtament, in ſo far as the ſame were profitable to the Purſuer the Executrix.

Eodem Die, inter Eaſdem.

George Moncrieff of *Sauchop*, in his Contract of Marriage with *Catharine Monipeny, obliged himſelf to infeſt her in a Liferent yearly Annuity of Eight Chalders of Victual to be uplifted betwixt* Yule *and* Candlemas *furth of his Lands, beginning the firſt Year's Payment, betwixt the firſt Feaſt of* Yule *and* Candlemas *after his Deceaſe. George Moncrieff* having died *November* 19, 1707, *Catharine Monipeny* his Relict craved an Aliment to be modified to her from the 19 *November*, till *Candlemas* thereafter.

Alledged for Iſobel Moncrieff the Husband's Executrix. No Aliment can be allowed. Becauſe, Aliment to a Relict till the next Term after her Husband's Deceaſe, is indulged only when ſhe hath neither immediate Acceſs to her Jointure, nor a Fund of Credit, that ſhe may not be left to live upon the Air: As when her Liferent is provided by Way of Annualrent, in which Caſe, if ſhe happen to die betwixt Terms, or before the firſt Term of Payment of her Joynture, ſhe gets nothing at all: and ſeing that may fall out, no Perſon will credit her in Proſpect of her Jointure, which Reaſon for an *interim* Aliment, ceaſeth in this Caſe, where the Relict's Security in a Liferent Annuity out of certain Lands, afforded her a Fund of Credit immediately after her Husband's Deceaſe; ſeing whether ſhe ſurvive *Whitſunday* or *Martinmas*, or not, ſhe hath ſtill Right to leſs or more of her Jointure. This Diſtinction ſeems to be eſtabliſhed by a ſolemn Deciſion *in Terminis, January* 1662, *Cowper* contra L. *Tofts*, obſerved by *Gilmore.*

Anſwered for the Relict. There is no ſolid Difference betwixt a Liferent-proviſion of Annualrent, and a Liferent-proviſion out of Lands, where the Proviſion doth not commence till the firſt Term after the Husband's Death: For here lies a Neceſſity of an alimentary Proviſion *medio Tempore.* Whether the Liferent be due the next Term after the Husband's Deceaſe, or not by the Relict's living till then, or dying before, or whether ſhe have a Fund of Credit or not, Aliment is due to her by a general Rule, and not in particular Caſes only. So that ſhe is entitled to an *interim* Aliment, by a general Rule, Whereby a Relict having a Jointure by a former Husband, or being Proprietar of Lands as an Heireſs, hath Right to ſuch an Aliment: Which proceeds rather upon the Motive of natural Obligation, than that of mere Neceſſity. As to the objected Prattick in the Year 1662, it makes for the Relict; ſince there Aliment was decerned, not to be allowed in the next Term's Rent.

The Lords modified a Sum to the Relict for her Aliment from her Husband's Death, till the Commencement of her Jointure.

June 24, 1712. Martha Wright *and* David Kinloch *of* Conland *her Husband*, *contra* John Wright *Merchant in* Edinburgh.

THe deceaſt *John Wright* Bute-purſevant, *January* 28, 1707, did (under the Reſervation of his own Liferent, and of his whole Houſhold-pleniſhing, and a Liferent of 200 Merks yearly in Favours of *Lillias Sanderſon* his Wife) diſpone his whole Eſtate heretable and moveable, to *Alexander Wright* his only Child, and the Heirs of his Body, which failing, to *Laurence* and *Martha Wrights* his Brother and Siſter, and *John Wright* Merchant in *Edinburgh* his Brother in Law, equally among them, and their Heirs. Which Diſpoſition bore the ſaid *John Wright* to be named Tutor to the Diſponer's Son the Inſtitute, and that the Writs were inſtantly delivered to him, in Name of the Son and the other Subſtitutes. On th ſame Day *Lillias Sanderſon* procured from her Husband another Diſpoſitio of all his Moveables to their Son, and failing of him in Favours of her ſel, over and above the 200 Merks of Liferent. Which Diſpoſitition was pe-fected by an Inſtrument of Poſſeſſion of the Date thereof in Favours of the Wife; and thereafter transferr'd by her to *John Wright*, one of the Subſti-tutes in the other Diſpoſition, for Payment of the Liferent provided to her in that other Diſpoſition. The Diſponer's Son, and *Laurence Wright* another of the Subſtitutes having died, *Martha Wright*, as Heir ſerved to them, raiſed a Reduction of the Diſpoſition in Favours of *Lillias Sanderſon* the Wife, upon theſe Reaſons, *Viz.* Either it was prior or poſterior to the Purſuer's Diſpoſition: If prior, it was *Donatio inter Virum et Uxorem, quæ ſolum Morte confirmatur*, and was revoked by the ſubſequent Diſpoſition; if poſterior, it was *a non habente Poteſtatem*, the Diſponer being *ab ante* denuded by the other Diſpoſition, containing Warrandice from Fact and Deed.

Anſwered for John Wright. The Purſuer ought to be poſitive in the Fact whereupon ſhe founds her Reaſon of Reduction: For a Purſuer is not, as a Defender, privileged to propone contrary Alledgeances. And how can the Judge determine any Thing certainly, while the Purſuer is at an Uncertainty how to inſiſt? 2. The Defender anſwers the Purſuer's *Dilemma*, by propoſing another, that is, If the Diſpoſition in Favours of the Wiſe was granted before the other, it is not revocable, being a reaſonable Proviſion to a Wife no otherways provided: If poſterior, (which is more probable) it ought to ſubſiſt; in Reſpect it doth not appear that the firſt Diſpoſition was a delivered Evident, and it bears no Clauſe diſpenſing with not Delivery.

Replyed for the Purſuer. The Diſpoſition in Favours of the Purſuer, and the other Subſtitutes, bears to have been inſtantly delivered to the Defender as Tutor to the Son, in Name of him and of the Purſuer, and other Subſtitutes; and the Preſumption of Law ſtands *pro Veritate Inſtrumenti*, till the contrary be made appear. 2. The Writ being now in the Defender's Hand, Law preſumes for the Purſuer, unleſs the Defender prove not Delivery. 3. The Writ is good without Delivery, Becauſe, 1. It's a Diſpoſition by a Father to his Son, *November* 11, 1624, *Children of* Elderſlie *againſt his Heir.* 2. The Diſponer having an Intereſt by his reſerv'd Liferent, his Poſſeſſion was the Son's and Subſtitutes Poſſeſſion, *Stair Inſtit. Page* 66: Which is conform to the civil Law, whereby the Property of *Legata* and *Hæreditates* were tranſmitted without Delivery; particularly in the Caſe of a Reſervation of a Diſponer's Liferent, *L.* 28. *C. de Donationibus.*

Duplyed for the Defender. Had the firſt Diſpoſition been delivered, it is not very probable that the Granter would have altered it the ſame Day.

It doth not import that the Diſpoſition bears, That it was delivered to the Defender in Name of the Perſons concerned: For what is in the Body of a Writ cannot prove actual Delivery thereof, but only that it was deſigned to be delivered. A Clauſe of Delivery relating to other Writs than that wherein it is inſert, will indeed bind theſe other Writs upon the Receiver of the Diſpoſition: But no Clauſe in any Writ can prove Delivery of that individual Writ. Nay, it it hath been found, That a Diſpoſition, tho' judicially ratified, being in the Granter's Hand, is not preſumed to have been delivered.

The Lords preferred the Purſuer the Heir ſubſtitute to the Relict: And therefore reduced the Relict's Diſpoſition. The Lords ſeemed to go upon the Reaſons following, which occurred to their Lordſhips at adviſing, *Viz.* 1. The Diſpoſition in Favours of the Purſuer, was good without Delivery, becauſe of the Granter's reſerved Liferent. 2. The Wife's Diſpoſition, tho' followed with an Inſtrument of Poſſeſſion, could not veſt any Title of Property or Poſſeſſion in her *ſtante Matrimonio*, but what did immediately return to the Huſband *Jure Mariti*. 3. The Tranſaction made by *John Wright* the Defender with *Lillias Sanderſon*, did accrew to the Son and his Subſtitutes: Becauſe the Defender being not only Tutor to the Diſponer's Son, but alſo Truſtee for his Subſtitutes, for whoſe joint Uſe and Behoof the Diſpoſition bears to have been delivered to him; any Benefit or Advantage that could ariſe from ſuch a Tranſaction, ought to be communicated to the Subſtitutes.

Eodem Die. Robert Sinclair *of* Quendal, *againſt* David Murray *of* Clarden.

IN the Action of Compt and Reckoning at the Inſtance of *Robert Sinclair*, againſt *David Murray*, the Defender proponed Compenſation upon two Receipts, whereby Captain *Andrew Dick* the Purſuer's Author acknowledged the Receipt of Mony from the Defender's Father, and obliged himſelf to allow the ſame to him at compting.

Replyed for the Purſuer. The two Receipts are preſcribed.

Duplyed for the Defender. Tho' Obligations, upon which Action may be raiſed when the Creditor pleaſeth, be *temporalia quoad agendum*, and do preſcribe; yet Diſcharges or Receipts affording Ground of Defence, which the Receiver cannot found on till he be purſued, are *perpetua ad excipiendum*, and cannot preſcribe.

The Lords found, That the Exception on the two Receipts is perpetual.

Thereafter 10 *July* 1712, The Purſuer proponed Recompenſation upon other two Sums due by the Defender's Father to Captain *Dick*.

Alledged for the Defender. 1. Theſe Debts are preſcribed. 2. He hath Right to apply the indefinite Receipts upon which he founds his Compenſation, to any Sums wherein he is Debtor to the Purſuer, conform to the Rule *Electio eſt Debitoris*: And doth apply them to extinguiſh other effectual Debts not preſcribed, 13 *February* 1680, *M'rieth* contra *Campbell*.

Replyed for the Purſuer. 1. The Receipts founded on by the Defender to inſtruct his Ground of Compenſation, *laborant eodem Vitio*, with theſe produced to prove the Recompenſation; therefore if the one be perpetual *ad excipiendum*, the other muſt be alſo perpetual *ad replicandum*. And albeit regularly in Payments *Electio* be *Debitoris*, yet if he make not his Election when he pays, *Electio eſt Creditoris*, *L.* 8. *C. de Solution.* The Defender cannot be heard to quarrel the Recompenſation, upon any Ground that was not competent to him at the Time when theſe two Receipts were granted to the Purſuer's Author: And as Preſcription could not have been objected then, neither can it now. Beſides, as *Reus excipiendo fit Actor*: So by proponing Recompenſation on the firſt Purſuer turns Defender, and gets the Power of Election how to apply the Payments.

The Lords found, That the Reply of Recompenſation was alſo perpetual.

June 26, 1712. *Sir* Andrew Kennedy *Conſervator*, &c. *Supplicant*, *againſt Sir* Alexander Cuming *of* Culter.

SIr *Andrew Kennedy* ſet forth in a Petition an Order and Decree of the Houſe of Peers, dated 19 *April* 1711, reverſing the Lords Decreet in Favours of Sir *Alexander Cuming*; and ordering their Lordſhips to direct Expences in the Suits mentioned in the ſaid Order to be taxed according to the Courſe of the Court: Purſuant whereunto, he had, by Appointment of their Lordſhips 21 *July* 1711, Summoned Sir *Alexander Cuming*. The Lords 9 *November* 1711, upon Sir *Alexander*'s pleading his Privilege of Parliament, ſuſtained his Plea, notwithſtanding he had waved his Privilege by anſwering before the Houſe of Lords, and could not reaſſume it; Eſpecially againſt the Execution of a Sentence paſt upon Compearance. This occaſion'd the Petitioner to proteſt for Remeid of Law: But upon better Advice, he gave in a ſummary Complaint to the Houſe of Peers, as a more expedite and leſs expenſive Way to obtain Remedy: Who thereupon directed a ſecond Order to the Lords of Seſſion, That they ſhould furthwith tax the ſaid Expences, and direct the ſame to be paid to the Petitioner, purſuant to the Order and Judgment above-mentioned. Therefore the Petitioner prayed their Lordſhips to reſume the Conſideration of the Affair, and his Accompt of Expences, and forthwith to proceed to determine therein, and order Payment thereof.

Anſwered for Sir Alexander Cuming. He conceived himſelf not bound to anſwer to the Petitioner's Claim, unleſs he were cited, and had the *Induciæ legales*: As the Lords found laſt Year upon the ſame Queſtion. Nor can the former Summons ſupport the preſent Petition; Becauſe, the Lords have determined upon a Point of Privilege, belonging to Sir *Alexander*, as a Member of the Houſe of Commons; and Sir *Andrew* having proteſted for Remeid of Law, the Lords are *Functi*, and he is out of the Field, until that Proteſtation be regularly diſcuſſed. For the Order now inſiſted on, *Viz. Forthwith to Tax* is to be underſtood in civil and habile Terms, that is ſummarly, without abiding the Courſe of the Roll, but never without a Citation and Libel, which is eſſentially and previouſly neceſſary to the obtaining of any Decerniture whatſoever upon the moſt ſummary Complaints, even againſt Perſons preſent, unleſs there were an Action depending, in which the Complaint is receivable by Way of Incident, which cannot in this Caſe be ſaid, ſeing the former Dependence in the principal Cauſe is determined by a Decree.

The Lords found, That Sir *Alexander Cuming* muſt anſwer to the Petitioner's Claim of Expences, without Neceſſity of any further Citation.

June 28. 1712. *The Earl of* Wintoun, *againſt Mr.* William Hay *of* Drummelzier *and Mr.* James Seton *Brother to the Viſcount of* Kingſtoun.

UPon Report of the Lord *Ormiſtoun*, the Lords refuſed to examine Witneſſes, as to *Drummelzier*'s concurring with Mr. *Seton* in the Management of the Earl's Eſtate by Advice: Becauſe, Advice and Concurrence are general Terms dipping in Law; but ordained the Witneſſes to be examined as to Words or Facts they heard or ſaw *Drummelzier* ſay or do.

July 1, 1712. Alexander M'ildownie, *againſt* John Graham *of* Dougalſtoun.

DOugalſtoun alledged, That the Bond which is the Foundation of *M'ildownie*'s Proceſs againſt him is null, 1. As wanting a Date. 2. For that it doth not bear to be ſubſcribed before Witneſſes, but only written before Witneſſes: The Lords repelled both theſe Nullities; In Reſpect it was anſwered for the Purſuer, 1. The Bond is payable at three ſeveral Terms in the Years of GOD therein-mentioned, which ſufficiently ſupplies the Want of a Date at the End. So 15 *January* 1662, *Grant* contra *Grant*; The Lords found a Bond not null for wanting a Date as to the Day, Month and Year, ſeing it bore Annualrent from a certain Time in ſuch a Year laſt paſt, which ſupplied the Date as to the Year. 2. It's frivolous to object, That the Bond bears only to be written before Witneſſes, and not that it was ſubſcribed before them, ſeing the Bond bears to be ſubſcribed by Notaries, for the Granter, who could not writ, before Four Witneſſes. And it can be no juſt Ground of Exception againſt this Bond, That the Words, *I have ſubſcribed theſe Preſents*, are wanting, ſeing the Granter could not ſubſcribe.

Eodem Die. Mary Scot *Lady* Halkſhaw, *againſt the Dutcheſs of* Buccleugh.

IN the Action at the Inſtance of the Lady *Halkſhaw*, againſt the Dutcheſs of *Buccleugh*, Sup. 12 *February* 1712, for relieving the Purſuer of the equal half of the Sum in a Bond granted by Captain *Scot* as Principal, and the Earl of *Buccleugh* and *John Scot of Sintoun* as Cautioners, to Sir *William Dick*, aſſigned by Sir *William* to *Scotſtarbet* only againſt the Principal, and *Sintoun*, which the Purſuer as repreſenting *Sintoun* paid upon Diſtreſs.

Alledged for the Defender. It was competent for the Purſuer to have objected when ſhe was diſtreſſed, That ſhe could not be liable for the Co-cautioner's Share, whom the Creditor had ſo liberated. For a Creditor exacting Payment *in ſolidum* from one Cautioner, is obliged to aſſign againſt all the Co-obligants, *L. 17. ff. de Fidejuſ. L. 11. C. eod.* Yea Cautioners are ſometimes induced to engage for a Debtor, in View of having a proportionable Relief from the Co-cautioners, if the Principal ſhould fail. And the original Creditor who by his Fact of reſtricting the Aſſignation, put his Aſſigny out of Capacity to aſſign more as the half of the Sum, could not diſtreſs the Purſuer for the whole: And if ſhe hath officiouſly paid more, without proponing ſuch an obvious Defence, *ſibi imputet* that ſhe cannot inſiſt for Relief.

Replyed for the Purſuer. The Creditor ſtood under no Obligation to aſſign this Debt to the Purſuer, upon Payment; and therefore ſhe cannot be charged with omitting a Defence or Exception that was not relevant. For albeit, by the civil Law, Creditors were obliged *vendere cæterorum Nomina ei qui ſolvere paratus erat*; Becauſe by that Law, neither *Correi debendi*, nor *Fidejuſſores* had Relief *niſi Actio ceſſa fuerat*, or *ex Pacto*: Yet with us, tho' Aſſignations be requiſite in ſome Caſes, where the Party paying cannot have Relief, Co-principals and Cautioners are liable in mutual Relief *ex Naturâ Rei*; and ſo the Creditor, to whom the Purſuer paid the Debt, was under no Neceſſity to aſſign the ſame to her, who had Relief competent to her *aliunde*. Conſequently, the Purſuer had no relevant Defence to ſave her from total Payment againſt the Creditor, who could not aſſign againſt the Co-cautioner.

The Lords found, That the reſtricted Quality in the Aſſignation did not found a relevant Defence to the Purſuer, againſt paying more than the half of the Debt.

July 2, 1712. James M'millan *and the Lord* Pitmedden, *againſt* Robert Douglaſs *Merchant in* Edinburgh.

THe Lords reponed *Robert Douglaſs*, againſt a Decreet of the Juſtices of Peace, decerning him to pay to *James M'millan*, as having Right by Aſſignation from the Lord *Pitmedden*, 8 *Lib. Sterling*, as the Cedent's Share of 100 *Lib. Sterling* reſting by *Robert Douglaſs* to the Partners of the Powder Manufactory: Albeit Mr. *Douglaſs* had compeared in the Court, proponed Payment, and ſuffered the Term to be circumduced againſt him for not proving, and not deponing upon the Verity of the Libel referred to his Oath. In Reſpect the Decreet was pronounced in a Compt and Reckoning for ſo great a Sum by Juſtices of Peace, in vacation Time without a Diſpenſation.

July 3, 1712. Agnes Colquhoun *Lady* Monboddo, *againſt the Laird and Lady* Newmains.

THe Lady *Monboddo* having inſiſted in a Proceſs againſt the Laird and Lady *Newmains*, for declaring her Right to the Lands of *North-woodſide* and *Kippo*, diſponed by her, in her Contract of Marriage to *Alexander Irvine* of *Monboddo* her Huſband, reſerving her own Liferent; upon this Ground, That there was a Clauſe in the Contract irritating his Right, in Caſe he failed to perform his Part of the Contract, which Irritancy was incurred; The Lords the   Day of   aſſoilzied the Defenders from the Declarator, reſerving the Purſuer's Right of Liferent as accords. After Extracting this Decreet of *Abſolvitor*, the Purſuer added a new Concluſion upon the Margin of the principal Summons, for declaring her Right of Liferent, and that the Defenders ſhould be liable to her for the Rents of the Lands.

The Lords found, That no new Concluſion could be added to a Summons, after an Act is thereupon Extracted, and far leſs after a Decreet Extracted But allowed the Purſuer to inſiſt upon the Summons as originally libelled as accords.

Eodem Die. John Hepburn *of* Humbie *and* John Gordon *Merchant in* Edinburgh, *againſt the Lord* Strathnaver.

IN a Competition betwixt the Lord *Strathnaver*, and *John Hepburn*, for the Earl of *Sutherland*'s Share of the Equivalent Mony; The Lords found the Earl's Aſſignation thereof to the Lord *Strathnaver* his Son in his Contract of Marriage, reducible upon the Act of Parliament 1621, as being *inter conjunctos* without an onerous Cauſe, unleſs the Aſſigny can inſtruct, That the Cedent had then a ſeparate unincumbred Eſtate ſufficient to pay all his Debts. For it was thought, That the Marriage could not be ſuſtained as the onerous Cauſe of this Aſſignation, from the inſerting thereof in the Contract, which made it no more valid than if it had been a gratuitous Aſſignation in a Paper apart: Seing it is not provided in Favours of the Wife or Children of the Marriage, but ſimply to the Lord *Strathnaver* himſelf, his Heirs and Aſſignies.

Eodem Die. *Mr.* John Spotſwood *of that Ilk Advocate and other Creditors of Mr.* Alexander Brown *of* Thornidikes, *againſt* Alexander Brown *of* Baſſendean.

MR. *John Spotſwood* and other perſonal Creditors of Mr. *Alexander Brown* having purſued Reduction upon the Act of Parliament 1621, of a Diſpoſition

poſition of the Lands of *Baſſendean*, granted by Mr. *Alexander* to *Alexander Brown* his ſecond Son: The Lords 24 *June* 1709, found, That a Diſpoſition tho' not completed by Infeftment, could not be reduced by a perſonal Creditor. Whereupon the Proceſs ſtopped till the Purſuers had adjudged; and then they inſiſted in their former Reduction.

Alledged for the Defender. The Adjudication cannot be a Title to inſiſt in the old Proceſs, becauſe in all Reductions the Purſuers active Title ought to be libelled and given out *in Initio Litis.*

Replyed for the Purſuers. Albeit the Adjudication be poſterior to the Summons of Reduction, the Bonds whereon it is founded are prior. And the Lords do ordinarly ſuſtain an imperfect Title *ad inchoandam Litem*, as a Charge upon a Bond requiring Requiſition, *June* 28, 1671, *Hume* contra *Lord Juſtice Clerk*, a general Diſpoſition *omnium Bonorum*, *Jus Sanguinis* in an apparent Heir, or neareſt of Kin; and allow Requiſition to be uſed, a confirmed Teſtament or Retour to be produced *cum Proceſſu*, and the original Proceſs then goes on as if the Title had been complete at the Beginning.

Duplyed for the Defender. The Inſtances mentioned by the Purſuers do not meet the Caſe: For Requiſition was allowed *pendente Lite*, becauſe the Bond and not the Requiſition was the active Title; whereas here the Adjudication, and not the Bond, is the active Title. Again, a general Diſpoſition is ſuſtained *ad inthoandam Litem*, in Reſpect it gives *Jus ad Rem*, tho' not *Jus in Re*; whereas a perſonal Bond *non tangit Subjectum*, but doth only oblige the Granter's Perſon. The Inſtance of *Jus Sanguinis*, is as little to the Purpoſe; ſeing that in ſome Caſes doth afford not only *Jus ad Rem*, but *in Re*; as in poſſeſſory Actions, for continuing the Defunct's Poſſeſſion; in other Caſes it ſufficeth *tam ad finiendam, quam ad inchoandam Litem*, as in Exhibitions *ad deliberandum.*

The Lords repelled the dilatory Objection, and ſuſtained Proceſs at the Purſuer's Inſtance, the former Defect in his Title being made up.

July 4, 1712. John Hamilton *of* Bangour *and his Tutrix, againſt the Lord and Lady* Ormiſtoun.

THE deceas'd Sir *William Hamilton* Lord *Whitelaw*, in his Contract of Marriage with Dam *Anna Houſtoun*, *obliged himſelf to imploy* 60000 *Merks upon Land or other ſufficient Security for her liferent Uſe, which the Lady accepted in full Satisfaction*, &c. *except the whole Houſhold-pleniſhing that ſhould happen to be in their Dwelling-houſe the Time of his Deceaſe; which Houſhold-pleniſhing, Heirſhip-moveable included, in Caſe ſhe ſurvived him, he thereby diſponed to her free of all Debts whatſoever.* Sir William, *ſtante Matrimonio*, granted to his Lady a Bond wherein *he obliged his Heirs not of his own Body, for important Cauſes and Conſiderations, to pay to her* 7000 *Pound* Sterling, *and declared that the Bond ſhould be effectual for forcing his Heirs, Executors and Succeſſors to pay her the Sum thereinmentioned* or *otherwiſe for affecting his whole Eſtate heretable and moveable therefore.* Thereafter he purchaſed a Lodging in *Edinburgh*, and provided her to the Liferent thereof. This Lady and my Lord *Ormiſtoun* her preſent Husband for his Intereſt, purſued *Bangour*, as Heir to the Lord *Whitelaw*, for Payment of ſeveral Debts, and recovered Decreet againſt him. Who raiſed Reduction upon the Head of Minority and Leſion for the Reaſons following, 1. The Lady could not claim both the 7000 Pound Bond and the Liferent of the Houſe as ſeparate and diſtinct Rights. Becauſe, 1. The Liferent being poſterior to the Bond is to be interpreted in Satisfaction thereof *pro tanto*: Juſt as the Bond being poſterior to the Contract, was *November* 16, 1708, found to be in Satisfaction of the

Liferent Proviſions therein. 2. Law conſtructs the Liferent of the Houſe to have been taken as a corroborative or collateral Security of the Obligement in the Contract to imploy a Sum for her liferent Uſe; which collateral Security becomes extinct and returns to the Heir, now that the original Debt in the Contract is overpaid by the 7000 Pound Bond. The ſecond Reaſon of Reduction was, That the Value of the Houſhold-pleniſhing ought likeways to be imputed in Payment of the gratuitous Bond. Becauſe, 1. *Debitor quocunque modo non præſumitur donare*, that is *jactare ſuum*, even in Prejudice of his Heir who is in Law *una & eadem Perſona* with him; but rather to intend, That the ſmall Reſidue of his Eſtate ſhould go to his Heir, as an Incouragement to repreſent him, that he might not die inſolvent without an Heir, which no Man can be thought to deſign or deſire. 2. The Clauſe of the Bond for affecting therewith the Granter's whole Eſtate heretable and moveable, clears that the Defunct intended his Eſtate to be the Fund of Payment: Conſequently, the Lady could not withdraw the Moveables or any Part of the Defunct's Eſtate from the Payment of this Bond, and claim theſe *tanquam præcipuum*. And if the whole Eſtate was to be ſubjected to the Payment of the Bond, that is to be underſtood in the Order and Courſe of Law, *Viz.* The Moveables in the firſt Place, and the Heretage in the next.

Anſwered for the Defenders. 1. It is own'd that the Liferent of the Houſe is to be eſteem'd in Implement of her liferent Annuity: But how it can be again extinguiſhed by another Deed, *Viz.* The Bond, is incomprehenſible; the Bond being granted before the Liferent of the Houſe, could never come in Place thereof. Nor can the Liferent be underſtood in Satisfaction of the Bond. For 1. The Liferent was taken ſimply to the Lady, without any Obligation upon my Lord to complete that which became already her plenary Right, and properly applicable only to the Proviſion of Annuity. 2. The Bond and the Liferent of the Houſe are *Diſparata*; the one a liferent Infeftment, the other a Bond for a Sum of Mony. 3. The Bond is a conditional Obligation payable after the Granter's Deceaſe in Default of Children of his own Body: Whereas the Liferent of the Houſe was ſimple and irrevocable, and immediately took Place. So *July* 24, 1623, *Stuart* contra *Fleming*, The Lords found that a poſterior Security took not away a former Bond: Theſe being of different Natures, and the laſt having no Relation to the firſt, nor mentioning to be given in Satisfaction thereof. To the ſame Purpoſe there is a Deciſion marked by *Dirletoun*, *Pag.* 159 betwixt *Abernethy* and *Forbes*.

2. No Regard to the ſecond Reaſon of Reduction. Becauſe, it is *Res judicata* by the Decreet extracted, where the Heir having alledged that a Silver Montieth and Decanter did not belong to the Lady, as Houſhold-pleniſhing: The Lords, *July* 14, 1710, found that ſhe had Right to theſe Two Particulars, by Virtue of the Diſpoſition to the Houſhold-pleniſhing contained in the Contract. Now as here are *eædem Perſonæ*, and *eadem Cauſa decidendi*: So the Subject is the ſame, *Viz.* Part of the ſame Moveables carried by the Diſpoſition; ſince *idem Subjectum* doth not conſiſt in Individuals, but in Things under the ſame Character and Kind. 2. The Houſhold-pleniſhing was my Lady's Property at her Huſband's Deceaſe, becauſe in the Contract of Marriage the ſame are diſponed to her *per Verba de præſenti*; and ſo were no Part of his Eſtate heretable and moveable befalling to his Heirs and Executors, which he appointed to be applyed for Payment of the Bond. For the Clauſe that the Bond ſhould be effectual to his Lady for forcing his Heirs and Executors to pay, or otherwiſe for affecting his whole Eſtate heretable and moveable, hath no other Meaning than that, either his Heirs and Executors muſt pay, or the Lady might have ready Execution againſt the Heretage and Executry falling to them.

Replyed for the Purſuer. 1. The Caſe is the ſame in Law, as if the Heir had purchaſed the Houſe, and taken the ſame to the Lady in Liferent; and as ſhe could not in that Caſe have inſiſted for both the Liferent, and the whole Sum in the Bond, neither can ſhe do it in this Caſe, where the Purchaſe was made by the Defunct himſelf, with whom his Heir is reckoned *eadem Perſona*. It's as little to be thought, that the Defunct would exhauſt his Inheritance, and overburden his Heir by multiplying Donatives; as that the Heir would ſo overburden himſelf. Nor can it be pretended in Law or common Senſe, that the intervening Liberality of the 7000 Pound *Sterling* ſhould make the Liferent of the Houſe a better ſeparate Security, than if no ſuch Liberality had been exercis'd. And tho' the 7000 Pound Bond be prior in Date to the Liferent of the Houſe, yet *in Effectu* it is poſterior: Seing the Bond was undelivered and revocable till it was confirmed by the Granter's Death. 2. *Illud non agebatur* in the Decreet, to call in Queſtion the Lady's Right to the Pleniſhing, but all the Debate therein was about the Extent thereof, whether it comprehended a Montieth and Decanter, which the Lords overruled. The Heir is not queſtioning what is comprehended under the Denomination of Pleniſhing, nor doth he ſtruggle with the Lady for the Right to the Pleniſhing: He is content ſhe have it, but only that it muſt be imputed in Satisfaction of the Bond *in Valorem*. The Lady is much miſtaken if ſhe imagine, that the Contract of Marriage did *ipſo Facto* tranſmit the Property of the Pleniſhing to her, from the Moment of her Husband's Death. On the contrary, it belonged to the Husband all the Days of his Life; and was *in Bonis ejus*, confirmable in his Teſtament after his Death. She was entitled by the Contract, only to purſue the neareſt of Kin if they ſhould confirm, or to confirm her ſelf Executrix Creditrix. So from what my Lord *Dirletoun* in his *Doubts*, *Tit. Pleniſhing*, *Pag.* 136, 137, ſays, it may well be argued, that the Lady's liferent Proviſion being accepted in full Satisfaction of Terce or Third of Moveables, except the Pleniſhing to which ſhe is provided by the Contract free of Debts, that muſt be underſtood ſo provided, as the Law did provide her if ſhe had not been excluded: Becauſe it is an Exception *de Regula*; and if ſhe could have had no Share of the Moveables by Reaſon of Debts, ſhe has no Claim by the Contract. For the Aſſignation is a Kind of *ſurrogatum ſapiens Naturam ejus cui ſurrogatum eſt*. Nor is the Heir bound to warrand the Right of the Pleniſhing to her to be free of Debt: Becauſe, a Diſpoſition of Pleniſhing or Moveables in a Contract is only of the Nature of a Legacy, which obligeth the Executor but not the Heir. And if it could take Place againſt the Heir, 'tis a Debt of the Defunct's abſorbed by the 7000 Pound Bond, *quia Debitor non præſumitur donare*. And *ſeparatim*, ſuppoſe the Heir were liable to warrand the Diſpoſition againſt onerous Creditors and Third Parties, he could never be obliged to diſburden the Pleniſhing of a Gratuity given to the Lady her ſelf; nor ſhe allowed to exact from him Payment of the Bond without allowing him Relief off the whole Executry, Pleniſhing as well as other Moveables; eſpecially conſidering that theſe Moveables were at the Husband's Diſpoſal ſo long as he lived; and if the Lady had predeceas'd, her Executors had no Intereſt therein. Nor could a general Aſſignation to a Subject ſo uncertain tranſmit the Property without Confirmation. The Prattick betwixt *Stuart* and *Fleming*, *July* 24, 1623, doth not in the leaſt fortifie the Lady's Pretence, for it goes upon two Specialities, both the Bonds bore Love and Favour, and the ſecond was ſatisfied in the Father's Lifetime, without his applying it to Payment of the firſt, or recalling the firſt. The other Deciſion betwixt *Abernethy* and *Forbes*, doth make as little for the Lady: Becauſe the Bonds there, narrated different preceeding Cauſes; and ſo could never be underſtood in Satisfaction of one another.

The Lords ſuſtained both the Reaſons of Reduction: And found, That the Lady cannot claim the Liferent of the Houſe, as a ſeparate Claim by and attour the 7000 Pound *Sterling*; but that the former muſt be interpreted in Satisfaction of the latter; and found alſo, That the 7000 Pound Bond abſorbed the Diſpoſition of the Houſhold-pleniſhing ſo as ſhe cannot ſeek both.

July 8, 1712. Naomi Forbes *and* Alexander Paterſon *Chirurgion Apothecary in* Inverneſs *her Husband, againſt the Lady* Colodden.

IN the Exhibition at the Inſtance of *Naomi Forbes*, againſt the Lady *Colodden* her Mother, for exhibiting two Bonds of Proviſion granted by the deceas'd *Duncan Forbes* of *Colodden* her Father: The Lady deponed, acknowledging that her Husband delivered to her in Truſt two Bonds of Proviſion in Favours of their Daughter the Purſuer, one for 3000 Merks, another of a poſterior Date for 6000 Merks, in Satisfaction of all former Proviſions; and that there was a Clauſe in the 6000 Merk Bond declaring it effectual only in Caſe ſhe married with the Deponent's Conſent, and were no Diſgrace to her Father's Family; and that the Deponent got theſe Bonds in Truſt from her Husband with full Power to deliver either one or other, or none of them, as ſhe ſaw Cauſe; purſuant to whoſe Directions ſhe had burnt the Bonds, upon the Purſuer's running away with Mr. *Paterſon* her Husband.

The Lords found, That the 3000 Merk Bond is abſorbed and comprehended in the 6000 Merk Bond; and that the Defender had no Power to deſtroy the Bonds, her Daughter not having married to the Diſparagement of her Father's Family. And remitted to the Ordinary to hear Parties Procurators in the Proceſs of Liquidation of the Damage and Payment, and how far in this Caſe, *Loco Facti impreſtabilis ſuccedit Damnum & Intereſſe*.

Albeit it was alledged for the Defender. The Qualities adjected to her Oath being intrinſick to the Act of having, *de quo quærebatur*, muſt be as probative of the Manner of having, as the reſt of the Oath is of the having had. For when any Point is referred to one's Oath, all the Circumſtances that enter into the Nature, and are *Partes Actus*, may be deponed upon, and ought to be received. And albeit in this Caſe the adjected Qualities had been extrinſick, yet the Oath cannot be queſtioned, becauſe *juratum eſt deferente Adverſario*. So that it being proved by the Defender's Oath, the only Mean of the Purſuer's Probation, that the Bonds were delivered by the Granter to the Defender in Truſt, with full Power to make them her Daughter's, or not, as ſhe thought fit, and under Obligation to deſtroy in the Event which happened; her doing ſo was juſtifiable. Becauſe, as the Father had the abſolute Diſpoſal of theſe undelivered Bonds; ſo he might commit them to the Defender with the ſame Power he had himſelf. Had *Colodden* given to his Lady 6000 Merks *in Specie*, to be beſtowed by her at Pleaſure on their Daughter, or the Heir; could the Daughter have quarrelled the Truſtee's conferring that Mony upon the Heir, or *vice verſa*? Neither can ſhe quarrel the Defender's deſtroying the Bonds in Obedience to her Husband's Appointment in a diſcretionary Manner, for which ſhe was accountable to none.

In Reſpect it was anſwered for the Purſuer. Albeit he who gives, may qualify his Gift as he thinks fit: Yet Law, for the Security of Property, provides that a Bond or other Security once out of the Granter's Hand (tho' delivered to a Third Party) belongs to the Creditor, who only can qualifie and limit the Right, and recover it *per mille Manus*. The Receiver or Haver who, as a naked *Cuſtos* of the Writ, ſubject to what Law requires of ſuch as have the ſimple keeping of what belongs to another, can never exoner her ſelf by her own Aſſertion. All intended or deſigned by a Proceſs of Exhibition, is only Expiſcation, and to diſcover where the Writ lies. Now, the Lady having acknowledged, That the Bonds were depoſited in her Hand; the preſumed Terms of Depoſitation are, That the Depoſitary ſhall give back the Writ to the Perſon he had it from if required, and if not, to the Perſon in whoſe Favours it is conceived, *January* 25, 1677, *Ker* againſt *Kers*. Could a Depoſitarie's Oath prove againſt the Creditor, in a Bond depoſited, that the Granter ordained it to be cancelled in a certain Event, it were abſolutely in the Depoſitarie's Power to make the Obligation ſubſiſt or not, *Stair, Inſtit. Lib.* 1. *Tit.* 13. §. 4. The Purſuer had Occaſion only to refer the having of the Writ to the Defender's Oath; which being acknowledged, the Obligation to deliver or make up the Damage, takes Place in Favours of the Creditor. The Delivery of the Bond to the Defender by her Husband, and the Qualities or Conditions of the Delivery are all forced into the Ladie's Oath, without any Connection to what is ſimply referred. *Eſto*, that *Colodden* had Power to order the Bonds to be delivered or deſtroyed in certain Events, he could not effectually commit this Power to the Lady, but by his own Writ. How ſoon a Bond is out of the Granter's Hand, Law preſumes Delivery to the Behoof of the Creditor, againſt whom no Condition, Limitation, or Reſtriction ſhould be qualified by the Oath of Granter or Depoſitary. Again, tho' the Qualities in the Oath were inſtructed by the Father's Writ, the Lady could have had only a diſcretionary Power to act rationally: Whereas ſhe burnt the Bonds *ſine juſta Cauſa*; in ſo far as the Quality in the Bond was not known, or intimated to the Purſuer. And tho' her marrying without her Mother's Conſent, might be conſidered as a Neglect of her Duty, it can never be ſtretch'd to forefeit her Bond: The Marriage being ſuteable, and no Diſparagement to her Father's Family. Beſides, as ſhe could not be thought to have contravened with any Neglect or Contempt of her Father's good Pleaſure: So ſhe being ſcarce Thirteen Years of Age when her Bond of Proviſion was ſigned, could not give any reaſonable Occaſion to jealous her good Deportment. There is no Parity betwixt *Colodden*'s delivering a Bond, and his delivering Mony to his Lady, to be beſtowed at her Pleaſure. Seing a Bond is a *Corpus*, which may not only be exhibited, but recovered *Rei Vindicatione*: Whereas the Delivery of a Sum of Mony transfers the Property to the Receiver, and makes her only Debtor by an Obligation to reſtore, which, having no other Foundation than the Truſtee's Oath, might be qualified by her at Pleaſure.

Eodem Die. *The Butchers of* Dalkeith *and* Muſſelburgh, *againſt the Magiſtrates of* Edinburgh, *and Incorporation of Skinners there.*

THE Butchers of *Dalkeith* and *Muſſelburgh*, purſued a Declarator againſt the Magiſtrates of *Edinburgh*, and the Incorporation of Skinners, concluding, That it ſhall be lawful to them to reſort to the Market of *Edinburgh* with their Fleſhes and Skins, and to ſell them there at all Freedom, and to export out of the Market their ſaid Skins, in caſe they be not ſold there; And that the Incorporation of Skinners can neither by themſelves nor with the Concurrence of the Magiſtrates, ſet a determined Price upon their Skins, or oblige the Butchers to ſell at a Price; nor can the Magiſtrates, upon their Refuſal incarcerate them, or arreſt their Skins.

Anſwered for the Defenders. Two Things by Law and immemorial Cuſtom are underſtood to belong to Burrows, to which Markets have been granted, *viz.* 1. To overſee that no inſufficient Goods be brought to Sale, leaſt they impoſe upon the Weak, and break the Credit of Commerce. 2. To ſet Rules and Prices to the Markets, according to the Condition and Plenty of Goods, and Circumſtances of Trade. It being then granted, That the Magiſtrates may viſit and ſet Prices; it doth follow by neceſſary Conſequence, That Goods imported to any Market ſhould be ſold there, for the current Prices, if offered, and cannot be kept up by the Proprietars, or carried Home again. Becauſe, thereby Merchants, who are invited in Proſpect of a fair Market, would be diſappointed and groſly impoſed upon, and a Mine would be run under the ancient Conſtitution of the Country, to blow up the Privileges of the Royal Burrows, particularly their excluſive Privilege to peil and pack Skins and Hides. Were the Out-town Fleſhers allowed, after they have brought their Skins to a publick Market, and are offered the current Prices, to carry them away again, they would ſell their Skins to others who have no ſuch Privilege of Packing and Peiling, and ſo Buyers would not frequent the publick authorized Markets, but go to thoſe Places where the Goods were to be expoſed; the Incouragement of Trade by ſetting up and countenancing publick Markets would be diſappointed; Country Butchers, who pay no Part of the publick Burdens of *Edinburgh*, would take the Bread out of the Mouths of the In-town Butchers and Skinners, who are liable to all Burdens; and Trade it ſelf muſt alſo ſuffer Decay, by the carrying out Skins into the Country to be unskilfully manufactured. The Nature of Freedom is not an undoubted Faculty to do whatever a Man pleaſes; but to do with the Quality, *Niſi quid Vi aut Jure prohibeatur*. And the Principle, *Unuſquiſque Rei ſuæ liber Moderator & Arbiter*, is bounded in all Societies, with the common Intereſt of the whole. Therefore, as *Reipublicæ intereſt ne quis Re ſua male utatur*, and *Salus Reipublicæ ſuprema Lex*, are the governing Principles in civil Societies: So the Government in all Nations, hath a *Dominium eminens*, for directing even private Property to the Good of the Common-wealth. The Markets of *Edinburgh* were eſtabliſhed with a particular Regard to the Accommodation and Serving of the Neighbours firſt, and then of all the Liedges, *Act 86. Parl. 6. Ja. 6.* It is for the ſame Cauſe that Foreſtalling and Regrating are made Crimes; Becauſe they wrong the Freedom and Benefit of open Markets: Foreſtalling and Regrating concerns all Manner of Merchandize, *Act* 113. *Parl.* 7. *Ja.* 5. *Act* 150. *Parl.* 12. *Ja.* 6. If ſuch keeping up and carrying off the Goods be allowed, How can Regrating be prevented? To what End did Law require that Goods ſhould be brought to a Market, if they were not to be ſold there? Is not a private Party's *liberum Arbitrium* in the Diſpoſal of his Goods, reſtrained as much by the *Act* 21. *Parl.* 4. *Ja.* 5. *Diſcharging to buy Goods* (and conſequently to ſell) *before the ſame be preſented to the Market; or to buy in the Market, till Market-time of Day*: As that *liberum Arbitrium* is reſtrained, by obliging them to ſell at current Prices in Market? And is not the End the ſame, That the Liedges be ſupplyed? By the Seal of Cauſe of the Skinners Burgeſſes of *Edinburgh*, confirmed under the Great Seal in the Year 1631, and ratified in Parliament 1633, it is ſtatuted, *That the Butchers bring the Skins with the Bulks to the Market to be ſold; and that the Skins be not ſold but in open Market, while they be viſited by the Searchers, under the Pain of Eſcheat of the Skins. Attour, That none of the Skins be Cutted, Tarleathered,* &c. *under the Pain of Five Shilling* Scots, *to be taken off the Owners for every faulty Skin; and that no rough Skin be ſcored, holled, or blayned, under the Pain of Eight Penies* Scots *for ilk Score or Blayn,* &c. *And it ſhall be Leiſum to the Viſitors to detain the Skins till the Unlaw be paid; and no green Skins are to be ſold in any Booth or Fleſher's Houſe, but in open Market, under the Pain of Ten Pound to be paid by the Buyer, and Five Pound by the Seller, who is to be put in Ward till he pay.* There is alſo an Act of Parliament 1695, confirming all the Privileges of the Skinners within Royal Burrows; And further, confirming an Act of the Convention of Burrows, requiring Magiſtrates to put the Laws for the Sufficiency of Skins and Incouragement of Skinners, to Execution.

Replyed for the Purſuers. They have no Deſign of Regrating or Foreſtalling;

ling; they intend only to declare the Freedom and Liberty of carrying back their own Skins, when they, the firſt Sellers, cannot have their Price, which ſeems to be the Liberty of Markets, and all Merchandizing: For otherwiſe, a Set of combining Buyers might impoſe what Price they pleaſe, to the Prejudice of the Country whence theſe Things are brought. This, in the Conſequence, concerns the whole Heretors of the Nation, whoſe Prices for their Beſtial is heightned, in Expectation of the Value of the Skins. The Seal of Cauſe or Charter produced, gives no Power to the Magiſtrates to impoſe a Price on ſuch Merchandiſe: Therefore this muſt be left to the common Rule of Property, *Quiſque eſt Moderator & Arbiter Rei ſuæ.* Magiſtrates have indeed Power to reſtrain Abuſe in certain Things which concern humane Suſtenance, as Vivers; and the Lords of Seſſion have ſuch a particular Privilege within the Town of *Edinburgh*; but this cannot, without a particular Law, be extended to the Subject in Hand. Seing then the Magiſtrates have no Juriſdiction to impoſe a Price upon the Skins, and the Market Price in this circumſtantiate Caſe will have no other Rule, than what comes from the Arbitrement of the Incorporation of Skinners, (the Variety of Skins being ſuch as they can be reduced to no certain general Price) it is much better that the common Rule of buying and ſelling be obſerved; *That is*, That every one make the beſt Market he can. Otherwiſe, the Preparative might be drawn to all other Commodities brought in upon Market-days, ſuch as Shoes, Stockings, Wright and Smith Work, &c. The Royal Burrows have indeed the Privilege of Packing and Peiling; *That is*, exporting and vending Abroad, but not the Privilege of ſole buying upon the Market: The Market-days are for the Benefit of the Liedges in general, where all may reſort to buy and ſell.

The Lords found the Country Butchers free to ſell their Skins or Hides to beſt Avail, and that they are not bound to ſell them at the Price ſet on them by the Skinners or Magiſtrates; But that, if they get not their own Price, they may carry back the ſame: And that neither the Skinners nor Magiſtrates have Power to ſecure the Skins, or Hides, or Perſous of the Contraveners on that Account.

July 9, 1712. Barbara Fea *Spouſe to* Patrick Traill *of* Ellneſs, *againſt her Husband.*

IN the Proceſs at the Inſtance of *Barbara Fea*, againſt *Patrick Traill* her Husband: The Lords found the Defender obliged to aliment the Purſuer, according to his Fortune. Albeit it was alledged for the Defender, That it was the Duty of a Wife to follow and live with her Husband; and if the Purſuer would come to *Ireland*, where the Defender reſides at preſent, he would entertain her according to his Quality and Fortune. In Reſpect it was anſwered for her, That if the Defender would tell her in what particular Place of *Ireland* he is, and advance Mony to defray the Expence of her Journey, ſhe was content to repair to him. But ſince he declines to let her know where he may be found, and to furniſh her Mony, to enable her to come to him: His Offer to aliment her in *Ireland*, is but a meer Sham and Amuſement. Eſpecially conſidering, That ſhe had formerly gone in Queſt of him to *London*, who finding her there maltreated her, and then deſerting the Place for her Sake, retired ſhe knows not whither. But he having a Land Eſtate in *Orkney*, ſhe ought to have an Aliment out of that in the mean Time.

Eodem Die. Elizabeth Grant *Spouſe to* James Kennedy *Perwig-maker in* Edinburgh, *againſt* Patrick Grant *of* Dunlugas.

RObert Grant *of Dunlugaſs* having, *in Anno* 1687, diſponed his Eſtate to *Patrick Grant* his eldeſt Son in his Contract of Marriage, with the Burden

Burden of 6000 Merks to *Andrew Grant* his younger Son, and *Elizabeth Grant* his Daughter, for their Proviſions; to be divided among them, and paid at ſuch Terms, as their Father ſhould appoint: In Implement of this Obligation, *Robert Grant* in *November* 1693, aſſigned to *Andrew* and *Elizabeth Grants* all that was addebted to him by *John Campbell* of *Friertoun* his Father in Law; and further, He and *Patrick Grant* his eldeſt Son obliged them to pay to *Elizabeth* 1000 Merks, declaring the Bond and Aſſignation to be in full Satisfaction to *Andrew* and *Elizabeth*, of all they could claim through their Father's Deceaſe, or their eldeſt Brother's Contract of Marriage. *Elizabeth Grant* purſued *Patrick* her eldeſt Brother's Son as repreſenting his Father and Grand-father, for Payment of the 1000 Merks, and the equal half of the other 5000 Merks due to her by the above-mentioned Settlement.

Alledged for the Defender. That *Robert Grant* the Father had exerc'd his Faculty of Diviſion by giving the Purſuer 1000 Merks in full Satisfaction; which effectually excludes her from all further Claim.

The Lords found, That there is *Jus quæſitum* to the Purſuer by the Contract of Marriage, and that the Means aſſigned by the ſecond Bond of Proviſion proving ineffectual, ſhe might repudiate the ſame, and thereby hath an Intereſt to claim an equal Share of the Proviſions to the Children in her Brother's Contract of Marriage. But the Lords thought, That if ſhe did refuſe to accept of the Father's ſecond Deed, ſhe could not claim the additional 1000 Merks as a *Præcipuum*. The Lords reaſon'd thus, The Purſuer's Right to a Share of the 6000 Merks was no ways extinguiſh'd: Becauſe, tho' the Father, by his Power of Diviſion, might give more or leſs of the 6000 Merks to her Brother and her; he was ſtill obliged to give the whole betwixt them. If the Father had made no Diviſion, the Son and Daughter would have had Right to the 6000 Merks equally, and by juſt Proportions: Which *Jus quæſitum* could never be taken from them, but with their own Conſent, except upon Payment of the whole 6000 Merks to one or other, or both.

Eodem Die. Hay *Miniſter of the Goſpel, againſt Sir* Samuel Forbes *of* Foveran.

IN a Spuilzie at the Inſtance of *Hay*, againſt Sir *Samuel Forbes*, a Perſon called as a Party in the Proceſs being paſs'd from *ſimpliciter*, was allowed to be examined as a Witneſs *cum Nota*. The Reaſon for taking his Oath *cum Nota*, was, becauſe, the Lords thought that the paſſing from him, might be ſome Obligation upon him to the Purſuer: Or that perhaps he was paſs'd from to catch greater Fiſh.

July 10, 1712. Hamilton *of* Wiſhaw, *againſt* Boid.

UPon Report of the Lord *Cullen*, The Lords found, That an Advocate compearing without a Mandate, for a Perſon out of the Kingdom, called as a Defender in a Proceſs, ought to be allowed to ſee the Proceſs in common Form: But did not determine whether ſuch an Advocate might be allowed to propone Defences for his abſent Client.

Eodem Die. *The Magiſtrates of* Edinburgh, *againſt the Country Brewers.*

IN the Cauſe at the Inſtance of the Town of *Edinburgh*, againſt the Brewers of the Shire (mentioned *ſupra* 18 *July* 1711) It was alledged for the Town, That they may impoſe a greater Duty upon the Sledge than upon the Load, proportionably to the greater Quantity of Ale brought into the Town by the Sledge. For this petty Cuſtom of Eight Penies was impoſed upon the Load, which was Eight Gallons, and Four Penies upon the Burden, which was Four Gallons; and the Load and Burden were rated, not becauſe the one was carried on a Man's Back, and the other on Horſe Back; but becauſe the Load conſiſted of Eight Gallons, and the Burden of Four. Whence it follows, That Two Loads or Sixteen Gallons now charged upon a Sledge, ought to pay double, and ſo proportionably, according to the greater Quantity of Ale that ſhall be imported upon a Sledge.

Anſwered for the Brewers. As the inſtituting of Cuſtoms and Tolls are *de ſummo Imperio*, Sixtinius *de Regal. Lib.* 2. *C.* 6. *N.* 14. *vid. Tit. ff. de Public. et Vectigal. Tit. Cod. nov. Vectig. Inſtit. non poſſ.* Craig *Feud. Pag.* 112. *in Fin.* So the adding or diminiſhing from, and the reforming or altering Tolls or Cuſtoms eſtabliſhed by the Sovereign's Conceſſion, or ancient Conſuetude, is held to be an Innovation and Uſurpation of the Royal Prerogative, *d. Tit. Cod. L.* 10. *ff. de Public. et Vectig.* puniſhable not only by Infamy, and Fining, but even by Death, *Minſiger Obſerv.* 29. *Lib.* 5. *N.* 3. *Farin. Quæſt.* 172. *Part* 3. *N.* 67. And the exacting this double Duty for a Load of Ale of a double Quantity or two Nine-gallon-trees, is an Alteration and Augmentation of the Cuſtom by the Magiſtrates Authority, which cannot be allowed.

Replyed for the Town. It's not doubted, but that the impoſing Cuſtoms belongs to the Sovereign Power, and that Cuſtoms and Impoſitions can only be altered or augmented by the Supreme Power: But here no Cuſtom is demanded, ſave what is granted by King and Parliament; and there is no material Alteration of the Impoſt of Cuſtom. This petty Cuſtom being given upon the Load of Eight Gallons of Ale, or upon the Load of Ale as well known to be Eight Gallons; where two Loads, or Two Nine-gallon-trees, are charged upon a Sledge, it is but ſtill the ſame Cuſtom, without Alteration or Augmentation, to exact Sixteen Penies for the ſame (as Eight Penies formerly for the ſingle Load) ſave that it is indeed made eaſier. So that all the Brewers Latine Texts and Citations of Authors, are only an empty Flouriſh. Neither King nor Parliament ever dream'd, That by removing this Load to a Sledge, or two Loads to a Sledge, the Duty might be fruſtrated or evaded. Farther, that the Quantity rules the Matter, and that the King's Grant is ſo to be underſtood, is evident from this; that tho' nothing be determined in the Town's Charter and Gift with a Relation to Ale imported to *Edinburgh* upon Carts; yet, becauſe the ordinary Draught in a Cart is Three Eight-gallon-trees of Ale, Two Shilling *Scots* of Duty upon the Cart of Ale is eſtabliſhed by Cuſtom and Preſcription; keeping always the ſame Proportion that there is betwixt the Burden and the Horſe-load: Altho', if People have a Mind to cavil, a Cart-draught is frequently called a Load.

The Lords found, That the Town of *Edinburgh* can impoſe a greater Duty upon the Sledge than upon the Load, proportionably to the greater Quantity brought into the Town by the Sledge, than the Load; but not exceeding Two Shilling *Scots* for the greateſt brought into the Town of *Edinburgh* for a Cart-load.

Eodem Die. George Wilſon *of* Sands, *againſt* George M'kenzie *in* Stonehive.

G*Eorge Wilſon* inſiſted againſt *George M'kenzie*, for Re-payment of 60 *lib.* contained in a Bill drawn by *George M'kenzie*, and directed upon *Alexander Deuchar* and *George Wilſon*, payable to *John Campbell Deuchar*'s Servant, and indorſed by him to the Treaſurer of the Bank, who got Payment thereof from *George Wilſon.*

Alledged for the Defender. He cannot be liable to this Action of Recourſe. Becauſe, 1. The Bill was drawn by him only upon *Alexander Deuchar*, as a Fund of Credit to negotiate as he beſt could for his own Behoof, and the Security being refuſed when offered to the Bank ſo directed and ſingly accepted by him, *George Wilſon*'s Name was thereafter added to the Direction by *Deuchar*, who prevail'd with *Wilſon* to accept the Bill conjunctly and ſeverally with him, upon his giving Back-bond to *Wilſon* to relieve him of all Hazard from his Acceptance; and *Deuchar*, by his Servant's indorſing the Bill thus accepted to the Treaſurer of the Bank, got up the Mony. So that the Defender had nothing to do with *Wilſon*, who accepted not by any Order from him, but upon the Faith of *Deuchar*'s Obligement of Relief. 2. As when a Bill bears not an Order to place the Value to the Drawer's Accompt (in which Caſe the Accompt is the Rule) nor an Order to pay as *per* Advice, (in which Caſe the Letter of Advice regulates) there is no Recourſe competent to the Accepter paying, againſt the Drawer: So when a Bill is drawn, without bearing Value in the Hand of the Perſon drawn upon, if he deſign to have Recourſe; he ſuffers the Bill to be proteſted for not Acceptance, and then accepts it for the Honour of the Drawer. But if he ſimply accept, the Preſumption lies againſt him, that Value was in his Hand; and he cannot recur againſt the Drawer. 3. It's clear by a ſigned Declaration of Eleven knowing Merchants, That, when a Bill is drawn upon two Perſons accepting conjunctly and ſeverally, tho' it do not bear Value in the Accepter's Hands, one of the Accepters paying hath no Recourſe againſt the Drawer; if he the Drawer can qualify and inſtruct that he had Value in the Hands of the other Accepter. Now it's acknowledged, That Value was in *Deuchar*'s Hand, for he received the Mony from the Bank, and his Bond of Relief to *Wilſon* acknowledgeth the ſame.

Replyed for the Purſuer. 1. The Want of a Direction on the Bill to *Wilſon*, when firſt preſented to the Bank, ſignifies nothing: For it's preſumed to have been added of Conſent *ex poſt Facto*, ſince the Bill bears it ſo; and *in Rei Veritate* it was added by *M'kenzie*'s own Conſent. 2. Tho' there had been no Direction to *Wilſon*, yet the Defender is liable in Repetition, becauſe *Cauſam Damno dedit*, by his implicitely truſting *Deuchar* with the Bill. 3. Whatever Reſpect may be had to the Judgment of knowing Merchants, more is due in this Point to the Deciſions and Opinions of Judges and Lawyers. The Contract here betwixt the Drawer and Accepter is *Mandatum*; And that betwixt the Drawer and the Creditor, is *mutuum.* So that were a Mandate given to two Perſons conjunctly to manage the Conſtituent's Buſineſs, would any Exception competent to the Conſtituent againſt the one Mandatary, be competent againſt the other? No ſure, *Arg. L.* 27. *ff. de Pactis. L.* 10. *ff. de duob. Reis.* And yet this is all the Import of the Drawer's Defence. This Bill in ſo far as concerns the Purſuer, being truly a Mandate *Cauſa Mandantis*, and for *Deuchar*; both ſtood obliged to the Purſuer. 4. As it would have been no good Argument to *George M'kenzie*, againſt the Bank, who advanced the Mony to *Deuchar* upon the Faith of the Bill, that *Deuchar* got the Mony:

no more can it be obtruded againſt *Wilſon*, who, by repaying the Mony to the Bank, came in their Right and Place. Yea, *Alexander Deuchar*'s geting the Mony from the Bank upon the Credit of the Defender's Bill, is ſo far from bearing any Colour of Defence for *M‘kenzie*, that it is a ſtrong Reaſon why he ought to refound the Mony to the Purſuer.

The Lords found the Alledgeance, *viz.* That *Alexander Deuchar* ſignified to *George M‘kenzie* the Defender, that the Bank refuſed the Bill unleſs they got a Co-accepter, and that the Defender conſented that the Purſuer ſhould be added, relevant by the Defender's Oath of Verity, to give the Purſuer Recourſe: And in Caſe the Defender depone *negative*, then found, That the Purſuer having accepted upon the Faith of *M‘kenzie* the Drawer, and *Alexander Deuchar* being Bankrupt; *George Wilſon*, and *M‘kenzie* muſt be reputed *tanquam Correi promittendi*, and the Sum equally divided betwixt them; and ordained the Purſuer to aſſign to the Defender the Half of the heretable Bond of Relief he got from *Deuchar*.

July 17, 1712. Janet Hume *Relict of* John Hume *of* Eccles.

THe Lady *Eccles* repreſented by Bill, That ſhe having obtained from Captain *Thomas Young* of *Lenie*, a Diſpoſition to an Appriſing affecting the Eſtate of *Eccles*; which Diſpoſition lodged in the Hands of *George Renton* her Doer happened to be amiſſing ſometime after his Death, thro' the Confuſion of his Papers, and was found without two Sheets of the Narrative that had been torn off thro' careleſs keeping, but having the whole diſpoſitive Part, Subſcriptions, and Margins entire; and craving that their Lordſhips would interpoſe their Authority for ſupplying the Narrative, by the Oaths of *George Robertſon* Writer in *Edinburgh* Drawer of the Diſpoſition, and *James Clerk* his Servant Writer thereof, who could depone upon the Tenor of the Narrative; and that it was exactly conform to two Sheets written by *James Clerk*'s Hand, and given in with the Petition; and craving their Lordſhips would authorize the Sheets of the Narrative ſo made up, without a formal proving of the Tenor, to be added to the Diſpoſition, and the Diſpoſition ſo made up to be received in the Ranking of the Creditors of *Eccles*, as a full and entire Writ.

The Lords remitted to the Lord *Fountainhall* Ordinary of the Ranking, to take the Depoſitions of *George Robertſon* and *James Clerk*, in Order to redintegrate the Diſpoſition.

Eodem Die. Andrew Clerk *Burgeſs of* Saint Andrews *and* Iſobel Reid *his Spouſe, againſt the Creditors of* Broadlees.

IN the Competition of the Creditors of *Broadlees*, there was produced for *Alexander Clerk* and *Iſobel Reid* his Spouſe, an heretable Bond of Proviſion with Infeftment thereon, granted by *Alexander Reid* of *Broadlees* in Favours of his younger Children for 12000 Merks, whereof the ſaid *Iſobel Reid* his Daughter's Share is 3000 Merks.

Alledged for the Creditors. *Iſobel Reid* and her Husband cannot crave Preference upon the Bond of Proviſion, becauſe the ſame is innovated. In ſo far as, in their Contract of Marriage, *George Reid* of *Broadlees Iſobel*'s Brother had obliged himſelf to her for the like Sum of 3000 Merks, which ſhe, with Conſent of her Husband, accepted in full Satisfaction of all Executry, and Portion natural, which might fall to her thro' the Deceaſe of her Father or Mother; and of all former Proviſions made to her by her Father, and therefore diſcharged *George Reid*, and all other Repreſentatives of her Father thereof.

Anſwered for Alexander Clerk and his Spouſe. Novatio nunquam præſumitur, unleſs particularly expreſſed, *L. ult. C. de Novat.* And Contracts of Marriage being reckoned *uberrimæ Fidei*, it can never be ſuppoſed, that by this Contract containing no more than what *Iſobel Reid* was provided to formerly, ſhe was to renounce any former Security. The adjected general Clauſe *of all former Proviſions*, can be underſtood only of Things of that ſame Nature with thoſe ſpecially mentioned. The Deſign of taking the Brother bound for the 3000 Merks, ſeems only to have been, to afford immediate Acceſs againſt him without a previous Conſtitution, for Payment of what he ſtood antecedently bound for as Heir to his Father. 2. There can be no Novation, *niſi ubi prior Obligatio perimitur, L. 1. ff. de Novat:* And here the Annualrent conſtitute by Infeſtment, could not be extinguiſhed by the Clauſe in the Contract of Marriage, but only by an expreſs Renunciation. The Lords have never found the accepting a new Right in Satisfaction of a former Debt, to be an Innovation thereof, except in the Caſe of perſonal Obligations, which are *ipſo Jure* extinguiſhable by a Diſcharge, or *nudo Pacto*, which Infeſtments of Annualrent are not.

Replyed for the Creditors. The Heir's new Obligation being given expreſly in Satisfaction of the former, and it appearing to have been the Meaning of Parties, not to corroborate, but to take away the former Obligation; the ſame becomes extinct and innovated, 23 *July* 1633, *Lawſon* contra *Scot*, 6 *December* 1632, *Chiſholm* contra *Gordon* As a further Argument, the Term of Payment of the Tocher differs from the Term of Payment in the heretable Bond, which is a diſtinguiſhing Mark of Innovation, *§. 3. Inſtit. quib. Mod. toll. Oblig.* And a Diſcharge, or Innovation by accepting new Security in Satisfaction, doth extinguiſh *ipſo Jure* real as well as perſonal Debts, as to the Creditor himſelf, a regiſtred Renunciation being only neceſſary for certifying the Liedgs, and to ſecure againſt ſingular Succeſſors.

Duplyed for Alexander Clerk, &c. The Exception upon this Diſcharge of the Bond of Proviſion is taken off by this Reply, That the Mony for which the Diſcharge was made is not paid; And *qui ex Contractu mutuo et correſpectivo agit, niſi prius ex ſua Parte adimpleverit, a Limine rejicitur.* So Dirletoun *Tit. mutual Obligements in Contracts*, holds, That the Comprizer of a Minute of Sale, will have no Action for Implement, unleſs he pay the Price: Seing the Price is the final Cauſe of the Diſpoſition, And agreeable hereunto is the Deciſion, 3 *December* 1675, *Lady Muſewell* contra *Creditors of Muſewell.*

Triplyed for the Creditors. The Lady *Muſewell* and the Party contracting with her were under mutual Obligements to perform Deeds *in futurum*: Whereas here is no Obligement *in futurum*, but all tranſacted and performed *de præſenti*.

The Lords found, That the Proviſion in the heretable Bond by *Alexander Reid* to his younger Children, is innovated as to *Iſobel Reid*'s Share by her Contract of Marriage. But allowed Parties to be heard upon the Import of *Cauſa data non ſecuta* in this Caſe.

Eodem Die. *Dame* Rachel Nicolſon *Lady* Preſtoun, *againſt Doctor* George Oſwald *of* Preſtoun.

SIr *Thomas Hamilton* of *Preſtoun* having infeſt Dame *Rachel Burnet* his Lady, in a yearly Annuity of 1200 Merks out of his Barony of *Preſtoun*: In a

Contract of Marriage betwixt Sir *William Hamilton* Sir *Thomas*'s eldeſt Son, and Dame *Rachel Nicolſon* his Lady's Daughter of former Marriages in the Year 1670, Dame *Rachel Burnet* granted a Renunciation of the Annuity containing this Clauſe irritant, *Viz. If it ſhall happen the ſaid Sir* William Hamilton *to die without Heirs-male of his own Body, or to have but one Daughter; then and in either of theſe Caſes reſpective foreſaid, the Renunciation ſhould be null, and of no Avail, Strength or Effect.* Sir *William* having died leaving no Heirs-male, but only three Daughters; Dame *Rachel Nicolſon* his Relict, who was aſſigned by her Mother to the Annuity aforeſaid, purſued a Poinding of the Ground.

Compearance was made for Doctor *Oſwald* preſent Heretor of *Preſtoun*, who alledged, That the liferent Annuity ſtood renounced.

Replyed for the Purſuer. The Renunciation is not ſimple, but conditional, and irritated, 1. By Sir *William Hamilton*'s dying without Heirs-male of his Body. 2. By his leaving a Daughter; the Words, *In Caſe he have but one Daughter*, importing if there be but ſo many as one Daughter.

Duplyed for the Defender. The Clauſe irritant muſt not be divided into two Alternatives, but taken complexly as if it had run thus, *If Sir* William *die without Heirs-male, leaving only one Daughter, then the Renunciation ſhall be null*: Now albeit Sir *William* wanted Heirs-male, he had ſeveral Daughters, and ſo cannot be ſaid to have but one; conſequently, the Irritancy is not incurred *in Terminis*, nor yet in the Meaning of Parties. The Lady was allowed Recourſe to her Annuity, if Sir *William* left only one Daughter, and not in the Caſe of his leaving more Daughters: Becauſe, an Eſtate is more incumbred with the Proviſion of ſeveral Children, than with the Proviſion of one. This Abſurdity would follow from taking the controverted Clauſe in a divided Senſe, ſo as to infer the Irritancy from either the Failure of Sir *William*'s Heirs-male of his Body, or the Exiſtence of one Daughter, *Viz. Eſto* there had been 20 Sons, and but one Daughter, the ſecond Member of the Irritancy would have been incurred. Now *Verba ita accipienda ſunt, ut illud de quo agitur magis valeat, quam pereat. Et quoties idem Sermo duas Sententias exprimit, ea potiſſimum accipitur, quæ Rei gerendæ aptior eſt.*

Triplyed for the Purſuer. The Words muſt have Effect, tho' the Conſequence were hard: For *ita Lex ſcripta eſt*; And by an old Act of *Sederunt* in the Year 1713, the Lords declared they would interpret irritant Clauſes, according to the expreſs Words thereof. And juſtly, ſeing otherways, Contracts would not be the Deeds of Parties, but the Deeds of their Succeſſors, and very often of their Contradictors or Oppoſites; and at beſt of the Judges, who ſhould adviſe what was moſt reaſonable for the Parties to have done and intended, taking their Rule of Conjecture, from the preſent Time and Argument, tho' never ſo different from the Inclination and Circumſtances of Parties at the granting of the Deed. 2. Neither is it abſurd to make the Irritancy take Effect, as the Purſuer pleads it ſhould: For the Grand-mother in Caſe of an Heir-male and no Daughters, ceded her Jointure out of Reſpect to the Family; But ſecured her Return to it in the Event of a Daughter, that ſhe might be in a Condition to provide that Daughter. And tho' there might have been many Sons, ſhe did not think it worth her while to look to their Proviſion: Becauſe the Sons of great Families are generally better able to provide for themſelves than the Daughters, whoſe Station and Quality is a Burden to them, and makes them miſerable if unprovided.

The Lords found, That ſeing there was no Heir-male of the Marriage, the Renunciation was void and null.

July 18, 1712. Andrew Cheap *Brother to* James Cheap *of* Roſſie, *againſt* James Arnot *of* Woodmill.

ANdrew *Cheap* having charged *Woodmill*, to make Payment of 253 *Lib.* 12 *ſh. Scots*, with Annualrent and Penalty contained in his Bond 11 *November* 1608, and of 100 *Lib.* with Annualrent and Penalty contained in his other Bond dated 27 *April* 1709: He ſuſpended upon this Ground, That the Charger having received Payment of 20 *Lib. Sterling* by a Bill drawn by the Suſpender 26 *February* 1709, upon *David Harden* of *Aberuthven*, payable to the Charger, conform to his Receipt on the Back of the Bill; that 20 *Lib. Sterling* muſt be imputed *in ſolutum pro tanto* of the Sums charged for, ſeing the Bill doth not bear *Value received.*

Alledged for the Charger. Value being preſumed to be received in all Bills, tho' not bearing Value; preſent Value is preſumed to have been given in this Caſe. Becauſe, 1. That is to be preſumed, which is moſt ordinary, *L.* 114 *ff. de R. J.* And the ordinary Way of dealing in Bills is by delivering preſent Value in Mony or Goods. And Men of Buſineſs, when they draw Bills payable to their Creditors, take Receipts of the Sums in the Bills in Part of Payment of the Debts owing by the Drawers; or qualifie the Bills ſo that the Perſons drawn upon, ſhall take ſuch Receipts from the Poſſeſſors: For that otherways, the Drawer of the Bill ſhould have no Security for the Sum in the Bill, nor Inſtruction that the Debt was paid. It would marr Commerce, and prove a Snare to Merchants and others, knowing no ſuch Diſtinction of Bills bearing Value, and thoſe not bearing Value, if the latter ſhould be interpreted in Satisfaction of anterior Debts.

Anſwered for the Suſpender, 'Tis indeed ordinary to give preſent Value for Bills, and Value received is implyed betwixt Perſons no otherways concerned together but by that ſingle Bill: But in the preſent Caſe, the Suſpender being Debtor *ab ante* to the Charger, and giving a Bill not bearing Value received, the Preſumption of preſent Value given ceaſeth. The Charger would not agree to give the Suſpender a Receipt in Part of Payment: Becauſe, he had a Mind to be fully ſecured, and knew not if the Bill would be accepted and paid.

The Lords found the Sum in the Bill founded on by the Suſpender to be imputable in Payment of the Bond prior to the Date of the Bill; unleſs the Charger prove by the Suſpender's Oath, That the Bill was granted for another Cauſe.

Eodem Die. *The Earl of* Bute, *againſt* James Halyburton *of* Pitcur.

SIr *George Mackenzie* of *Roſehaugh* Lord Advocate, by his Bond 10 *December* 1684, for certain good Cauſes and Conſiderations, obliged himſelf, his Heirs, Executors, and Succeſſors, to pay to *Margaret Halyburton* Daughter to *Pitcur*, which failing to *James* her Brother, *&c.* the Sum of 6000 Merks at the next Term after her or his attaining the Age of ten Years complete, with Annualrent thereafter during the not Payment; as alſo he obliged himſelf and his aforeſaid to pay to *George Halyburton* his Wife's Uncle's Children, and ſome other Relations of his Wife, ſeveral Sums of Mony payable a Year after his Wife's Deceaſe, under a certain Condition and Proviſion, which is now all cancelled and worn away, except the laſt Words, bearing *the Bond to be in Satisfaction of all that any of his Wife's Relations could claim from the Granter or his Succeſſors, any manner of Way as Paraphernalia, Donation,* &c. In the Year 1686, Sir *George* got an heretable Bond and Infeftment from *Pitcur* in his Lands for 5000 Merks. *George Mackenzie* Son and Heir to Sir *George* in the Year 1701, commenced a Proceſs againſt *James Halyburton* of *Pitcur*, as repreſenting his Father, for Payment of the 5000 Merks, and ſome other Sums contained in other Bonds, which is now wakened by the Earl of *Bute* the Purſuer's Heir of Tailzie. The Defender proponed Compenſation upon the 6000 Merks, which by the firſt Bond was payable to him failing his Siſter, who is dead.

Alledged for the Purſuer. The Bond ſo miſerably lacerated and cancelled in a moſt material and ſubſtantial Part, namely the Condition under which it was granted, is no ways probative of the Compenſation: ſeing the mank Part of the Bond might have contained a Clauſe evacuating the ſame in a certain Event. If ſuch a Bond were ſuſtained, all our Writs in *Scotland* conceived under ſuch Conditions (and a great many are ſo conceived) coming in the Hands of Perſons whoſe Intereſt it is, that the Conditions ſhould be removed out of the Way, theſe would have it in their Power to make the Writs pure and ſimple, by tearing off the conditional Part. The common Law and all Lawyers agree, That Writs thus lacerate and cancelled, make no Faith, *L.* 1. *ff. de Bon. Poſſ. Sec. Tab. et Gloſſ. ibid.* And *ad L.* 3. *C. de Edict Div.* Adrian. *toll.* Lauterbach *Comment. Tit. de Fide Inſtrum. N.* 56, 57 Maſcard. *de Probat. Vol.* 2. *Concluſ.* 1261 *N.* 2, 4. *Concl.* 256. *N.* 4, 9. With this the Canon Law agrees, *Cap.* 3. *Extr. de Fide Inſtrum.* Whence the Doctors infer, That a Writ razed, not in the Narrative, but in the obligatory or diſpoſitive Part, ſhould have no Credit. And therefore 26 *November* 1671, *Pittullo* contra *Forreſter*, the Lords found a Bond whereof about half a Line in a material Place, the Term of Payment, was ſo blotted and obliterated, that what had been thereon written before could not be read, to make no Faith; and refuſed to allow it to be adminiculated by Witneſſes. Becauſe, it was preſumed, That the Words wanting might have been a Clauſe to evacuate the Bond.

Anſwered for the Defender The *Lacuna* or Defect in the Writ quarrelled happen'd not *conſulto*, but *caſu*, by being expoſed to the Injuries of Wet and Air (the Mother of Ruſt and Corruption in ſuch Kind of Bodies) when the Houſe of *Pitcur* was plundered at the Revolution by a Troop of Dragoons who ſcattered the Papers about the Cloſs: and *Nemo tenetur præſtare Caſum fortuitum.* All the Authorities brought for the Purſuer do concern the Caſes of Vitiation or Laceration *ex Propoſito*. In the Prattick betwixt *Pittullo*, and *Forreſter*, the Bond in Queſtion had ſuffered Manufacture, and been vitiated: Whereas here is neither Vitiation, nor Laceration by the Debtor in the Bond; but only an Accident happening to a Writ once complete, whereof the Obligation can only be diſſolved by Performance or Diſcharge. That ſupervening Accidents do not alter or take away Obligations once formally conſtituted, is clear from the Title *ff. de his quæ in Teſtam. delentur*, and the *Tit. Cod. de Fide Inſtrum.* And from the known Form of Proceſs for proving a Tenor. Were it not abſurd, that a Writ intirely loſt, ſhould be made up again as Authentick as the Original, and yet a Writ torn by Accident, in any conſiderable Clauſe, ſhall be found abſolutely null? Since all the Eſſentials of the obligatory Part of this Bond, are extant; That there might have been a reſolutive Clauſe, is circumſtantial and conjectural; And the Obliteration of this conjectural Part was altogether fortuitous, without Deſign: The Aſſerter of a reſolutive Clauſe to have been filled up therein, ought to prove his Alledgeance, at leaſt to give ſome Evidence thereof. For preventing the ſuggeſted Hazard of a Creditor's turning a proviſional Bond to a ſimple Obligement, by wearing out the proviſional Clauſe, *Non ſtatim Caſum conquerentibus facile credendum eſt*, *L.* 5. *C. de Fide Inſtrum.* But the *Caſus* is to be diſtinctly proved, as is done here. 2. The proviſional Clauſe wanting, follows in the End of the Obligations in Favours of other of the Granter's Lady's

Relations; and therefore doth only concern theſe, and not the Obligation in Favours of the Defender, which is ſimple and abſolute. Beſides, that the Term of Payment of the Sum due to the Defender, is different from the Terms of Payment of the other Obligations.

Replyed for the Purſuer. Neither Law nor Lawyers make Diſtinction, whether a Writ be vitiated by Induſtry, or Chance, or be cancelled, razed and delete, *vel ſi enormem patiatur Fracturam*: Determining uniformly upon all that *regulariter non probant.* Tho' the Deciſion betwixt *Pittullo* and *Forreſter* proceeded upon a vitiated Paper, the Reaſon given for it, is what is here urged. The Diſtinction of Writs torn *conſulto* and *inconſulto*, is imaginary, and not only without Foundation in Law, but manifeſtly choketh Reaſon and good Policy. Becauſe, it may fall out that a Writ purely and ſimply obligatory, may be deſtroyed *Infortunio*; doth it follow that all Writs in a Party's Poſſeſſion who hath met with a Miſchance, muſt neceſſarly be made up of what Tenor the Party pleaſeth? The Inſtances adduced for the Defender from the Title of the common Law, *de his quæ in Teſt. Delen.* are nothing applicable to the preſent Caſe: For Teſtaments being preſumed to remain with the Teſtator, and being in his Hands, Law preſumes that *Deletion* or *Obduction* therein happened from the Change of his Will. 2. The proviſional Clauſe being ſubjoined to the Obligement in Favours of the Defender, as well as theſe in Favours of the Lady's other Friends, it muſt affect all equally, remote or immediate.

The Lords found, That the Bond founded on to inſtruct the Compenſation, is not a binding Obligation; and therefore repelled the Defence founded thereon.

July 22, 1712. *Competition betwixt the Creditors of the deceaſt* Thomas Craig *of* Riccartoun, *and the Creditors of Mr.* Robert Craig *now of* Riccartoun.

THE *deceaſt* Thomas Craig *of* Riccartoun *Tailzied his Eſtate* 2 Auguſt 1682, *to himſelf and the Heirs-male of his Body; which failing, to* Robert Craig *his Brother, and the Heirs-male of his Body; which failing to his other three Brethren* ſucceſſive, *and the Heirs-male of their Bodies; which failing, to the ſaid* Thomas *his eldeſt Daughter without Diviſion; and ſo forth to his other Daughters, and his neareſt lawful Heirs and Aſſignies whatſoever: With a Prohibition to* Robert Craig, *and his other three Brethren, and the Heirs-male of their Bodies, to contract Debt, or do other Deeds in Prejudice of the foreſaid Heirs-female; declaring all ſuch Debts or Deeds to be void, and of no Avail for affecting the Eſtate, or their Perſons, when ſucceeding thereto.* Upon the Procuratory of Reſignation in the Tailzie, Reſignation was made in the Sovereign's Hands *Anno* 1684, and a Charter and Seaſine in the Terms aforeſaid expede. Mr. *Robert Craig*, who was ſerved and retoured Heir of Tailzie to his Brother *Thomas* in the Year 1691, having contracted much Debt, there aroſe a Competition betwixt his Creditors, and the Creditors of *Thomas Craig*, who alledged, That the Debts contracted by Mr. *Robert contra Leges Talliæ*, could not affect the tailzied Eſtate in Prejudice of them: The Prohibition to contract Debt being in Effect *a Fidei Commiſſum* in their Favours, the Tranſgreſſion thereof is a null Deed, and the Nullity pleadable by them who have good Intereſt, as anterior Creditors to the Maker of the Tailzie. For ſuch Conditions or Prohibitions annexed to Contracts irritate the Facts of Contravention in ſo much, that *ex Alienatione contra Prohibitionem conventionalem facta, non transfertur Rei Dominium.* Ann. Robert. Rer. *Judic. Lib.* 3. *C.* 14. *Sande de prohibita Rerum Alien. Part.* 3. *Cap.* 4. *Par.* 4. *Cap.* 2. §. 19. Huber *Diſput. Fundam.* 5. *ad Tit. Quib. Alien.*

Lic. vel non §. 14. And as a teſtamentary Prohibition hath this Effect: So our Tailzies are of a teſtamentary Nature, being *Deſignationes Succeſſorum, et juſta Voluntas de eo quod quis poſt Mortem ſuam fieri velit.* Now the Conveyance *Thomas Craig* made of his Eſtate to his Brethren, being *ſub Modo et Conditione*, there can be no Queſtion of his Will and Intention, which is the grand Rule of all Deeds of a teſtamentary Nature: And he being abſolute and unlimited Proprietar, there was nothing to hinder him to give what Laws to his own he thought fit.

Anſwered for the Creditors of Mr. Robert Craig. The Prohibition to contract Debt, cannot be effectual againſt them: Their Debtor's Right being affected with no Clauſe irritant or reſolutive upon his Contravention by contracting Debts; but only the Debts ſo contracted declared void and null, 11 *March* 1707 Lady *Riddoch* contra *Rebecca Bruce.* And in the Caſe of the Tailzie of *Anandale* in the Year 1662, the Clauſe irritating the Fie in the Perſon of the Heir of Tailzie contracting, was the ſole Ground ſuſtained for evacuating the Creditors Rights. The Act of Parliament 1685, doth further clear that our Law hath always required irritant and reſolutive Clauſes to evacuate a Right of Property. It implys a Contradiction, That Mr. *Robert Craig* ſhould be abſolute Fiar and *Dominus*, without the Exerciſe of *Dominium*, which is as inſeparable from it, as Heat or Light is from the Sun. *Nemo facere poteſt ne leges in ſuo Teſtamento non habeant Locum.* Whereof *ſande de Probib. Rer. Alien.* doth elegantly ſet forth the Reaſon. *Vide* alſo to this Purpoſe, *L.* 38. §. 4. *ff. de Legat.* 3. where ſuch a Prohibition without naming the Perſon in whoſe Favours made, is called *nudum Præceptum*, in Oppoſition to *Præceptum veſtitum.* Perſons may indeed effectually adject lawſul Qualities to their Alienations, ſuch as, that the Receiver contravening ſhall forfeit and fall from his Right: But *Thomas Craig* the Diſponer *hoc non voluit, quamvis potuit*, but *voluit quod non potuit*, he hath adjected Qualities to his Diſpoſition, authorized by no Law, and inconſiſtent with Property. For ſeing *Robert* doth not loſe the Fie, the next Member of the Tailzie, could not come to the Eſtate, without ſerving Heir to him, and thereby behov'd to acknowledge his Deeds, notwithſtanding the prohibitory Clauſe, *Sande ibid. Cap.* 9. §. 32. L. 149. *ff. de Reg. Jur. L.* 11. *C. de Diverſ. et Temp. Præſcr.* L. 7. *C. de liberali Cauſa.*

Replyed for the Creditors of Thomas Craig. It's not inconſiſtent for a Perſon to be Proprietar, and yet reſtrained in the Exerciſe of his Property, ſo as not to be capable to alienate: There being a Multitude of Inſtances both in the civil, feudal, and our own Laws of Property ſo reſtrained, as that the Proprietar cannot alienate, and yet remains Proprietar. Lawyers go into the Diſtinction of *Dominium plenum*, and *diminutum*, or *limitatum*; that the free Power of diſpoſing is only the Effect of the one, and not of the other. Is it not ſo in the Caſe of a Minor, and of a *Prodigus cui bonis interdictum eſt*? And in the Caſe of Alienation upon Death-bed, notwithſtanding the Alienation, the Diſponer is conſidered as Proprietar, and his Succeſſor muſt ſerve Heir to him. Nor is there any Difference in this Matter betwixt Limitations of Property by Law, and Limitations by Deed of the Proprietar: For to uſe the Words of *Sande, quamvis Teſtatorum Perſona privata ſit, et non ut Legiſlatoris publica, non majorem tamen hac in Parte Creditur habere Effectum Teſtatoris, quam legis interdictum, quod uti quiſque legaverit,* i. e. *de Re ſua diſpoſuerit, ita Jus eſſe Legiſlator voluerit.* So that the ſame holds alſo in conventional and teſtamentary Prohibitions, *L.* 2. *C. de Donat. quæ ſub Modo, L.* 3. *C. de Condict. ob Cauſ.* Mattheus *de Auction. Lib.* 1. *Cap.* 11. Where if a *Fidei-commiſſarius* cannot interpoſe to obſtruct a Sale for the Teſtator's Debt, but might interpoſe *ſi ob Debita Hæredis fiduciarii Licitatio fiat*, to preſerve their own Right: Much more may the Creditors of the Teſtator compete either for a Preference, or in the Right of the *Fidei-comiſſary*, to maintain their own Intereſt. The Principle of *Hæres* being *una Perſona cum Defuncto*, taken in its utmoſt Latitude, aroſe from the Subtlety of the *Roman* Law, whereby *Nemo poterat ſimul teſtatus, & inteſtatus mori*: Which never held with us, who have ſeveral Sorts of Heirs, as of Line, Tailzie, Conqueſt and Proviſion, reckoned *eædem Perſonæ cum Defuncto*, only in ſo far as *ejus Perſonam ſuſtinent*. Therefore it is, that Heirs of Proviſion are not liable for voluntary Deeds in Prejudice of their Proviſion; And Heirs of Tailzie, whoſe Predeceſſor ſtood bound not to contract Debts upon the Eſtate, being Creditors as well as Heirs, are not bound to warrand any Deeds contrary to the Conditions of the Tailzie, *March* 10, 1683, *Drummond* againſt *Drummond*: But a preſumptive Heir of Tailzie, may ſecure himſelf by Inhibition from his Predeceſſor's Debts and Deeds, tho' at the ſame Time he muſt be ſerved Heir to the Granter. Again, a *Proteſtant* Heir is not liable for the voluntary Deeds of his Predeceſſor done to his Prejudice. The *L.* 114. §. 14. *ff. de Leg.* 1. makes for the Creditors of Mr. *Robert.* there being here both *Perſona adjecta* and *Ratio* expreſs'd, which makes it *Præceptum veſtitum.* And the Law doth not require, That the Perſon adjected be the ſame who is otherways immediately to ſucced, *L.* 69. §. 3. *ff. de Leg.* 2. There is nothing in *L.* 138. §. 4. *ff. eod.* but a *nudum Conſilium*: Which cannot be pretended in this Prohibition. And *Sande* doth ſufficiently explain himſelf in the Words following thoſe cited for the other Party, *Hæc Prohibitio* (ſays he) *uſque adeo valere putatur, ut ſi contra eam fiat Alienatio, non valeat, nec Dominium transferatur*, &c. There ſeems to be no Neceſſity of a reſolutive Clauſe in order to make the Prohibition effectual, either by the civil Law, *L.* 69. §. 3. *L.* 88. §. 15. *ff. de Legat.* 2. *L.* 11. §. 9. *ff. de Legat.* 3. *Novel.* 159. or the Deciſions of foreign Courts, *Grivell Deciſ. Senat. Dolani* 64. compared with *Deciſ.* 122. But, it may rather be pleaded, That, in this Caſe, the Heir of Tailzie, by alienating and contracting Debts, hath fallen from his Right: Seing the Maker of the Tailzie provides ſo anxiouſly againſt ſuch Deeds; *Et qui vult Conſequens, vult Antecedens.* As to the Act of Parliament 1685, tho' it allow the next Heir of Tailzie to purſue a Declarator of Irritancy, or to ſerve to his more remote Predeceſſor, it doth not make that neceſſary.

Duplyed for the Creditors of Mr. Robert Craig. By the old civil Law, the Contravention of ſuch Prohibitions produced not *Actionem in Rem*, or *Rei Vindicationem*, againſt the Perſon to whom the Subject was diſponed, but only an extraordinary Proſecution againſt the Fiduciary or Contravener: Upon which Account fiduciary Heirs under ſuch Prohibitions, were obliged to find Caution, That the Subject ſhould remain with the Heir ſubſtitute, *L.* 67. §. 5. *ff. de Leg.* 2. And when by the Law of the *Codex*, *L.* 1, 2. *C. commun. de Legat. Rei Vindicatio* was introduced to *Fidei-commiſſary Heirs*, the fiduciary Heirs fell from their Right of Conſequence: But never had *Hæres fidei-commiſſarius* any Right to the Subject at the ſame Time, while *Hæres fiduciarius* remained Proprietar. If the Practice of other Countries were to be look'd into in this Matter, many Inſtances might be found coming nearer to our Law, than the foreign Authorities adduced for the other Party: As appears from the ſeventeenth Pleading of Mr. *Le Maiſtre*, Advocate to the King of *France*, *Paris Edit.* 1688. No doubt poſitive Law can reſtrict and qualifie the natural Courſe of Things, as in the Caſe of Minors, furious Perſons, *&c.* But where poſitive Law is ſilent, as in the Caſe of ſimple Prohibitions upon the full Proprietar, the Rules of the natural Law muſt take Place, which private Perſons have not Power at their own Hand to invert or contradict. The Deciſion *March* 10, 1683, betwixt the *Drummonds*, is far from the Caſe of a ſimple Prohibition, a Bond there being declared payable only with Conſent of the therein Subſtitute: Whereas a ſimple Prohibition infers only an Obligation among the Heirs themſelves.

The Lords found, That in Reſpect the Tailzie contains no Irritancy of the Right of the Contravener, by Alienation or contracting Debts; Therefore *Robert Craig* of *Riccartoun*'s Debts do equally affect the Eſtate of *Riccartoun* with the Debts of his Predeceſſors, according to their Priority of Diligence. For the Lords thought the Power of diſpoſing to be ſuch a natural Effect and Conſequence of Property, that no Authority leſs than the Legiſlative, could diveſt a Proprietar thereof. And if the Prohibition upon an Heir of Tailzie be not fenced with a reſolutive Clauſe, irritating the Contravener's Right of Property, the next Heir of Tailzie muſt be liable to, at leaſt, all his Predeceſſor's Debts and Deeds. Yea, as a Man cannot provide, That his Heir ſhould not be liable for his onerous Debts; ſo neither can he provide, That his Heir's Heir ſhould be free of his Heir's Debts: Whence reſolutive Clauſes took their Riſe as a neceſſary Expedient to make Prohibitions *de non contrahendo Debitum* effectual. And generally Tailzies provide, That the Heir contravening ſhall loſe his Right, and the next Heir ſhall enter to the Heir laſt infeſt before the Contravener, as if the Contravener were naturally dead.

Eodem Die. Alexander Murray *of* Brughtoun, *againſt the Lady* Semple.

IN a Competition for the Arrears due to the deceas'd Lieutenant Colonel *James Hamilton*, betwixt *Murray* of *Brughtoun*, and the Lady *Semple*, both pretending Right thereto by Aſſignations from the Lieutenant Colonel: The Lords found the Aſſignation to *Brughtoun*, bearing, *To be written by* Edward Dudgeon *Gentleman*, null; becauſe the Deſignation of the Writer was not good.

Albeit it was alledged for *Brughtoun*, That the Title of *Gentleman* is owned in ſeveral Acts of Parliament regulating Pains and Fines by the Quality and Degree of the Perſons, being a Character of Diſtinction peculiar to ſuch as are below the Degree of Barons or landed Men, and above that of Yeomen and Tradeſmen: As among the *Romans*, *Spectabiles Clariſſimi*, *ſuperilluſtres*, were authorized Diſtictions of Quality. Beſides in *England*, and in *Ireland*, where the Aſſignation was written, Perſons of Faſhion above the Degree of Merchants or Tradeſmen and under that of Knight, go under the Title, Addition, or Deſignation of Eſquires or Gentlemen, in the Direction of Letters, Bills of Exchange, *&c*. And Writer and Witneſſes cannot be expected to be otherwiſe deſigned in Writs, than they are commonly deſigned in the Place where the Writ is granted. 2. The Lords are in Uſe to conjoin ſuch general Deſignations with the Place where the Writ is dated, ſo as to preſume the ſame for the Place of Abode of the Perſon ſo deſigned: And this Aſſignation being written at *Dublin* in *Ireland*, muſt be underſtood written by *Edward Dudgeon*, Gentleman of *Dublin* in *Ireland*.

In Reſpect it was anſwered, That not every Adjection to a Writer's Name is in the Conſtruction of Law a ſufficient Deſignation, but ſuch only as doth, by taking off Ambiguity or Uncertainty, ſo fix and point out the Perſon deſigned, as he may be known and found, in Caſe Improbation or Falſhood were proponed. But the Deſignation of *Gentleman*, being aſſumed by every Body at Pleaſure, doth in Effect no more aſcertain the Perſon, than if he had been deſigned *Man* or *Boy*. Nor 2. Can the Writer of this Paper be preſumed *Gentleman* in *Dublin*, where it was writ, *Gentleman* being no Imployment, or Character that connects with the Place, as Merchant or Chirurgion might do. 3. Tho' there were no need of an Addition or Deſignation to Writer, or Witneſſes in a Paper by the Law of *England* or *Ireland*, yet this not bearing to be ſigned;

ſigned, ſealed and delivered, according to the Form obſerved there, but being written after the *Scottiſh* Form, with a Conſent to Regiſtration in the Books of Council and Seſſion in *Scotland*, in Relation to a Subject in *Scotland*, it muſt ſtand and fall according to the Law of *Scotland*.

July 23, 1712. *The Lord and Lady* Ormiſtoun, *againſt* John Hamilton *of* Bangour *and his Tutrix.*

THE Lady *Ormiſtoun* and her Husband inſiſted againſt *Bangour*, as Heir to the Lord *Whitelaw* the Lady's former Husband, for Payment of the Expences of the Defunct's Funerals, aſſigned by the Furniſhers to her upon Payment.

Alledged for the Defender. No Proceſs can be ſuſtained againſt him for Articles of Expences acquired by the Purſuer, after the ſame were preſcribed *quoad Modum probandi*, in the Perſons of her Authors, not being ſued for within Three Years after they fell due.

Replyed for the Purſuer. The Expences acclaimed being directly and principally payable out of the Executry, and this Preſcription not being an Extinction of the Debt, but only of the Manner of Probation by Witneſſes: The Lady *Ormiſtoun* who, as come in Place of the Lady *Houſil* the Executrix, by Aſſignation to the Subject of the Inventory confirmed, ſtood obliged to pay the Defunct's moveable Debts, might warrantably pay the Accompts now purſued, after expiring of the *Triennium.* Since thereby ſhe did but renounce a Privilege competent to her to claim or not, as ſhe thought fit. Nay, an Executor muſt neceſſarly pay, even after elapſing of Three Years, any Debt ſhe is conſcious to be truly reſting: Becauſe the Verity thereof may be proved by her Oath.

Duplyed for the Defender. 1. The Lady *Ormiſtoun*'s Tranſaction with the Executrix, can only have Effect betwixt themſelves, and cannot intitle her to the Privilege of the Executrix: Tho' her Obligement to relieve the Executrix, at the Hands of the Defunct's Creditors, be a paſſive Title againſt her. 2. *Eſto* the Purſuer were veſted with the Privilege of Executrix, ſhe could not apply any Part of the Executry to the Payment of Debts preſcribed as to the Manner of Probation: Seing an Executor's Oath, tho' it may prejudice her ſelf as to her proper Intereſt, can never wrong the Heir, or Creditors of the Defunct, *March* 6, 1627, *Scot* contra *Cockburn*, *March* 13, 1627, *Ker* contra *Caringtoun.*

The Lords found the Accompts of the funeral Charges contracted by my Lady *Ormiſtoun* and paid without the Three Years, do not preſcribe: But found the Accompts of ſuch Charges where ſhe was not Contracter paid without the Three Years, preſcribed.

July 25, 1712. Alexander Moncrieff *of* Mornipea, *againſt the Heirs and Creditors of* Ballo.

THE major Part of the Lands of *Ballo* holding Ward of the Crown, being alienated by the Heretor for the Time before the Year 1661, *Robert Balfour* of *Ballo* the laſt Heretor granted ſeveral baſe Infeſtments of Annualrent ſince then, and died in the Year 1692. The deceas'd *John Moncrieff* of *Mornipea* being infeſt in the Year 1694, upon a Charter of Recognition of the ſaid Lands, under the Great Seal granted by the Sovereign in the Year 1693, *Alexander Moncrieff* his Son and Heir commenc'd and inſiſted in a Declarator of Recognition againſt the Heirs and Creditors of *Ballo*.

The Lords ſuſtained the Defence of Preſcription by Virtue of Fourty Years Poſſeſſion without Interruption after the Year 1661, before which the major Part of the Lands had been alienated, to exclude Recognition; and alſo found the Poſſeſſion by baſe Infeftments granted by *Robert* the laſt Vaſſal in Favours of Annualrenters after his Deceaſe, ought to be reckoned equal to *Robert*'s own Poſſeſſion to make up the Years of Preſcription for excluding the Recognition.

Albeit it was alledged for the Purſuer, That ſince the Year 1692, when *Robert Balfour* died, and Preſcription was far from being completed, there was no ſtanding Infeftment of Property renewed in the Perſon of his Heir, conform to the Deciſion, *February* 5, 1671, E. *Argyle* contra L. *M'naughtoun*, So that Preſcription of the Property, cannot be made up by the Poſſeſſion of the Annualrenters after *Robert*'s Deceaſe: Tho' an Annualrenter's Poſſeſſion may be interpreted the Heretor's Poſſeſſion during the Heretor's Lifetime, For the Act of Parliament 1617 requires Poſſeſſion by Virtue of Seaſins one or more continued and ſtanding together for the Space of Fourty Years: And an Infeftment of Annualrent cannot be underſtood a Continuation of an Infeftment of Property, whereupon the former is but a Servitude, ſo as Poſſeſſion by Virtue thereof could complete Preſcription of Property after the Deceaſe of the Perſon infeft in the Property, when there is no new Infeftment of Property, to which the Poſſeſſion can be aſcribed.

In Reſpect it was anſwered for the Defenders. Albeit *Robert* the laſt Vaſſal died in the 1692, *Hæreditas jacens* was *Vice Domini*, and repreſented the Defunct ſince his Death, which Interval muſt be computed to fill up the Years of Preſcription. For did the apparent Heir juſt now ſerve, would not the *interim* Poſſeſſion from his Predeceſſor's Death, be reckoned his, the Heir's Poſſeſſion, and his Service be drawn back to the Moment that his Predeceſſor died? There being no Interruption by any extraneous Intruder into the Poſſeſſion *medio Tempore* by an excluſive Title, which is conform to the civil Law, *L.* 31. §. 5. *ff. de Uſurp. & Uſucap.* And as an apparent Heir not ſerved may continue his Predeceſſor's Poſſeſſion; So the Years of ſuch an apparent Heir's Poſſeſſion will count, in the Courſe of Preſcription. Now Creditors continuing the Defunct's Poſſeſſion *Hæreditatis jacentis*, in his Right, is the ſame upon the Matter as if his apparent Heir had poſſeſs'd.

2. The Lords found, That there may be a Conjunction of poſterior Deeds of Alienation within the Preſcription, with Deeds of Alienation prior to the Commencement thereof to infer Recognition *quoad Exceſſum*, with the Burden of Annualrents preceding the Year 1661.

Albeit it was alledged for the Defenders, That how ſoon the major Part of the Lands was alienated, they recognoſced and became *ipſo Jure* the Superior's, from which Time the Vaſſal and others deriving Right from him having poſſeſſed Fourty Years by Virtue of their Rights, are ſecured therein by the poſitive Preſcription, which hath the ſame Effect in Law as an Alienation, *L.* 28. *ff. de Verb. Signif.* or a Confirmation with a *Novo-damus* from the Superior, which hinders antecedent baſe Infeftments to enter *in Computo* with ſubſequent baſe Infeftments, to make up the major Part, in Order to Recognition, *November* 23, 1683, *King's Advocate* contra L. *Cromarty*. For the Recognition once preſcribed, as all other preſcribed Rights, *vivendi alterius non habet Facultatem*, *L.*3. *C. de Preſcript.*30 *vel* 40 *Ann.* 'Tis *a non Ens cujus nullæ ſunt Affectiones, nulli Effectus*. So that Debts contracted after the Recognition was incurred, and thereby *Jus quæſitum* to the Superior, did not make his Right more valid; conſequently can never be computed to eſtabliſh what was already ſufficiently eſtabliſhed, tho' they might be reckoned upon to make up a new Recognition, ſince the completing of Preſcription. Nor can they be conſidered as Interruptions of the Preſcription, Interruption being always the Deed of the Perſon for whom, not againſt whom, it is uſed.

In Reſpect it was anſwered for the Purſuer. It was in the Superior's Option when to claim the Benefit of Recognition. And albeit Proſecution of the feudal Forfeiture, upon the firſt Alienation of the major Part, was out of Lenity forborn: Yet when, by recent repeted Deeds of Alienation, the Vaſſal had rendered himſelf incapable to ſerve his Superior, theſe Deeds ſhould be conjoined with the former Alienations to make up the major Part. For the ſuppoſed Preſcription could put the Vaſſal in no better Caſe, than if he had obtained a Declaration or Obligement from his Superior, that if he tranſgreſſed no more by making further Alienations, the Superior would not quarrel his Right upon the former Deeds. It's a Miſtake to think, that ſuch a Preſcription would have the ſame Effect *quoad* the old Infeftments, as if they had been conſented to by the Superior: For at moſt it doth import only a Confirmation. Now the Superior's Confirmation doth not hinder the Right confirmed to be brought *in Computo* to make the reſt of the Lands recognoſce, if the major Part was alienated before Confirmation, *November* 23, 1683, *Recognition of the Lands of Cromarty.* 2. If the recent Deeds of Alienation could not be conjoined with the prior Alienations of the major Part, that might happen to be ſecured by Preſcription; the Vaſſal could never afterward incur Recognition, by ſubſequent Deeds; ſince he had not another major Part to alienate: And ſo the Nature of the Fie would in Effect be changed.

July 26, 1712. John Corsbie *Portioner in* Preſtounpans, *againſt* George M'lair *there.*

IN the Action at the Inſtance of *John Corsbie*, againſt *George M'lair*, for the Spuilzie of a Caldron: The Lords ſuſtained a Tenant in a Dwelling-houſe in *Preſtounpans* belonging to the Purſuer, as a habile Witneſs for him. In Reſpect our Cuſtom rejects only moveable Tenants in Lands, whereby they have their Subſiſtence, from bearing Witneſs for their Maſters, as ſuppoſed to be more under his Influence, than Tenants in Dwelling-houſes can be thought liable to the Influence of their Landlords.

Eodem Die. Henry Blair *of* Newtounmill, *againſt* David Edgar *of* Kethick.

H*enry Blair* having purſued a Declarator of Thirlage againſt *David Edgar* of *Kethick*, upon an old Contract in the Year 1633, betwixt *John Edgar* then Heretor of *Kethick* and *Patrick Blair* the Purſuer's Author; whereby *the ſaid* John Edgar *obliged himſelf, his Heirs, Succeſſors and Tenants of his Lands, to haunt and repair to* Patrick Blair'*s Mill with their grindable Corns to ſerve their Houſes and Families for free Multure, and good Services,* Viz. *A Peck of Six Firlots uſed and wont:* It was found relevant for the Defender to free his Lands of Thirlage by the Contract, that he was a ſingular Succeſſor to the ſaid *John Edgar*, and the Obligement never clothed with Poſſeſſion. The Purſuer produced ſome Witneſſes for proving Poſſeſſion conform: Who deponed, That the Defender came to the Purſuer's Mill when he pleaſed, and went to other Mills when he pleaſed, without being challenged; and when he came to the Purſuer's Mill, never paid Knaveſhip, and the Mill Horſes brought the Corns to the Mill, and carried Home the Meal.

The Lords found a Thirlage conſtituted by the Contract 1633, and Poſſeſſion thereupon proved by the above voluntary Acts of coming ſometimes to the Purſuer's Mill; tho' the Defender was never interpelled or hindred to go to other Mills, when he pleaſed, nor paid dry Multure when he went by the

Purſuer's Mill: In Reſpect of his Author's anterior Obligement to come to the Mill. But becauſe the Purſuer did found upon the Depoſitions aforeſaid, to inſtruct Poſſeſſion upon the Bond of Thirlage, and that Bond mentions good Services as the conditional Terms of coming to his Mill: The Lords explained theſe good Services by the Depoſitions, *Viz.* That the Defender ſhould not be liable to Knaveſhip, and that his Loads ſhould be carried to and from the Mill, upon the Mill-horſes.

July 30, 1712. *Sir* Andrew Kennedy *Conſervator*, &c. *againſt Sir* Alexander Cuming *of* Culter.

THE Lords 26 of *June* laſt having found Sir *Alexander Cuming* obliged to anſwer to Sir *Andrew Kennedy*'s Claim of Expences ſummarly: It was contended for Sir *Alexander*, 1. Seing in this Caſe Expences are ordered to be taxed according to the Courſe of the Seſſion, none can be modified; becauſe by the Practice of the Seſſion, no Expences are due, where there is *probabilis Cauſa litigandi.* Now Sir *Alexander* had *Cauſam litigandi maxime probabilem:* In ſo far as, he had not only the Opinion of the Doctors of the civil Law, but alſo the Authority of a Decreet of the Seſſion it ſelf on his Side; and it was never heard, that a Party prevailing ſhould in the ſame Court where his Action was ſuſtained as juſt, be condemned in Expences as *temere litigans.* 2. There is no Precedent for charging in this Accompt before the Lords of Seſſion, the Expences of the Appeal before the Houſe of Peers. 3. If the Lords were to proceed to modifie Expences, they could not enter into the Detail or particular Conſideration of the Accompt given in by Sir *Andrew*, nor modifie a greater Sum in the whole than uſed to be modified in other Proceſſes before the Seſſion, where there had not been eminent Calumny or Contumacy.

The Lords found, 1. That the Remit from the Houſe of Peers to tax Expences, implies that Expences are to be modified; but that their Lordſhips are to determine the Quantity. 2. That the Expences of diſcuſſing the Appeal are not to come *in Computo*, or be conſidered in this Modification. 3. The Lords, without entring into the Detail or particular Conſideration of Sir *Andrew Kennedy*'s Accompt of Expences, modified 100 Pound *Sterling* of Expences to be paid to him by Sir *Alexander Cuming.*

Eodem Die. James Gordon *of* Daach, *againſt* James Gordon *of* Techmuiry.

IN a Cauſe at the Inſtance of *James Gordon* of *Daach*, againſt *Techmuiry*: The Lords found, That the Sheriff of *Aberdeen* had committed Iniquity in examining Witneſſes who lived within the Sheriffdom of *Bamff*, upon a Citation by Virtue of Letters of Supplement granted by the Sheriff of *Bamff*. In Reſpect a Sheriff could not grant Letters of Supplement.

November 8, 1712. John Vint, *againſt the Lord and Lady* Hawley *and the Earl of* Dalhouſie.

IN the Action at the Inſtance of *John Vint* as Creditor to the deceas'd *William* Earl of *Dalhouſie*, and *William* now Earl of *Dalhouſe* as repreſenting the Defunct: The Purſuer inſiſted *primo Loco* againſt the Lady as Heir of Line.

The Lords found, That the Lady being ſerved Heir *cum Beneficio Inventarii*, and having no Intromiſſion with the Defunct's Eſtate, but what was exhauſted by Payment of preferable Debts, and being debarr'd from medling with the reſt of the Eſtate, by a depending Competition with the Heir-male: She is not perſonally liable, if ſhe aſſign the Inventory to the Purſuer; but decerned her either to aſſign, or to pay the Sum due to him. And accordingly a Day was taken for her to produce a Diſpoſition.

November 13, 1712. *The Earl of* Dalhouſie, *againſt the Lord and Lady* Hawley.

W*Illiam* Earl of *Dalhouſie*, *Anno* 1646, made a Settlement of his Eſtate in Favours of *George* Lord *Ramſay* his Son, and the Heirs-male of his Body; which failing, to his own Heirs-male whatſoever: By Virtue whereof this *George* (afterwards Earl) was infeſt in the Year 1647. *William* Earl of *Dalhouſie*, Earl *George*'s eldeſt Son, was in the Year 1674 ſerved, retoured and infeſt *tanquam legitimus & propinquior Hæres* to his Father: To which Earl *William*, the preſent Earl his Couſin-german being ſerved Heir-male in *October* 1711, purſued Reduction and Improbation againſt the Lady *Hawley* Earl *William*'s only Child and Heir of Line, of all Rights and Titles to the Eſtate in her Perſon.

Alledged for the Defender. The Purſuer's Service as Heir-male to Earl *William*, who died Infeſt in the Eſtate *tanquam legitimus et propinquior Hæres* to his Father Earl *George*, could afford him no Title thereto, nor be any Ground of Action to quarrel Rights affecting the ſame. Becauſe, tho' the Eſtate in the Year 1646, was ſettled in Favours of Heirs-male; yet ſince that Settlement bore no Limitation on the ſubſtitute Heirs of Tailzie, from altering the Succeſſion; and *William* Earl *George*'s Son was ſerved *tanquam legitimus et propinquior Hæres*, which implyed that he was ſerved Heir of Line; the Fortune thereby devolved upon the Lady *Hawley* his Heir of Line. Now, That Farl *William*'s Service *tanquam legitimus et propinquior Hæres* can be no otherwiſe underſtood than as Heir of Blood whom the Law calls, and we term Heir of Line, is clear from the different Stiles of Brieves and Services in the Chancery; wherein *legitimus et propinquior Hæres* is the diſtinguiſhing Character of an Heir of Line. Where a Fie is provided to any other Heir, the Retour ought to bear that the Perſon ſerved is *legitimus et propinquior Hæres maſculus Talliæ vel Proviſionis*, according to the Quality of the Fie: Which is moſt neceſſary for preſerving the Diſtinction betwixt the ſeveral Kinds of Fies, and that Perſons may know the Condition of thoſe they contract with, or in what Order or Method to purſue their Heirs. This could not be if the Forms of Chancery were arbitrary and applicable according to the Lesbian Rule: Therefore the preſcribed Forms of Chancery (which are *Actus legitimi*) are preciſely to be obſerved. Any Inqueſt, ſeing Earl *William*'s Retour ſerving him neareſt and lawful Heir in general Terms to his Father, could never have demurred to ſerve the Lady *Hawley* his only Child neareſt and lawful Heir to him: Upon the Faith of whoſe Infeſtment, no Body would have ſcrupled to lend her Mony, without ever dreaming of a Diſappointment through the ſurpriſing Appearance of an Heir-male. So the civil Law doth peculiarly apply the Word *Legitimus*, in Matters of Succeſſion to a Perſon who ſucceeds by Diſpoſition of Law, *ſine Proviſione Hominis*: *As Tutela legitima*, is that which goes by Law to the neareſt Agnat; *legitimus Hæres* is he that ſucceeds *ab inteſtato*.

Anſwered for the Purſuer. He is regularly ſerved Heir-male to *William* Earl of *Dalhouſie* his Couſin, Earl *William* being truly and effectually ſerved

Heir-male to Earl *George* his Father. For, *legitimus et propinquior Hæres*, is a general Deſignation applicable to all Heirs *in ſuo Genere*, according to the laſt Inveſtiture: And generally all Brieves, even of Heirs-male, and Proviſion, bear only *legitimus et propinquior Hæres*; tho' ſometimes the Word *Maſculus*, or *Proviſionis* (which is not *de Eſſentia*) be added *ex ſuperabundanti*. Beſides, albeit a general Service of an Heir of Line, requireth no more for its Foundation, but the Propinquity of Blood; yet in a ſpecial Service, there muſt be a Voucher and Document for verifying to the Inqueſt, that the Perſon to be ſerved, is *legitimus Succeſſor* in theſe Lands, *Viz.* The Seaſin of him laſt infeſt. Now how could the Inqueſt, who had Earl *George*'s Seaſin produced in their Preſence, and under their Conſideration, have returned Earl *William* by a Special Service, to have Right as naked Heir of Line to the Eſtate of *Dalhouſie*, which by the laſt Inveſtiture was conveyed to Heirs-male.

The Lords found, That Earl *William* being eldeſt Son, and thereby both Heir-male and of Line to Earl *George*, and ſerved *legitimus et propinquior Hæres* to him in Lands wherein Earl *George* was infeſt to himſelf and his Heirs-male, ought to be underſtood as ſerved in the Terms of Earl *George*'s Infeſtment: And therefore repelled the Objection, and ſuſtained Proceſs.

Eodem Die. John Vint, *againſt the Earl of* Dalhouſie.

IN this Action mentioned *ſupra* 8 *November* Inſtant, the Lady *Hawley* being decerned as Heir of Line to the late Earl of *Dalhouſie*, to diſpone to the Purſuer for Security of his Debt, the Inventory of the Defunct's Eſtate, the Purſuer inſiſted for Payment againſt *William* now Earl of *Dalhouſie*, upon the Act of Parliament 1695: Becauſe he, paſſing by the Defunct his immediate Predeceſſor, who was three Years in Poſſeſſion of the Eſtate, had ſerved Heir-male to a remoter Predeceſſor, and conſequently was liable for the Debts of the interjected Perſon to the Value of that Eſtate.

The Lords found, That the Defender being only apparent Heir-male to the Purſuer's Debtor, can only be liable *ſuo Ordine*, after the Heir of Line is firſt diſcuſs'd. For the Act of Parliament doth not take away from an apparent Heir the Privilege of diſcuſſing, that would be competent to him if ſerved.

November 18, 1712. Anna Nairn *Daughter to the deceas'd* David Nairn *Doctor of Medicine, againſt* Thomas *and* Antonia Barclays.

BY Contract of Marriage betwixt Sir *David Barclay* of *Collairny* and Dame *Anna Riddel* his Spouſe, the Lady was provided to a Liferent of the Lands of *Pitblado* and others; and becauſe the Houſe of *Pitblado* was ruinous and had not been inhabited for many Years before, Sir *David* obliged him and his Heirs to build and repair the ſame, with all Eaſements and Office-houſes neceſſary thereto, for accommodating the ſaid Dame *Anna Riddel* in a Jointure-houſe in Caſe ſhe ſurvived him. Sir *David* died in the Year 1655, leaving the Houſe of *Pitblado* in no better Caſe than it was the Time of the Contract of Marriage, and the Lady, without requiring her Husband's Repreſentatives to repair it, provided her ſelf of a Dwelling-houſe elſewhere. After whoſe Deceaſe, *Anna Nairn*, as deriving Right from Doctor *Nairn* her Father, to whom the Lady had aſſign'd her Liferent with the whole Obligements in her Contract of Marriage, purſued

ſued *Thomas* and *Antonia Barclays*, as repreſenting Sir *David*, for Payment of 500 Merks yearly from the 1655, when Sir *David* died, till *Martinmas* 1686 *incluſive*, as the Damage ſuſtained by the ſaid Dame *Anna Riddel* for Want of her Jointure-houſe all that Time.

Alledged for the Defenders. The Obligement to repair conſiſting *in Facto* preſtable at no preciſe Time, they could not be purſued for Damage or Intereſt, unleſs they or their Authors had been *in Mora*: Which cannot be pretended; ſeing they were never required in the Lady's Lifetime to put the Houſe in Repair. And if by the civil Law *Debitor in Obligatione quæ in faciendo conſiſtit*, who could not be purſued preciſely *ad Factum præſtandum*, but only for Damage and Intereſt ariſing from his *Mora* might ſtill redeem himſelf from that, *præſtando Factum*, or by Performance at any Time *ante Litem conteſtatam L.* 84. *ff. de V. O*: Much more the Defenders, who could not be *in Mora* till Requiſition, ought to be aſſoilzied from Damages by our Law, which obligeth a Man *præſtare Factum* by the Compulſitors of Horning and Caption; and where the Fact comes principally both *in Obligatione et Proſecatione*, and the Damage and Intereſt is only an acceſſory Penalty ariſing from the Debtor's *Mora*.

Replyed for the Purſuer. In all Obligements *ad Factum præſtandum*, *Loco Facti ſuccedit Intereſſe*; and *Dies interpellat pro Homine.* Now in the Caſe of this Obligement to build and repair the Lady's Jointure-houſe, the Term of Performance being the Husband's Death before her, the Damage takes Place againſt his Heirs, who fail'd to perform, and is to be liquidated with Reſpect to the Lady's Quality, and the Convenience a Jointure-houſe upon the Lands would have afforded for the Uſe of her Tenants, and uplifting the Rents. The *L.* 84. *ff. de V.O.* doth concern the Building a Houſe to one in Property, and doth not liberate from Damages ſuſtained before Performance, after he who ſtipulated to build was *in Mora*, but only from after Damages: As is clear from *Cujacius*'s Obſerve on that Law, Viz. *Si propter Moram Actor jam ante Litem conteſtatam Damni aliquod ſenſerit, non poteſt liberari offerendo.* So that the Text cited out of the Law doth not meet the Caſe, in ſo far as Sir *David*'s Obligement was not to build and repair a Houſe to his Lady in Property, but only for a Habitation to her and her Family during her Survivance. The Purſuer doth not inſiſt *ad Factum præſtandum*, but for Damage the Lady ſuſtained through not Performance, the Years ſhe lived after her Husband; which can never be ſatisfyed by an Offer to build or repair the Houſe now after her Death, when ſhe cannot enjoy it.

Duplyed for the Defender. 1. Albeit in Obligements to be performed at a fix'd Day *Dies interpellat pro Homine*; yet where no Day is adjected, Interpellation or Requiſition is neceſſary to produce the common Effects of *Mora* or Delay. The Maxim *quod ſine Die debetur, præſenti Die debetur,* has indeed this Effect, that the Creditor may immediately demand Performance; but Requiſition muſt be uſed in Order to put him *in Mora*, ſo as to be liable to Damage and Intereſt for not performing. And albeit the Day of Sir *David*'s Death implyed in the Nature of the Obligement, was a Time when the Creditor might demand Performance; the Husand's Repreſentatives are not to be reckoned *in Mora* from that Day, till they were duly interpelled. 2. Sir *David Barclay*'s Obligation to repair a Houſe to his Lady to dwell in after his Deceaſe, was conditional, at leaſt conceived *in Diem incertum, qui pro Conditione habetur*: And in conditional Obligements purifying the Condition doth not put the Debtor *in Mora*, without Interpellation, *Boekleman Com. in Tit. ff. de Vſur.*

The Lords found, That the Obligement could produce no Action at the Aſſigny's Inſtance, unleſs Requiſition was made in the Lady's Lifetime;

and that the Damage thro' Want of the Houſe, could only be acclaimed from the Date of the Requiſition.

Eodem Die. *Baillie* Tod *and the Procurator-fiſcal of* Muſſelburgh, *againſt Baillie* Crookſhanks.

IN the Proceſs at the Inſtance of Baillie *Tod*, againſt Baillie *Crookſhanks*, for a verbal Injury committed by him againſt Baillie *Tod* when a preſent Magiſtrate, the Purſuer adduced Baillie *Mitchel* and two common Town Officers for Witneſſes.

Objected for the Defender. 1. Baillie *Mitchel* can't be admitted a Witneſs: In Reſpect at the Time of committing the alledged Injury, he was a Magiſtrate himſelf, and pronounced Decreet againſt *Crookſhanks* for the Injury; which ſhewed his Affection in the Cauſe, and is ſomething more than the giving partial Counſel. 2. The two common Officers having a Dependence upon, and being under the Impreſſion of the Magiſtrates of the Burgh, cannot be received Witneſſes for the Purſuer, who, tho' he be not a preſent Magiſtrate, is ſtill upon the Council.

Anſwered. Tho' Baillie *Mitchel* were ſtill in Office, he might be Judge to an Action for Injury done to his Collegue: There being no Parity betwixt his judging in the Cauſe, which is *ex Officio*, and the giving partial Counſel, which is an officious Intermeddling in an Affair without a Call. Beſides, both the Purſuer and Baillie *Mitchel* being now exauctorated, they are to be conſidered only as in a private Capacity. Conſequently, 2. They cannot be ſuppoſed to have any Authority over the Officers produced as Witneſſes of the perſonal Injury done to Baillie *Tod*, tho' aggravated by the Circumſtances of his being a Magiſtrate.

The Lords repelled both the Objections made for the Defender; and allowed Baillie *Mitchel* and the Town-officers to be received as Witneſſes.

November 19, 1712. Alexander Agnew *Kirk Treaſurer of* Kirkum, *againſt* Hugh Campbell *of* Aires.

IN the diſcuſſing of a Suſpenſion of a Decreet obtained by *Alexander Agnew* before the Sheriff of *Wigtoun*, againſt *Hugh Campbell* for the Sum of 200 *Lib.* as the Penalty for his Relapſe into Fornication, he being a landed Man conform to the *Act* 38. *Par.* 1. *Ch.* 2.

The Lords found, That Fornication committed by the Suſpender ſince the Act of Indemnity, ſubjected him to the double Penalty of a repeated Tranſgreſſion, in reſpect of Fornication committed by him before the Indemnity. Albeit it was alledged for the Supender, That there could be no Relapſe but where the Perſon accuſed was formerly guilty of the ſame Crime: And any Fornicator before the Indemnity cannot be pleaded, becauſe the Indemnity diſchargeth Perſons to be ſued, vexed, or unquieted in their Bodies, Goods, Chattels, *&c.* for any prior Offence. So that the firſt Fornication thus ſopited and extinguiſhed by the Act of Oblivion, ought not to be ripped up again, or brought in Remembrance, to infer any penal Conſequence; But the ſubſequent Offence ſhould be reckon'd as the firſt. In Reſpect it was anſwered for the Charger, 1. The Act of Indemnity cannot alter the Nature of Things, or hinder a ſecond Offence to be a Relapſe, and thereby liable to a double Penalty: Which is no Part of the Penalty of the firſt Tranſgreſſion indemnified, but only the Penalty of the Relapſe, which would be due, albeit the Penalty of the firſt Fornication had been diſcharged or paid. Nor 2. Is it a

Novelty, That Crimes indemnified as to Penalties due to the Fiſk, may be urged and proved in Order to recover Damages to Parties leſed, or to other Ends. Thus, albeit a Ward Vaſſal may at his Pleaſure lawfully alienate a Part of his Lands within the half; yet if he afterwards diſpone ſo much more as with the former Part exceeds the half, the Alienation that was lawful at firſt, will come *in Computo*, to infer the Pain of Re-cognition. 3. No Act of Indemnity extends to Crimes committed after the Term therein limited, to leſſen or aboliſh the Puniſhment thereof; and conſequently the double Penalty of the Suſpender's ſecond Fornication committed after the Indemnity, cannot be abated.

Eodem Die. John Hamilton *of* Pumpherſtoun, *againſt the Lady* Cardroſs.

THe Houſe of Peers having revers'd a Decreet of the Lords of Seſſion, reducing a Tack of the Lands of *Broxburn*, &c. ſet by Sir *William Stuart* of *Strathbrock* the Lady *Cardroſs*'s Predeceſſor, to *Alexander Hamilton* of *Broxburn*, his Heirs, *&c.* for the Space of three nineteen Years after the reſpective Terms of Commencement, and removing *John Hamilton* of *Pumpherſtoun* his Son and Heir from the Poſſeſſion; and having ordered *John Hamiltoun* to be reſtored to the Poſſeſſion of the Lands, and to have Satisfaction for what he hath loſt in Reſpect of the Profits thereof, by Reaſon of the Decreet reverſed: He in Purſuance of this Sentence, applyed to the Lords of Seſſion for liquidating what he had loſt by his being turn'd out.

The Lords found the Lady *Cardroſs* liable to *Pumpherſtoun* for the Years he was out of Poſſeſſion, for the excreſcent Duty contained in the Tack ſet by her to the new Tenant, more than what was contained in the Tack ſet to *Pumpherſtoun*'s Father, and for a Proportion of the Graſſum paid by the preſent Tenant to the Lady, effeiring to the ſaid Years, in full Satisfaction of *Pumpherſtoun*'s Damages through being diſpoſſeſſed.

Albeit it was alledged for *Pumpherſtoun*, That the Decree of the Houſe of Peers entitled him not only to the Profits the Lady had made by the Decreet of the Seſſion, but alſo to the Advantage he might have made, had he been allowed to continue his Poſſeſſion: and therefore ſhe ſhould be liable to him, for what Profit the Land yielded to the Tenant put in by her, ſince that would have fallen to him if he had not been removed.

In Reſpect it was anſwered for the Lady, That ſeing the Decree of the Houſe of Peers orders Satisfaction to be given to *Pumpherſtoun* for his Loſs in general Terms, the Lords are left to proceed and determine the ſame in their judicative Capacity; regarding thoſe Differences that Law makes betwixt Poſſeſſors *bona Fide*, and vitious Poſſeſſors or Intruders: And the Lady having ſet the Lands to the preſent Incumbent to the beſt Advantage ſhe could, *bona Fide*, from a Belief of her having Right ſo to do, and by all the Authority our Law could give her; ſhe can be obliged to reſtore no more than what ſhe made thereby.

November 21, 1712. Colin Mackenzie *of* Roſend, *againſt the Inhabitants of* Burntiſland.

IN the Action of abſtracted Multures at the Inſtance of *Colin Mackenzie* and his Authors, againſt the Inhabitants of *Burntiſland*, the Defenders having proponed Improbation, againſt the Execution of the Summons, and conſigned 40 *Lib.* as is uſual, and craved that the Purſuers might abide by *ſub Periculo falſi*; and the Purſuers having brought the Meſſenger to the Bar wh who abode by the Execution: The Lords found, That in Repect the Meſſenger a publick Servant, had abidden by his own Execution *ſub Periculo falſi*, the Purſuers were not obliged to abide by the ſame.

Thereafter 2 *December* 1712, The Lords found that the Defenders albeit they had conſigned the 40 *Lib.* could not be allowed a Term to improve the Execution, unleſs they propone the Exception of Falſhood *peremptorie*.

November 22, 1712. *Duke of* Montroſe *and others Supplicants.*

THe Duke of *Montroſe* and other Creditors of *Robert Campbell*, alias *Rob Roy*, after they had raiſed a Summons for liquidating their Debts and Damages, and cauſed cite the ſaid *Rob Roy* at his Dwelling-place, did before the Cauſe came in to be called by Courſe of the Roll, apply to the Lords by Bill, repreſenting, That they intended to refer their Libel to the Defender's Oath, in ſo far as it ſhall not be proved by Writ; and that for ſeveral Months he had fled and abſconded, and kept himſelf in the Highlands without any fixed or certain Abode; and craving *ut infra*: The Lords granted Warrant for an edictal Citation againſt the ſaid *Rob Roy* upon 21 and 6 Days at the Market-croſſes of the Head-burghs of the Shires where he reſided and haunted; in Order to hold him confeſſed upon the Libel, if he failed to appear. Albeit ſome of the Lords thought, That ſince Application had not been made for ſuch a Warrant originally at the raiſing of the Summons, it ſeem'd prepoſterous or precipitant to give it now till the Cauſe came in to be called before the Ordinary: Till which Time it cannot be known whether the Defender will appear or not.

November 26, 1712. William Douglaſs *Chamberlain to the Duke of* Roxburgh, *againſt* Thomas Chatto *of* Mainhouſe.

IN a Proceſs of ſpecial Declarator at the Inſtance of *William Douglaſs*, as Donatar of the Liferent Eſcheat of *Henry Mein*, by Virtue of a Gift from the Duke of *Roxburgh* Superior, againſt *Thomas Chatto*, as Poſſeſſor of ſome Lands belonging to the Rebel: The Lords ſuſtained an Adjudication with a Decreet of Mails and Duties obtained by the Defender againſt the Rebel, after the Rebellion, but before the Purſuer's Gift, for a Debt anterior to the Rebellion, as a ſufficient Title of the Defender's *bona Fide* Poſſeſſion, till the ſame ceas'd by pronouncing of the Decreet of general Declarator of the Liferent Eſcheat. Albeit the Adjudger was neither infeſt, nor had charg'd the Superior: In Reſpect a ſimple Adjudication, with a Decreet of Mails and Duties, is a ſufficient Title to poſſeſs and intromet with the Rents.

Eodem Die. *Colonel* John Erſkin *of* Carnock, *againſt Sir* George Hamilton.

IN the Competition betwixt Colonel *Erſkin* and Sir *George Hamilton*, for the Lands of *Tulliallan*, Sir *George* having founded on an Adjudication thereof in the Year 1680, led by Sir *Robert Mill* for 30 Years bygone Annuities of an Infeftment of Annualrent, granted by Sir *John Blackadder* then Heretor, effeiring to 5000 Merks, in Favours of *Thomas* and *Richard Blackburns*, to which Adjudication Sir *George* having Right from Sir *Robert Mill*, pretended the Legal was expired: The Lords found the Adjudication could only ſubſiſt as a Security for the Sums truly owing, and could not have the Benefit of an expired Legal: In Reſpect it was led for the whole bygone Annualrents ſince the Year 1649; whereas Sir *Robert Mill* had only Right to the Half, *viz. Thomas Blackburn*'s Share, till the Year 1675.

Albeit it was alledged for Sir *George Hamilton*, That his Adjudication being *articulatus Libellus*, and one of the Articles, *viz.* Half of the Annualrents, which the Adjudger had Right to from *Thomas*, being a good Debt; the Adjudication for that Article muſt expire, and carry off the whole Subject. No Informality as to *Richard*'s Share, can prejudice the other, according to the Rule, *Utile per inutile non vitiatur*: Eſpecially conſidering that the Infeftment of Annualrent granted to the *Blackburns* was in Effect two Infeftments, for *Concurſu Partes faciebant*, and *Nomina Debitorum ipſo Jure dividuntur*, tho' a conjunct Diſpoſition of Lands makes Heretors *pro indiviſo*. Thus an Adjudication led by a Creditor for different Bonds, if formal for one Bond which is not paid within the Legal, will expire, tho' informal as to the reſt, 6 *July* 1699, *Hay* of *Alderſtoun contra* Children of *Aberlady*.

To which it was anſwered for Colonel Erskin. That an Adjudication for ſeveral Sums whereof ſome are found not to be due, uſeth to be ſuſtained as a Security for Principal and Annualrents, but not to expire as to the Legal, *November* 23, 1677, *Boid* and *Graham* contra *Malloch*, *July* 20, 1678, *Morries* contra *Orrock*: In both which Caſes, the Libels were articulate. Appriſings led for more than is due, are open'd partly *in Odium plus Petitionis*; partly, for that the leading Adjudication for more Sums than are due, hinders the Debtor from offering to redeem; and alſo becauſe of the exorbitant penal Conſequence of an expired Legal, the Lords do graſp at any Reaſon to keep it open. 2. Sir *George* is not here in the Caſe of one adjudging *articulatim* for ſeveral Sums; This Adjudication being for the bygones of an Annualrent effeiring to a Sum: Nor are the Annualrents *articulatim* libelled, the Half as conveyed from *Thomas*, and the other Half as flowing from *Richard*; but ſimply the whole Annualrents from the 1649, to the 1680. So that the Caſe here is the ſame, as if Sir *Robert Mill* had adjudged for one Sum to the Half whereof only he had Right. The Deciſion *Hay* of *Alderſtoun* contra *Aberlady*'s Children, cannot be applyed: For there was nothing there to hinder the Adjudication to expire as to all the Sums for which it was led; only the Adjudger might have been debarr'd *perſonali Objectione* from making Uſe of the Sums contracted after Inhibition, to the Prejudice of the Inhibiter.

November 28, 1712. *Sir* Alexander Don *of* Newtoun, *againſt* James Don *ſecond Son to the deceaſ'd* Patrick Don *of* Ottenburn.

SIr *Alexander Don* of *Newtoun* in the 1681, ſettled his Eſtate of *Newtoun* in Favours of himſelf in Liferent, and Sir *James Don* his eldeſt Son and the Heirs-male to be procreated betwixt him and *Marion Scot* his then Spouſe in Fie; which failing to return to Sir *Alexander* himſelf; which failing to *Alexander Don* his ſecond Son and the Heirs-male of his Body; which failing to *Patrick Don* of *Aldtounburn* his third Son and the Heirs-male of his Body; which failing to the other Heirs-male to be procreated by Sir *Alexander*; which failing to the eldeſt Heir-female to be procreated betwixt the ſaid *James Don* and *Marion Scot*, without Diviſion; which failing to the eldeſt Heir-female of *Alexander Don*'s Body, without Diviſion; which failing to the eldeſt Heir-female of *Patrick Don* without Diviſion; All which failing to Sir *Alexander Don* his neareſt lawful Heirs and Aſſignies whatſoever: with and under the Proviſions, Reſervations, Reſtrictions, and Limitations after-ſpecified, *viz.* That it ſhall not be lawful to *James Don*, and his Heirs-male, nor to any other of the Heirs of Tailzie and Proviſion abovementioned, to ſell, anailzie, and diſpone the Lands, *&c.* redeemably or irredeemably

redeemably; nor to contract Debts, or to do any Deed whereby the ſame or any Part thereof might be appriſed, adjudged, or evicted from *James Don*, or any of the aforeſaid Heirs of Tailzie and Proviſion; The Deeds of Contravention were declared null, and the Tranſgreſſor to loſe his Right, and the ſame to pertain to the next Heir of Tailzie, who, tho' ſerved Heir to the Contravener, ſhould not be obliged to perform his Deeds, or pay his Debts. In the Year 1685, Sir *Francis Scot* of *Thirleſtane*, for the Sum of 99000 Merks paid and delivered to him, by Sir *Alexander Don* of *Newtoun* for himſelf and in Name and Behalf of *Alexander Don* his ſecond Son, ſold and diſponed the Eſtate of *Rutherfoord* to Sir *Alexander Don* in Liferent, and after his Deceaſe to the ſaid *Alexander Don* his Son and the Heirs-male of his Body; which failing to the eldeſt Heir-female of his Body without Diviſion; which failing to Sir *Alexander Don* and his Heirs-male of Tailzie and Proviſion contained in his Infeftments of the Lands of *Newtoun*: Under the expreſs Proviſions Limitations, and Conditions, contained in his ſaid Infeftments; and alſo under this expreſs Proviſion and Condition, That if the Eſtate ſhould fall to an Heir-female, ſhe ſhould be obliged to marry a Gentleman of the Name of *Don*, or her Huſband and Heir ſhould aſſume that Name, and bear the Arms of the Houſe of *Newtoun Don*; or otherways loſe their Right to the Eſtate of *Rutherfoord*, which in that Caſe ſhould fall and belong to the next Heir of Tailzie and Proviſion above-mentioned.

Sir *Alexander Don* of *Rutherfoord* old Sir *Alexander*'s ſecond Son, made a new Tailzie of his Eſtate, in Favours of himſelf and his Heirs-male and Female in their Order; which failing, to *James Don* ſecond Son to *Patrick Don* his Brother, and died without Children.

Sir *Alexander Don* now of *Newtoun*, Grand-child to old Sir *Alexander* by his eldeſt Son, and the ſaid *James Don*, did both take out Brieves of the ſame Form to be ſerved Heir of Tailzie to Sir *Alexander Don* of *Rutherfoord* their Uncle. And the Lords having appointed the Lords *Dun* and *Poltoun* Aſſeſſors to the Service; Sir *Alexander* inſiſted before the Macers and Aſſeſſors to have his Claim remitted to the Inqueſt.

Alledged for James Don. Sir *Alexander*'s Service as Heir of Tailzie to *Rutherfoord*, could not proceed till it were determined *in Jure*, which of them had beſt Right. The Inqueſt being only Judges of Fact in a Service, the Point of Right ought to be previouſly determined; and the Service to proceed by Direction or ſpecial Injunction from the Lords: Seing there cannot be two Heirs or two *Domini in ſolidum*; and there is a manifeſt Hazard of Perjury, for Inqueſts one or more to find, That two Perſons, upon different Grounds of Claim, are neareſt and lawful Heirs of Proviſion to Sir *Alexander Don* of *Rutherfoord* who died laſt veſt and ſeiſed of certain Lands. 2. The Point of Right ought to be firſt determined for preventing Pleas and Expences to the Parties, eſpecially where their Titles as here, are in the Field. 3. This is agreeable to the Analogy of Law in like Caſes, where a Party compearing with a plain and poſitive Right, will be heard to ſtop and exclude Diligence paſſing of Courſe, or Writs to be expede of Courſe: As in the Caſe of the Creditors of *Dalmahoy*, the Lords appointed the Adjudgers to mend their Libels, leaving out Lands diſponed by the Debtor to *Ronald Campbell*. And if a Party having diſponed Lands with a Procuratory of Reſignation, reſign the ſame, or offer a Signature in Favours of himſelf and his Heirs; the Receiver of the Diſpoſition would be heard againſt that Signature, and obtain the Lands diſponed to him to be expunged. Becauſe tho' *Jus ad Rem* remained in the Granter as to all Effects concerning Third Parties, yet he and his Heirs may be excluded *Exceptione Doli*, from doing any Deed in Relation to the Subject whereof he is diveſted by Diſpoſition. For the ſame Reaſon, the Heir of the Maker of a Tailzie, cannot be allowed to ſerve, where a Party appears with a Diſpoſition for reſigning theſe Lands in Favours of other Heirs.

Anſwered for Sir Alexander Don. The due and ordinary Courſe is, to allow both Parties to ſerve, Services proceed, and Brieves are expede at the Chancery of Courſe; the Deſign of the Inquiry is to try in what Lands the Deceas'd died veſt and ſeiz'd; if he died at the Faith and Peace of the Queen; and if the Purchaſer of the Brieves be his neareſt and lawful Heir in the Lands, *&c*: Which Cognitions proceed ſummarly, that Property may not ly *in pendenti*, and cannot be ſtopp'd till the Diſcuſſion of the Points of Right, which fall in naturally before the Lords in Declarators of Property, and not before the Macers and Inqueſt, who with their Right Honourable Aſſeſſors are in that Capacity reſtricted in the Verification of the Heads of the Brieve; For which Reaſon it is that the Brieve of *Mortanceſtrie* is not a pleadable Brieve.

Replyed for James Don. Albeit ſuch Services proceed ſummarly; yet where Parties appear and except upon Grounds inſtantly verified, to exclude the Title of the Claimer, they are heard: Which the very Form of the Proclamation of the Brieve, and *Act* 41. *Par.* 6. *J.* 3. import. The *Act* 94. *Par.* 6. *J.* 4. concerning Exceptions to be propon'd againſt Brieves of Inqueſt, hath by Cuſtom been extended to others than are there expreſs'd, if inſtantly verified, as my Lord *Stair* and Sir *George Mᶜkenzie* obſerve. For tho' Brieves of *Mortanceſtrie* are not pleadable Brieves, that is, ordinary Summonſes (which of old were called Brieves) yet by Cuſtom all Exceptions inſtantly verified are received againſt them. And *James Don* makes this Exception, That Sir *Alexander Don*, is not *legitimus et propinquior Hæres Talliæ et Proviſionis dictarum Terrarum*: Becauſe he ſtands excluded by a poſterior Tailzie in *James*'s Favours as incompatible with the laſt Inveſtiture. As to the Alledgeance that the Point of Right cannot be diſcuſs'd before the Macers, the only Judges to the Service; What then? Is it not ordinary after diſcuſſing the Point *in Jure*, to remit to the Judges of the Fact? And as the Macers proceed in ſuch Caſes, either upon Commiſſion, or by Advocation authorized by the Lords: So their Lordſhips do hear Parties, and determine the Point of Right in Order to direct the Service.

Duplyed for Sir Alexander Don. The Diſpoſition of Tailzie in Favours of *James Don*, ſtanding yet incomplete in the Terms of a perſonal Obligement without Infeſtment, (whatever Import it might have in a Declarator of Right) could not ſtop Sir *Alexander*'s Service vouched by the expreſs Tenor of the laſt Inveſtiture, without plain Violence to the Forms of Chancery: Since otherwiſe no ſpecial Service could proceed, ſo long as any Pretender might lay Claim to the Property of an Eſtate on any Account, tho' never ſo extrinſick to the Forms of Chancery, till the Claim of Right were determined, which may be tedious, and depend long. Nor is there any Incompatibility for Sir *Alexander Don* to be Heir of the Inveſtiture, while another hath an Obligement from the Defunct, that may force him when ſerved to denude: As Charges to enter Heir, in Order to complete Deeds granted by a Defunct without Infeſtment, are ordinary. Tho' there cannot be *Dominium duorum in ſolidum*, yet Sir *Alexander Don* may claim to be ſerved Heir in ſpecial in the Lands of *Rutherfoord*, whoſe Service, tho' perfected, would never obſtruct *James Don* from ſerving Heir in general, to make up a Right to this Bond of Tailzie. And Sir *Alexander* is willing that his Service be expede, without Prejudice to *James Don*'s Claim and Right of Property as accords.

Triplyed for James Don. However the Defunct may be ſaid, with Reſpect to the Superior or a Third Party, not to be denuded by the Diſpoſition of Tailzie in Favours of *James Don*; yet he hath denuded himſelf and his former Heirs of Tailzie, by that Diſpoſition as to the Deſtination of his Heirs:

Which is ſufficient to exclude Sir *Alexander*'s Claim, unleſs he alledge that the Diſponer was incapable to grant ſuch a Deed. For *qui Actionem habet ad Rem recuperandam,* as to the Heir of the Granter; *ipſam Rem habere videtur, L.* 15. *ff. de Reg. Jur.* Sir *Alexander,* as to the imaginary Succeſſion devolved on him, is to be held as if it were not devolved: *Quia non videtur cepiſſe qui per Exceptionem a Petitione removetur, L.* 13. *ff. eod. et non videtur quiſquam id capere, quod ei neceſſe eſt alii reſtiture, L.* 51. *ff. eod.* yea, *James Don* ſhould be held actually infeſt as to his Competitor, according to the Rule, *pro Facto accipitur id, in quo per alium Mora ſit quo minus fiat, L.* 39. *ff. eod.* Now if *James* be conſidered as infeſt, it's impoſſible the ſpecial Service can proceed in Favours of Sir *Alexander*: Becauſe the Infeſtment would be drawn back to its Source, and import a complete Alteration of the Deſtination of Succeſſion from the Defunct and the Heirs of the former Tailzie, to him and the Heirs of the new Tailzie; and Clauſes *in Favorem* may now be perfected after the Death of the Party in whoſe Favours conceived, under whom, and in whoſe Right his Heirs only claim. A Service being intended to eſtabliſh a Title to ſome Heretage, is not like a *Bore-brieve,* which requires no more but an Inſtruction of the Relation and Deſcent of the Party to the Office out which it iſſues. A general Service of an Heir-male without an Heretage, as a Foundation of the Claim, is a Chimera: So that 'tis inconſiſtent for both Parties to be ſerv'd to the Eſtate of *Rutherfoord,* but that it may be known which of the Services ought to proceed the Point of Right muſt be determined, nor can the Contradiction be avoided by alledging that the one is ſerved Heir general, and the other Heir-ſpecial; for that a ſpecial Service doth include a General, which is the Foundation of the Special. And if one be *legitimus et propinquior Hæres Talliæ,* the other cannot be ſo, and if not ſo, he cannot be *Hæres in dictis Terris.* It's a Miſtake to ſay, That the Deſign of a Service is to carry Right to a Diſpoſition: For it's deſign'd to eſtabliſh a Title to Heretage, that is, Where the Heretage conſiſts in an Obligation, to carry the Obligation; and where it conſiſts in Land, to carry the Land; the Titles are but Inſtructions and Acceſſories of that Right. The *Act* 35. *Seſ.* 4. *Par. W. and M.* hath changed the Nature of Rights to be conveyed or eſtabliſhed by Service, and Diſpoſitions containing Procuratory of Reſignation are not, as before, bare Obligations to diſpone, but are *Jura ad Rem,* which may be completed without any further Deed of the Granter or his Heirs: It being a Hardſhip upon an Heir to be charged to fulfill Deeds to his own Prejudice, or at leaſt where he had no Benefit; and equally hard, That a Creditor or Aſſigny's Right ſhould become worſe, and he put to new Expence on Account of his Debtor's Death, when no Body could reap any Benefit by it. Again, it would be a great Prejudice to *James Don,* That another ſhould be Infeſt in his Eſtate, that the very Perſon whom he could compel by the ancient Law, to enter to complete his Title, ſhould pretend to enter whether he will or not to diſpute it.

Upon the Aſſeſſors Report of the above Debate: The Lords ſtopped the Service till the Point of Right be ſummarly diſcuſs'd; and remitted the contending Parties to be heard before the Lord *Dun* for that Effect.

December 2, 1712. John Stirling *Brother to Sir* Mungo Stirling *of* Glorat, *againſt Mr.* William Gordon *of* Balcomy *Advocate.*

IN a Removing at the Inſtance of *John Stirling,* againſt Mr. *William Gordon,* the Defender alledged, That the Execution of the Precept of Warning was null and informal, in ſo far as the Execution againſt the Defender preceeded the Publication at the Pariſh Church, which was ſeveral Days after, and *Act* 39. *Par.* 6. Q. M. requires the Precept to be executed againſt the Tenant, and thereafter to be read at the Pariſh Church-door: Which dilatory Defence the Lords repelled, and ſuſtained Proceſs; thinking it ſufficient that both Execution and Publication was Fourty Days before *Whitſunday*.

December 4, 1712. Alexander Horſeburgh *of that Ilk Commiſſary of* Peebles, *againſt* Thomas Cranſtouns *elder and younger Commiſſary Clerks thereof.*

A*Lexander Horſeburgh* purſued his Clerks, for Compt, Reckoning and Payment to him of all the Profits, Emoluments and Caſualities of the Commiſſariot of *Peebles* belonging to him as Commiſſary ſince the Date of his Commiſſion, *Auguſt* 12, 1707, according to the Twenty fifth Article of the King's Inſtructions to the Commiſſaries recorded in the Books of Seſſion *February* 20, 1666: Appointing all the Profits to be divided into Three Parts, whereof Two ſhould belong to the Commiſſary, and a Third to the Clerk with the Burden of Paper, Ink, Wax and writing Chamber, and that it might be declared accordingly.

Anſwered for the Defenders. The Regulation of the Fees and Profits in the above Inſtructions never took Place, but they have always been local and conſuetudinary; every Court obſerving it's own Rules. And if the Defenders have uplifted more than according to Fourty Years conſtant Cuſtom of the Court, they are ready to compt: But are no otherways liable either as to Bygones, or in Time coming. Whatever Regard may be had to the Inſtructions 1666, they have not the Force of a Law, and the Regulation of Fees thereby is not ſo effectual as what is made by Acts of Parliament. Nor have theſe Inſtructions the Force of an Act of *Sederunt*: The Lords not having ordained them to be obſerved, but ſimply appointed them to be recorded, under Proteſtation that the recording ſhould no ways prejudice their Lordſhips Juriſdiction or Privilege. Now the Regulation of Fees by the Inſtructions 1666, never took Effect in any Commiſſariot in *Scotland*, ſo that it is gone in Deſuetude, or rather was never in Obſervance. Hardly are the Fees in any Act of Parliament ſince King *Charles* the Second's Time now in Uſe: Much more may ſimple Inſtructions tranſmitted from the Throne as Expediencies loſe their Force in Whole or in Part by long contrary Cuſtom; and tho' theſe being articulate, have been obſerv'd in ſome Articles, they might run in Deſuetude as to others.

Replyed for the Purſuer. Albeit the Inſtructions had not been appointed by the Biſhops (who had the Diſpoſal of all Offices ot Court) and authorized by the Sovereign, as they were; yet the Lords of Seſſion may regulate all inferior Courts; and the recording the Inſtructions in their Lordſhips Books was an interpoſing of their Authority to them, and gave them the Force of an Act of *Sederunt*. As to the Alledgeance, That the Inſtructions were recorded under Proteſtation, the Purſuer finds no ſuch Proteſtation, and it would have been needleſs; ſeing the Lords of Seſſion are the ſupreme Conſiſtory who can ſuſpend or reduce Decreets of Commiſſaries, and give what new Inſtructions to them they pleaſe. 2. If the Two Parts of the Dues to the Commiſſary had not been exacted at all, but paſs'd from to eaſe the Liedges, ſomething might be pretended againſt exacting the ſame after ſo long a Deſuetude and Forbearance: But the Clerk (who collects the Judge's Dues and his own) having uplifted the whole from the Liedges, cannot be exempted from compting for that which by Law belongs to another; even for all Bygones within Fourty Years, which he was *in mala Fide* to retain. Seing none can preſcribe Right to a Thing without ſome Title, and far leſs contrary to his own Right and Title, *Viz.* His Office, to which by the Twenty fifth Article of the Inſtructions a Third only of the Dues doth belong. Had the Judge and Clerk Right to their Offices with the Caſualties and Emoluments belonging thereto in general, Uſe and Cuſtom might have increas'd or diminiſhed their reſpective Dues. But here where every one's Proportion of the Dues is determined; it's impoſſible that Deſuetude by the Judge's not exacting his Part from the Clerk (who is Collector) can intitle the Clerk to the Judge's Part; more than one who hath a bounded Charter and Infeſtment can acquire, by never ſo long Poſſeſſion, Right to Lands without the Limits of his Charter; or a Miniſter's Neglect for Fourty Years to uplift ſome Part of his modified Stipend, could prejudice his Succeſſor in Office. What is a Commiſſary concerned whether his Predeceſſor called his Clerk to a full Account for his Dues or not?

The Lords found the Defence of Poſſeſſion relevant to aſſoilzie from Bygones preceeding the Date of this Decreet, but repelled the ſaid Defence as to the Emoluments in Time coming, and declared accordingly.

December 5, 1712. Alexander Hume *Writer in* Edinbugh, *againſt* Robert Smith Junior *Merchant there.*

IN a Competition for the Sum in a Bill of Exchange payable to *Henry Gladſtanes* Inn-keeper at *Ginglekirk*, betwixt *Robert Smith* to whom it was indorſed for Value, and *Alexander Hume* who as Creditor to the Indorſer had arreſted the Mony in the Accepter's Hand before Indorſation: The Lords preferred the Indorſee or Poſſeſſor of the Bill. In Reſpect it was not alledged, That the Indorſation was gratuitous without an onerous Cauſe; or that the Indorſee knew of the Arreſtment when the Bill was indorſed to him.

Eodem Die. *Mr.* James Smith *of* Whitehill, *againſt Mr.* Walter Stirling *Writer in* Edinburgh.

MR. *James Smith* obtained a Gift of *Patrick Steill*'s Eſcheat, Mr. *Walter Stirling* was aſſigned to 6000 Merks owing by *Steill* to *Thomas Deans* Eſquire, and the Aſſignation duly intimated before the Rebellion. *Patrick Steill* aſſigned ſeveral Bonds due to him by the deceas'd *Robert Deans* Merchant in *Edinburgh* to Mr. *John Cameron* in Truſt, who obtained Decreet of Conſtitution and Adjudication againſt the Repreſentatives of *Robert Deans*, and tranſferr'd the whole Rights with *Steill*'s Conſent to Mr. *Walter* before the Rebellion, under Back-bond to hold Compt to *Steill* for what he ſhould recover. Mr. *James Smith*, as Donatar of the Eſcheat, purſued Mr. *Walter* for 539 Pound *Scots* recovered by him of *Robert Deans*'s Effects.

The Lords found, That Mr. *Walter* being Creditor to the Rebel before the Rebellion, and having obtained Payment by Virtue of the Right from *Cameron*, whoſe Aſſignation from the Rebel was intimated before the Rebellion; He had Right to retain in Compenſation of the Sums due to himſelf *pro tanto*: And therefore preferred him to the Donatar. Albeit the Tranſlation from *Cameron* was not intimated to the Repreſentatives of *Robert Deans* before the Decreet of general Declarator of the Eſcheat. In Reſpect the Intimation of the Aſſignation to *Cameron* effectually denuded *Patrick Steill*, and put the Debtors *in mala Fide* to pay to him, who had only an Action on the Back-bond againſt *Cameron* to retroceſs, with which the Debtors were no Manner of

Way concerned. Nor was there any Neceſſity for *Cameron*'s Tranſlation in Favours of Mr. *Stirling* to have been intimated, in Order to denude the firſt Cedent, but only to ſecure againſt *Cameron*'s upliſting or aſſigning *de Novo*. For the Aſſignation to *Cameron* (tho' in Truſt) being tranſferr'd with the Cedent's Conſent, was equivalent to a Diſcharge of the Truſt, and an effectual Conveyance to Mr. *Stirling* of the Effects aſſigned to operate Retention, how ſoon they came into his Hand, againſt the Donatar.

December 9, 1712. John Gordon *Merchant in* Aberdeen, *againſt* William Anderſon *Merchant in* Montroſe.

IN a Proceſs at the Inſtance of *John Gordon* againſt *William Anderſon* for Payment of Sixteen Pound Ten Shillings *Sterling*, contained in a Bill drawn upon him by *Samuel Chalmers* Merchant in *Leith*, payable to the Purſuer, and ſuffered to be proteſted for not Acceptance: The Lords found the Defender liable to the Purſuer for Payment ſo far as he had of the Drawer's Effects in his Hand at the proteſting of the Bill, which did ſufficiently put him *in mala Fide* to pay thereafter to the Drawer; the Bill being virtually an Aſſignation to *Chalmers*'s Effects in *Anderſon*'s Hand, effeiring to the Sum therein; and the Proteſt equivalent to an Intimation.

December 10, 1712. Alexander Naughtoun *Factor in* Rotterdam, *againſt* Andrew Ritchie *Merchant in* Aberdeen.

A*Ndrew Ritchie* and *Alexander Orem* Baillie in *Aberdeen* being in Co-partnery, and having commiſſioned *Alexander Naughtoun* to ſend them Goods in Company, for which they deſired him by their miſſive Letters to draw Bills, and they would Honour the ſame; he drew upon them a Bill of Fifty Pound *Sterling* payable to *John Gordon* as *per* Advice, which Baillie *Orem* accepted in the ordinary Manner, but *Ritchie* adjected to his Acceptance theſe Words, *For my own Half*. In a Proceſs for Payment of this Bill at the Inſtance of Provoſt *Allardice*, againſt *Andrew Ritchie*: The Lords found, That *Ritchie* (who produced no Letters of Advice) ought to have ſimply accepted the Bill, and therefore is liable for the whole Sum therein.

Eodem Die. James Stuart *Son to the deceas'd Mr.* John Stuart *of* Aſcog *and Mr.* William Weir *Advocate his Factor, againſt* Archibald Douglaſs *of* Cavers.

A*Rchibald Douglaſs* of *Cavers* charged at the Inſtance of *James Stuart* and his Factor for Payment of 1000 Pound *Scots* Principal, Annualrents and Penalty contained in a Bond granted by the deceas'd *Thomas Scot* of *Whitſlead* as Principal, and the ſaid *Archibald Douglaſs* and others as Cautioners to the ſaid *James Stuart*, dated in the Year 1700; *Cavers* ſuſpended upon this Reaſon, That his Obligation as Cautioner is preſcribed by the *Act.* 5. *Parl.* 1695, Seven Years being elapſed ſince the granting of the Bond without any Diligence done thereon.

Alledged for the Charger. Preſcription runs not againſt Minors, and deducing the Charger's Minority, the Obligation is not as yet preſcribed.

Anſwered for the Suſpender. Albeit a Minor may be reſtored againſt the long Preſcription of Fourty Years, the ſhorter Preſcriptions (ſuch as this of cautionary Obligations is) run againſt him, unleſs he be exempted expreſly by Statute.

Replyed for the Charger. A Minor may be reſtored in all Caſes againſt Leſion by Negligence as well as by poſitive Deeds: Becauſe *contra non valentem agere non currit Præſcriptio.* Which Privilege is founded *in Jure communi*, upon the Lubricity of the Judgment in that Age. Minority is indeed *ob majorem Cautelam* expreſly excepted by Statute from Preſcription in Caſes whereby a notable Prejudice may ariſe; and in all Caſes where that *ſuperabundans Cautela* hath been neglected by the Legiſlators, it is virtually and tacitly excepted.

The Lords found, That the Years of Minority are not to be deduced to preſerve and continue the cautionary Obligation; and found, That the Minor hath no Benefit of Reſtitution againſt the Cautioner. The Lords thought, That the Act 1695 doth not introduce a Preſcription of cautionary Obligations, but makes, That no Man ingaging for another in any Bond for Sums of Mony, can be bound for the ſaid Sums longer than Seven Years, with this Proviſion, That legal Diligence by Inhibition, Horning, Arreſtment, or any other Way done within the Seven Years againſt the Cautioner for what fell due in that Time, ſhall ſtand good and be effectual after expiring of the Seven Years. By which Statute a Cautioner's Obligation *intra Septennium* is like that of a Husband for his Wife's moveable Debts during the Marriage. And as a Husband, after Diſſolution of the Marriage, is no further liable to pay his Wife's Debts, than *in quantum lucratus*, or in ſo far as his Eſtate heretable or moveable was affected by Diligence *ſtante Matrimonio:* So a Cautioner after elapſing of the Seven Years is only bound by legal Diligence affecting his real or perſonal Eſtate within the Seven Years, for what fell due in that Time.

December 12, 1712. Archibald M'aulay *of* Ardincaple, *againſt* Janet Bell *Lady Barachny.*

A Bond bearing Annualrent having been granted by *John Herbertſon* of *Barachny* for 1000 Merks payable to *Alexander Maxwell* of *Duntrochor*, his Heirs, Executors or Aſſignies; and in Caſe of his Deceaſe before uplifting the principal Sum, that *Margaret Bell* his Spouſe ſhould liferent the Annualrent thereof, without Prejudice to himſelf to uplift the Mony during his Lifetime; and *Alexander Maxwell* having died without Children before the Term of Payment: There aroſe a Competition betwixt *Ardincaple*, to whom *George Maxwell* the Defunct's Brother and Executor *qua* neareſt of Kin, having confirmed the Bond, aſſigned it, and *Janet Bell* Siſter and Executrix dative to the ſaid *Margaret Bell* the Defunct's Relict, who claim'd under her Siſter Right to the equal Half of the ſaid Sum as moveable *quoad Relictam* by the Husband's dying before the Term of Payment.

Alledged for Ardincaple. Alexander Maxwell the original Creditor being abſolute Fiar by the Conception of the Bond, the ſame devolved upon his Executor, who, by Virtue of his Confirmation having free and full Power to diſpoſe thereof, exerced that Power by the Aſſignation to *Ardincaple*, which lodged the Right to the Mony in his Perſon: And *Janet Bell* hath only Action againſt her Husband's Executor for Repetition, *February* 14, 1622, *Stevin* contra *Govan*, *July* 7, 1625, *Falconer* contra *Irving*, *December* 9, 1628, *Macky* contra *Dunbar*. The Wife's Intereſt in the moveable Eſtate of her Husband upon Diſſolution of the Marriage, is to be regulated according to the Nature of the Subject: That is, ſhe hath a Right of Property to the legal Share of Moveables that were in the joint Poſſeſſion of the Husband and her *ſtante Matrimonio*; but the Husband and his Executors are Fiars of Sums of Mony, in which ſhe hath no *Jus in Re*, but only a perſonal Action againſt the Executors to make the Half forthcoming to her. For as the Husband could, by alienating the Bond, have excluded her from any Share of the Mony: So by his taking the Bond payable to himſelf, his Heirs, Executors, or Aſſignies, and giving her only the Liferent, he manifeſtly declared his Intention, That ſhe ſhould have no further Intereſt. 2. The Relict was liberally otherways provided in her Contract of Marriage, and *Proviſio Hominis tollit Proviſionem Legis*.

Anſwered for Janet *Bell*. 1. The Intereſt of Wives in the Moveables in Communion is truly a Right of Property, the Exerciſe whereof and Adminiſtration (tho' reſtrained during the Subſiſtence of the Marriage, while the Wife is *ſub Poteſtate Viri*) is competent to her after Diſſolution of the Marriage, which the Huſband could not deprive her of: And an Executor, who is but an Adminiſtrator in Office, could not voluntarly aſſign to a Stranger; yea could not pay even to a Creditor of the Defunct, without a Sentence. Nor hath he Right of Adminiſtration of more than was *in Bonis Defuncti*; and the Relict's Share of the Huſband's Moveables was not *in Bonis ejus*. As to the cited Deciſions, it can not be thought ſtrange that Debtors or Intrometters with the Defunct's Goods, ſhould be liable to his Executor *primo Loco*, when the Quantity and Extent of the Relict's Intereſt is not known but from a Computation of the Debts and free Gear: But here where the Debt is ſtill extant in the Debtor's Hand, and the Executor in the Field, *cui bono* ſhould the Relict be put off to ſeek the Executor? Let him ſay now what he can againſt her, *Actiones non ſunt multiplicandæ*. 2. No Proviſion made by the Huſband without the Wife's Conſent, or Acceptance in Satisfaction, can exclude her from the Proviſion of Law. The making of a Law to exclude a Wife who hath a Liferent-proviſion from a Terce of Lands, without mentioning any thing of Moveables, doth imply that theſe were induſtriouſly omitted, and left as before to the Diſpoſition of Law. Beſides, here is no Liferent ſecured to the Wife, which can be preſumed in Satisfaction of a legal Right: Becauſe the Huſband being abſolute Fiar, could have diſappointed her thereof by upliſting the Mony; and he was not ſo much as obliged to re-imploy it for her Liferent Uſe.

The Lords found, That *Margaret Bell*'s Contract of Marriage doth not exclude her from an Intereſt in the Huſband's Moveables; and that ſhe is not excluded by the Act of Parliament 1681, that Act relating only to Terces. And found the Huſband's Executor had Right to confirm the whole Subject, and the *Jus exigendi*: But remitted to the Ordinary to hear the Relict's Procurators upon her Intereſt as to this Sum as free Moveables.

December 16, 1712: John Monro *Chirurgion in* Edinburgh, *againſt* Major George Monro *of* Auchinbowie.

THe deceas'd Sir *Alexander Monro* of *Bearcrofts* having in *Anno* 1699, aſſigned his Share in the *African* Company to his ſecond Son *John Monro*, without Prejudice to his Portion; and in the Year 1703, diſponed his whole moveable Sums, Goods and Gear to his Daughter *Jean*, who, as Executrix to her Father, confirmed the *African* Mony in his Teſtament, and aſſigned the ſame to Major *Monro* her eldeſt Brother, who upliſted it: *John Monro* purſued Repetition againſt the Major, by Virtue of the Aſſignation from Sir *Alexander* their Father.

Alledged for the Defender. The Aſſignation to the Purſuer, cannot carry Right to the *African* Mony, Becauſe 1. The ſame was never delivered by the Father to him. And tho' Bonds of Proviſion by Parents in Favours of Children *in Familia* require no Delivery: Yet Bonds in Favours of Children *foris-*

foris-familiat, and otherways ſufficiently provided, as the Purſuer was, are not effectual till they be delivered. 2. *Eſto* the Aſſignation had been valid, yet it was taken away by a poſterior Diſcharge granted by *John* to Sir *Alexander* his Father, of all Actions, Cauſes of Action, Suits, Bills, Bonds, Judgments, Challenges and Demands whatſoever, which *John* had or might have againſt Sir *Alexander* upon whatſoever Account preceeding the Date thereof: Thus it was determined in a parallel Caſe, 20 *June* 1680, *Young* contra *Paip*. 3. The Aſſignation was revoked at leaſt by the general Diſpoſition in Favours of *Jean*, conform to the Deciſion betwixt Mr. *William Hall* and Sir *William Gordon*'s Lady. Eſpecially conſidering, That Sir *Alexander* not only did not deliver the Aſſignation of the *African* Mony to *John*, but delivered it to *Jean* with the univerſal Diſpoſition; which clears, That the *African* Mony was underſtood to have been a Part of the Subject of the general Conveyance, and not deſigned to be effectual to *John*. 4. The Aſſignation is taken away by a Diſcharge granted by the Purſuer to the Defender, upon a Decreet Arbitral determining Differences betwixt them, wherein the Purſuer diſcharged all Clags and Claims he had againſt the Major for himſelf, and as repreſenting his Father; which is a Renunciation of any latent Claim againſt the Inheritance to which the Major had Right.

Replyed for the Purſuer. 1. All Writs granted by Parents to Children whether *in Familia* or *foris-familiat*, require no Delivery, *Stair Inſt. Pag.* 66. 2. It's abſurd to pretend, That the Diſcharge granted to Sir *Alexander* could take away the Aſſignation; It being the Nature of a Diſcharge to extinguiſh, and not to convey a Right. Beſides, there was no Action competent againſt Sir *Alexander* or his Heirs, upon the Aſſignation: And the Diſcharge doth only diſcharge all Actions and Law-ſuits competent to his Son againſt him before the Date of the Diſcharge, which could not take away his Father's Goodwill. The cited Deciſion where a Settlement in a Contract of Marriage was preſumed to be in Satisfaction of a prior Bond, *quia Debitor non præſumitur donare*, doth not concern the preſent Caſe, where there was no poſterior Payment made to *John*, which could be reckoned in Place of the Aſſignation. 3. The Aſſignation could not be taken away by the general Diſpoſition; *quia ſpecialia derogant generalibus*, whether the ſpecial Right be prior or poſterior to the general, *L.* 4. §. 3. *L.* 99. §. *ult. ff. de Leg.* 3. *l.* 15. *ff. de Peculio*, *L.* 1. *Pr. ff. de Auro Argent. Leg. Inſt.* §. 1. *de Codicil. Vin. Comment. ibid.* 29 *January* 1679, *Aikman contra* Succeſſors of *Boid*. The Prattick betwixt Mr. *Hall* and the Lady *Gordon* doth not meet: For there *Ceſnock* had expreſly revoked the Right in Favours of the Lady *Gordon*; But here the Queſtion is, Whether Sir *Alexander Monro* hath revoked this Aſſignation. Had the general Diſpoſition carried the *African* Mony, *Jean*'s Right to it would have been as good without this Paper, as with it: Conſequently it was not delivered to her as an Inſtruction of her Right. Nor could the Delivery of the Aſſignation to *Jean* be an Extinction of *John*'s Right: On the contrary it made it as effectual as if it had been delivered to *John* himſelf, ſince it went thereby out of the Granter's Hands. Nay, *Jean* who was the Father's Truſtee, and preſumed to underſtand his Intentions beſt, delivered the Aſſignation to *John* as his proper Evident after the Father's Death. 4. The Diſcharge upon the Decreet Arbitral could go no further than the Submiſſion, which was only in Relation to depending Proceſſes; and the Purſuer had then no Clag nor Claim againſt the Major in Relation to the *African* Mony, the preſent Claim having ariſen from his ſubſequent Deed of uplifting that Mony. Nor could either Party have in their View at that Time when the Diſcharge was granted, that any Difference would emerge concerning ſuch a Fund, which in all humane Appearance was then deſperate.

The Lords found, The Aſſignation in Favours of *John* is a valid Aſſignation without Delivery, being betwixt Father and Son. And found the general Diſpoſition by Sir *Alexander Monro* to *Jean* his Daughter of his heretable and moveable Eſtate, with the Delivery to her of the Aſſignation in Favours of *John* of his Intereſt in the *African* Company, is not a Revocation of that Aſſignation in Favours of *John*. And found, That the Diſcharge granted by *John* to the Father, doth not extend to the Mony in the *African* Company. And alſo found, That the Diſcharge following upon the Decreet Arbitral granted by *John* to the Major, doth not exclude this Claim.

January 16, 1713, James Gordon *of* Seatoun, *againſt* Jean Gordon *Lady* Linturk *and others.*

IN *Alexander Irving*'s Contract of Marriage with *Jean Gordon*, he as Principal and the Lairds of *Kincauſſie* and *Lairny* as Cautioners, having obliged themſelves conjunctly and ſeverally to infeſt *Jean Gordon* in Liferent in all and haill the Lands of *Linturk*; Mr. *Alexander Irving*, who made up a Title to theſe Lands after the Huſband's Death, granted to *Kincauſſie* and *Lairny* a Bond of Relief of their Cautionry in the Year 1682, and in the Year 1686, was inhibited by *James Gordon* his Creditor for 1000 Merks *per* Bond, who adjudged the Lands in the Year 1691. Mr. *Alexander Irving* did in Implement of this Bond of Relief, in the Year 1687, diſpone the ſame Lands in Favours of the Cautioners, who being infeſt, that ſame Year granted a Diſpoſition to *Jean Gordon* in the Terms of her Contract of Marriage. Whereupon there aroſe a Competition for Mails and Duties betwixt her and her Authors, and *James Gordon*, who claim'd Preference, in Reſpect that his Inhibition was anterior to the Diſpoſition made to them, tho' his Adjudication was poſterior.

The Lords found, That the Infeftment granted to *Kincauſſie* and *Lairny* is ſufficiently ſupported by Mr. *Alexander Irving*'s Bond of Relief; and therefore preferred them.

Albeit it was alledged for *James Gordon*, That the antecedent perſonal Bond of Relief, which imported only an Obligement to free and relieve them of any Damage they might ſuſtain through their Cautionry, if diſtreſſed by paying up the Jointure, could never ſupport the Infeftment after his Inhibition unleſs the Bond of Relief had born an Obligement to infeſt, either generally or ſpecially. In Reſpect it was anſwered, That any anterior Obligement, whether ſpecial or general, is ſufficient to ſecure againſt the Effect of an Inhibition, 10 *February* 1672, *Rig* contra *Beg*. 22 *July* 1675, *Gordon* contra *Seaton* and others. Beſides, here the Obligement to relieve was a tacit Obligement to infeſt; ſeing the Cautioners were preciſely bound to infeſt *Jean Gordon*, and could not be relieved of that Engagement without infeſting her.

Eodem Die. Colin Campbell *of* Glenderuel, *againſt* Mungo Graham *of* Gorthie.

G*Lenderuel* having charged *Gorthie* to make Payment of 1250 Merks, contained in a Bill drawn by *Robert Campbell* (commonly called *Rob Roy*) upon and accepted by *Gorthie*, payable to the Drawer or Order, for Value received, and indorſed to the Charger alſo for Value; *Gorthie* ſuſpended, and raiſed Reduction of the Indorſation to the Charger, upon the Act of Parliament 1696, anent Bankrupts, for this Reaſon, That *Robert Campbell* the Indorſer, at or within ſome few Days after the Indorſation, was a notour Bankrupt.

Alledged for the Charger. The Act of Parliament 1696, anent Bankrupts, takes no Place in Bills of Exchange. Becauſe, 1. Acts of Parliament relative to the Formality, Conſtitution, or Extinction of Writs uſe not to be extended to Bills of Exchange. 2. Sums even in In-land Bills, are not compenſable by the Accepter for the Indorſer's Debts, 31 *January* 1699, *Stuart* contra *Campbell*; conſequently not quarrellable upon the Statute of Bankrupt; ſeing that were ſtill to elide the Indorſation upon the Account of the Indorſer's Debt, which would derogate from the Faith and Currency of Bills, and occaſion Trade to ſtagnate. 3. The Generality of the Writers upon Bills do center and agree in this, That the Obligement of the Accepter of a Bill is good, and effectual, and cannot be revoked, tho' the Drawer was *lapſus* before Acceptance, or became inſolvent immediately after, *Du Puy. L' Art des Lettres de Change Chap.* 10. §. 1. 2. *Scaccia* §. 2. *Gloſſ.* 5. *N.* 327. *Molloy de Jure Maritimo, Lib.* 2. *Ch.* 10. §. 28. 4. It's the ſame upon the Matter whether the Value of Bills be paid in Mony or Goods, or be diſcompted, that is Value due to the Poſſeſſor upon ſome former Accompt, *Ricard. Traite du Commerce P.* 102. *Scarlet Stile of Exchanges, Ch.* 35. *R.* 5. When one having intruſted Goods to a Merchant, or indulged ſome Delay till he be able to pay Accepted Bills, takes Bills from that Merchant for the Price of ſuch Goods, or in Satiſfaction of ſuch former Bills; were it not out of Meaſure hard to quarrel that Bill upon the Act of Parliament 1696? Eſpecially conſidering, that the Indorſee in a Bill is not, like an ordinary Aſſigny, bound to notice or enquire if the Perſon on whom the Bill is drawn be Debtor to the Drawer or not, or to enquire about the Drawer's Condition, if he find the Accepter to be ſufficiently ſolvent. Nor is it neceſſary that Value be given for a Bill immediately when it is drawn *Du puy Ch.* 3. §. 29.

Anſwered for the Suſpender, 1. The Act of Parliament 1696, being conceived in general Terms without Exception of Bills of Exchange, ought to be extended to the indorſing of theſe, as well as to the Aſſignation of any other Debt or Right. Eſpecially in this Caſe, where the Indorſement was granted for Security of bygone Debt, and not for preſent Value in the Way of Trade. 2. Compenſation is not ſuſtained at the Inſtance of the Accepter of a Bill againſt the Indorſee or *Porteur* upon the Debts of the Indorſer or original Creditor, only where the Indorſee purchaſed the Bill for ready Mony, or other preſent Value in the Way of Commerce. And 3. It is only in that Caſe that *Du puy Scaccia et Molloy* ſay, That the Obligement of the Accepter of a Bill is good and effectual, tho' the Drawer was *lapſus* before Acceptance, or became inſolvent ſoon after. For 'tis certain, That if the Bill be for the Drawer's Behoof, his Indorſement to any of his Creditors in Security or Satiſfaction of a prior Debt, in Defraud of his other juſt and lawful Creditors, will not be a valid Tranſport or Indorſation. As is clear from the Cuſtom of other trading Nations, particularly *France*, as related by *Le ſieur Savary in his Le Parfait Negotiant, Page* 135. *que toutes Ceſſions et Tranſports ſur les Effects de Faillis ſeron null Sills ne ſont Faits dix jours aux moins avant La faillite publiquement connue*: Which is the ſame thing that with us is Statuted by the Act 1696, with this Difference only, That our Law annuls ſuch Deeds of Bankrupts within 60 *Days*; Whereas the *French* Edicts 1667, and 1668, limit the Time to 10 *Days*. And our Lawyers have always made this Diſtinction betwixt Satisfaction for bygone and preſent Value, *Stair Lib. Inſt.* 3. *Tit.* 9. *Pag.* 83. 4. What the Lawyers cited by the Charger ſay concerning the different Kinds of Value paid for Bills, doth not meet the preſent Caſe: For it needs not be diſputed, but that one Merchant may diſcount to another a prior Debt by Bill in the Courſe of Trade as Value furniſhed, which is indeed Value received in ſome Senſe; yet if ſuch a Bill be given for Payment of a prior Debt, while the Drawer is actually Bankrupt, or upon the Point of Breaking, the Law takes Place.

Replyed for the Charger. Le Sieur Savary's Opinion, *Pag.* 133, 137, doth not militate againſt him. The Caſe ſtated by that Author is this, *Paul* a Merchant in *Amſterdam*, ſuſpecting the Condition of *James* his Debtor there, prevails upon *James* to draw upon *Alexander* his Correſpondent at *Paris* for Sixty thouſand *Livers*, Value received, payable to *Paul* or Order, albeit he paid no Value for this Bill, but only gave his Note to the Drawer, to hold Compt to him for the Mony, when he ſhould get Payment of it. Immediately after *Alexander* at *Paris* accepted this Bill, *James* the Drawer broke. Upon which Matter of Fact, the Author gives his Opinion in three Points, *viz.* 1. If *Alexander* the Accepter had been Debtor to the Drawer, before his Acceptance, the Sum in the Bill would have been brought into the Bankrupt's Effects, and diſtributed among his Creditors. But if *Alexander* the Accepter was not formerly Debtor to the Drawer, but accepted his Bill in Hopes of getting Effects from him to pay before it fell due; *Paul* the Creditor in the Bill behoved to be anſwered with Payment; and the Bankrupt's Creditors could not complain, nor pretend to any Share thereof. Becauſe the Bill is not to be paid with the Effects of the Drawer their common Debtor, and ſo they are not wronged, but the Accepter, who has himſelf to blame for giving Truſt to the Drawer, whoſe Faith he followed. Which is a good Argument to decide in the Charger's Favours: Seing the Suſpender acknowledgeth that he was not Debtor to *Rob Roy* the Indorſer at the accepting of his Bill; but accepted the ſame for Cattel that were never delivered. 2. That Author is of Opinion, That *Alexander* the Accepter of the Bill would not be bound to pay the ſame to *Paul*, if he could prove by a Note under *Paul*'s Hand, That he was only to hold Compt to *James* the Drawer for the Value of that Bill when it ſhould be paid: Which makes nothing againſt the Charger, who accepted of an Indorſement to the Suſpender's Bill, not to hold Compt to *Rob Roy* when paid, but took it in Payment and Satisfaction of what he owed him; againſt whom he had no Recourſe if *Gorthie* had bankrupted and *Rob Roy* ſtood. 3. *Le Sieur Savary* gives his Opinion as to a third Point, That *Alexander* the Accepter of the Bill for Value received, could not be free of his Acceptance, but behoved to pay conform: Becauſe there was no Fraud on *Paul*'s Part, but only in the Drawer of the Bill; conſequently for the ſame Reaſon *Gorthie* muſt pay the Sum in this Bill.

The Lords found, That the Act of Parliament 1696, anent Bankrupts, takes Place in this Caſe, if the Suſpender prove that the Indorſation was for Satisfaction or Security of a prior Debt, and not for preſent Value received.

January 20. 1713. Robert Johnſton *of* Keltoun, *againſt* George Houſttoun *Son to the deceaſt* Patrick Houſtoun *Merchant in* Glaſgow.

IN a Proceſs at the Inſtance of *Robert Johnſton* againſt *George Houſtoun*, for reducing a Decreet *in Foro*, holding the Purſuer as confeſs'd upon the Verity of a Debt referr'd to his Oath: The Lords repelled this Nullity objected againſt the Decreet, That it was obtained at the Inſtance of Tutors nominate acting for *George Houſtoun* their Pupil, and no Nomination of Tutors produced therein. In Reſpect the Purſute was in their Name, founded on a Decreet dative, decerning them Executors for their Pupil, and a Licence to them to purſue, procured before the Commiſſaries, upon production of the Nomination, which is *Probatio probata*. The Lords alſo repelled this Nullity, That the Decreet proceeds upon a Licence to purſue, which excludes Sentence till Confirmation int rvene, and yet doth not bear, That the Debt was confirm'd or the Confirmation produced: In Reſpect the Defender now produced the Confirmation of a Date anterior to the extracting of the Decreet. And tho' Law requires the Debt to be confirmed before extracting, there is no Neceſſity to mention the Confirmation in the Decreet.

January 22, 1713. Janet Stark *and* David Tam *her Husband, againſt* George Jolly *Writer in* Edinburgh.

IN a Proceſs at the Inſtance of *Janet Stark* and her Husband againſt *George Jolly*, the Lords found the Defenders Intromiſſion with Seven Pound ten Shilling *Scots*, being ſo ſmall a Sum, and but one ſingle Act, not relevant to infer vitious Intromiſſion.

January 27, 1713. Iſobell Moncrieff *and her Husband, againſt* Katharin Monipeny *Lady* Sauchop.

IN the Proceſs depending betwixt *Iſobell Moncrieff* and the Lady *Sauchop*, (*ſupra June* 20, 1712) the Defender inſiſted for an Half of all the Defunct's Moveables (there being no Children of the Marriage) free of Debts bearing Annualrent, which ſhe contended muſt affect the Dead's Part only, and could not diminiſh her legal Share. Becauſe, Bonds bearing Annualrent being Heretable *quoad Relictam*, and ſo not falling under the Computation of Moveables whereof ſhe hath a Share, ſuch Debts of her Husband cannot burden her Share of the Moveables. And if the contrary ſhould obtain, the Intereſt of Relicts might be intirely cut off.

Anſwered for the Purſuer. Seing the Husband during the Marriage hath not only the Adminiſtration, but is *Dominus Actu*, and may diſpoſe of the ſame even gratuitouſly, and the Wife hath only Right and Intereſt *Habitu*, which *exit in Actum* at the Diſſolution of the Marriage; her Intereſt can reach no further than to the free Moveables after Payment of the Husband's Debts affecting the Executry: *Nam id ſolum noſtrum, quod Debitis deductis noſtrum eſt.* Now Bonds bearing Annualrent are proper Debts upon the whole Executry.

The Lords found, That moveable Bonds bearing Annualrent, whereof the Term of Payment was paſt before the Husband's Deceaſe, cannot affect the Relict's Share of the free Gear, but affect the Dead's Part only in this Caſe where the Defunct had no Children. *Vid. inf. June* 20, 1713, *inter Eoſdem.*

January 28, 1713. Margaret Scot *Lady* Hackſhaw, *againſt the Dutcheſs of* Buccleugh.

IN the Action at the Inſtance of the Lady *Hackſhaw* againſt the Dutcheſs of *Buccleugh*, as repreſenting *Walter* Earl of *Buccleugh*, for Relief of the Half of the Sum of One thouſand Pound, with Annualrent and Penalty, contained originally in a Bond granted to Sir *William Dick* by Captain *William Scot* as Principal, and the ſaid Earl and *John Scot* of *Sintoun* as joint Cautioners: The Defender pleaded, That the Bond is null, 'cauſe the Writer is deſigned only *Francis Dick* Servant to *Andrew Creich*. The Purſuer condeſcended, That *Andrew Creich* to whom the Writer of the Bond is deſigned Servant, was a Merchant in *Edinburgh*; and for aſtructing the ſame, founded on the Aſſignation granted by Sir *William Dick* of the foreſaid Bond, in Favours of

Sir *John Scot*, to which one of the Witneſſes is Mr. *Andrew Creich* Son to *Andrew Creich* Merchant in *Edinburgh*.

The Lords ſuſtained the Condeſcendance upon *Andrew Creich's* Deſignation, as ſufficient to ſupply the Nullity, and duly inſtructed by the aforeſaid Aſſignation produced.

Albeit it was alledged for the Defender, That tho' the Lords have been in Uſe to allow the ſupplying of ſuch a Nullity by a Condeſcendance upon a living Writer duly inſtructed; Yet, when the Writer is dead, a Condeſcendance upon his Deſignation was never ſuſtained without Writs and Adminicles, whereby his Hand-writ and Subſcription might be known and compared, *February* 22, 1676, *Innes* againſt *Gordon*, to anſwer the Deſign of the Law, That Falſhood may be prevented, and the Means of Improbation, direct or indirect, left entire. The borrowing the Deſignation of the Writer or his Maſter from another Writ, amounts to no more, than that the Deſignation given might have been true. And if that were ſufficient, no Writ could ever be annulled for Want of the Deſignation of Writer or Witneſſes: It being eaſie to condeſcend upon a Deſignation, and to prove by another Writ the Poſſibility of the Deſignation's being true, from the Exiſtence of Perſons ſo named and deſigned.

In Reſpect it was anſwered, 1. It is all a Matter whether the Deſignation be inſert in the Body of the Writ, or ſupplyed by a Condeſcendance; Seing both the Writ and Condeſcendance are equally liable to the Objection of Falſhood. 2. The Purſuer is in a more favourable Caſe, than if the Writer of the Bond were not at all deſigned, or his name inſerted and no more: For here the Writer is deſigned a Servant, which diſtinguiſhes him from all others not of that Rank; And farther, is deſigned Servant to *Andrew Creich*, which diſtinguiſheth him from all Servants to any other not of that Name; and from all the World, except there were more *Andrew Creichs* than one; And the Condeſcendance was only to make that Deſignation more ſpecial.

Eodem Die. William M‘pherſon *Writer in* Edinburgh, *againſt* John M‘pherſon *of* Dalradie.

WIlliam *M‘pherſon* having adjudged the Lands of *Invereſhie*, upon a Bond granted to him by Mr. *James M‘pherſon*, apparent Heir to *Elias M‘pherſon* of *Invereſhie*, for the ſaid apparent Heir's Behoof, and charged the Superior to enter him, he *William M‘pherſon* purſued a Reduction and Improbation of all Rights in the Perſon of *John M‘pherſon* affecting the ſaid Lands.

Alledged for the Defender. He cannot take a Day for producing any Writs whereon Infeſtment had followed; In Regard the Purſuer ſtood not Infeſt in the Lands, nor is the Charge againſt the Superior equivalent to Infeſtment in this Proceſs more than in a Removing, albeit *Fictione Juris* it be effectual in ſome particular Caſes, as for bringing in equally Adjudgers within Year and Day of the firſt effectual Adjudication, *December* 1683, *Brodie* contra *Elphinſtoun and others*. And tho' a Charge againſt the Superior be equal to an Infeſtment *quoad* him, for excluding him from the Caſualty of Non-entry: Yet as to Third Parties the Rule of Law, *nulla Saſina nulla Terra* ſtill obtains, *December* 14, 1627, *Beg* contra *Baillies* of *Lanerk*, *June* 24, 1681, *Oſwald* contra *Douglaſs* and *Deans*, *January* 20, 1665, *Little* contra *Nithſdale*, nor can it be pretended, That an Adjudger who hath charged the Superior, hath done all in his Power to have his Right made real: Seing he might proſecute his Right, by running from the Superior to the Crown who refuſeth none.

Replyed for the Purſuer. *Tantum operatur Fictio in Caſu ficto, quantum Veritas in Caſu vero*, therefore as an Adjudication on a Charge to enter Heir, doth as effectually carry the Right to the Lands, as if the Heir or Debtor being ſerved and infeſt had diſponed the ſame: Juſt ſo a Charge againſt a Superior to infeſt an Adjudger or Appriſer, hath the ſame Force as if the Creditor had been actually infeſt, in Order to attain Poſſeſſion and exclude others, *Stair Inſtit. Pag.* 211. *January* 20, 1665, *Little* contra Earl of *Nithſdale*, *June* 24, 1681, *Oſwald* contra *Douglaſs* and *Deans*.

The Lords repelled the Defender's Objection againſt taking a Term for producing Writs clothed with Infeſtment.

Further alledged for the Defender. The Adjudication being for the Behoof of the apparent Heir, no Reduction and Improbation of real Rights can be ſuſtained without an actual Service and Infeſtment thereon. Becauſe an apparent Heir ſerved, if not infeſt, cannot force Production of Rights completed by Infeſtment, more than an apparent Heir not ſerved, can reduce a perſonal Bond. Seing Apparency doth not ſtate him a proper Contradictor, and the Defender tho' aſſoilzied might upon the apparent Heir's Death, be reconvened by the next Heir ſerved, *Spotſwood Tit. Improbation, Stair Tit. Red. and Improb.* By our Practice apparent Heirs are only impowered to reduce Rights on Death-bed, and Rights, without removing whereof they could not be ſerved: And *Exceptio firmat Regulam in non exceptis*, *February* 11, 1635, *Muir* contra *Muir*. Beſides, the apparent Heir's taking Aſſignation from *William M'pherſon* the Truſtie, makes him *paſſive* liable; and the Diligence, *eo ipſo* extinguiſh'd by coming in his Perſon, cannot be the Title of ſo important an Action; and the Charge againſt the Superior muſt fall with the Adjudication it ſelf.

Replyed for the Purſuer. Whatever be the Effect of ſimple Apparency; yet an apparent Heir furniſh'd with an Adjudication and a Charge againſt the Superior in the Perſon of a Truſtie, hath a ſufficient Title in a Reduction, *January* 20, 1665, *Little* contra Earl of *Nithſdale*, *March* 13, 1707, *Robertſon* contra the Lord and Lady *Ormiſtoun*, *February* 11, 1635, *Muir* contra *Muir*, *December* 3, 1634, *Johnſtoun* contra *Johnſtoun*. And ſeing the Apparent Heir, by the Adjudication on his own Bond, ſubjects himſelf *paſſive* to the Defunct's Debts as effectually as if he were ſerved Heir; no Body hath Prejudice, whether he poſſeſs by ſuch an Adjudication, or by Infeſtment on Service and Retour.

The Lords repelled alſo this Objection, againſt the taking a Term, and ſuſtained Action againſt the Defender.

Eodem Die. Beatrix Linklatter *Relict of Captain* John Boſwal *Skipper in* Kirkaldy, *againſt* John *and* Iſobel Boſwals *his Children and Repreſentatives.*

Beatrix Linklatter having, in her Contract of Marriage with Captain *Boſwal*, diſponed her whole Means and Eſtate to him and her in Conjunct-fie and Liferent, and the Bairns of the Marriage in Fie; and in Caſe of her ſurviving him without Children of the Marriage, ſhe being impowered to diſpoſe upon the equal Half thereof: She purſued *John* and *Iſobel Boſwals* as Heir and Executor to the Captain, to Implement the Contract, the Marriage having diſſolved without Children. The Defenders gave in a Liſt of Deductions and Grounds of Compenſation, *viz.* 1. The Expence of leading an Adjudication in the Purſuer's Name, on a Bond due by *Weems* of *Fingask* to her, and Infeſtment thereon, as being a neceſſary Diſburſement for ſecuring a Subject wherein ſhe has a Joint-intereſt by the Clauſe of Return. 2. The Expence of rouping the Purſuer's Furniture and

Pleniſhing, which deduceth naturally as the Expences of ſhearing Corn, or confirming, and the like.

Alledged for the Purſuer. The Defunct having Right by the Aſſignation in the Contract to the Bond and the Pleniſhing, his Repreſentatives cannot charge the Relict with the Expences of rouping the one, or leading an Adjudication for Security of the other: Becauſe *Negotium ſuum geſſit.* 2. Tho' the Relict had been Debtor in a Share of theſe Expences, yet ſince by Law a Husband is bound to pay his Wife's moveable Debts, his Repreſentatives could crave no Deduction from her upon the Account of paying a Debt which Law transferred on him by the Marriage.

Anſwered for the Defender. Albeit the Husband as *Dominus*, might have alienated to Third Parties, yet the Wife had a proviſional Intereſt in the Subject in the Event of not being alienated, and her Survivance: Which having happen'd, ought to be conſidered as *ab Initio*; and no doubt the Husband beſtowed the Expences for the Good of all concerned. For tho' the Purſuer of an Improbation can claim no Share of his Expences from a Party reaping ſome conſequential Advantage accidentally ariſing thereby, who has no other Conjunction of Intereſt with him; yet Husband and Wife being *Socii*, and having an united Intereſt as to the Subject, tho' the former were not founded in the direct Action *Negotiorum geſtorum*, he is founded *in Actione utili*, and in the Action *pro Socio.*

The Lords found, That the Defenders muſt have Allowance of the Half of the neceſſary Expences for ſecuring *Fingask*'s Mony; as alſo the Half of the neceſſary Expences wared out by the Captain in rouping the Purſuer's Pleniſhing: She having an Intereſt in the Half of theſe Subjects.

The Defender craved Deduction alſo of 3 or 4000 *lib.* of Debt owing by the Purſuer before the Marriage, and payed by the Captain: For in liquidating the Value and Extent of what came by her, the Debt due by her at the Time ſhould be diſcounted. Seing no Body is worth more, than what they have *deductis Debitis.*

Anſwered for the Purſuer. Tho' the Captain had paid Debts for her, ſhe muſt enjoy the Liferent and Fie provided to her by her Husband in the Contract of Marriage, without any Deduction: Becauſe, Law obliging him to pay his Wife's Debt, he can claim no Compenſation upon that Account. Did a Husband provide his Wife who brought him no Tocher, to a Liferent of 10000 Merks, and impower her to diſpoſe of 1000 thereof, if ſhe ſurvived him, would his paying ſeveral moveable Debts for his Wife be a Ground to diminiſh her Liferent or Faculty provided to her? Which is exactly parallel to the preſent Caſe: The Extent of her Liferent being the full Value of what was aſſigned, and her Fie, the Half in the ſame Way as if ſhe had eſtimated her Means in the Contract. And the Husband's paying her Debts could afford no Ground of Compenſation, where there is no *Concurſus Debiti et Crediti*, the Wife being never Debtor to him, who paid only that Debt which the Marriage made his own; nor yet could it afford a Ground of Deduction or Reſtitution contrary to the plain Meaning of the Contract. Again, by the *Scots* Law there is a Communion of Moveables between Man and Wife, whereof the Husband during the Marriage has an unaccountable Adminiſtration: And after Diſſolution thereof each get their Share according to Law, without Reſpect to whoſe Debt, or how much was paid during the Marriage. Now the Purſuer having only her Husband's Perſonal Obligement to imploy on Annualrent the Value of the whole Means aſſigned by her to him, and a reſerved Power to diſpoſe of the Half of the Stock, this Faculty can no more be affected with Debts he payed for her, than Bonds granted to her, or Legacies left her could be ſo affected.

Replyed for the Defender. The Queſtion is not how the Means in Communion ſhall be divided after Diſſolution of the Marriage. But whether or not the Wife diſponing her Means *per Averſionem* to her Husband, and taking him bound to provide her to a Liferent of the Whole, and reſerving Power to her ſelf to diſpoſe of the Half thereof in Caſe of her Survivance, in liquidating the Extent and Value of her Means in Order to ſettle her Liferent and Fie: The Debts owing by her at the Time of the Contract and afterwards paid by him, ſhould be deduced. Becauſe the Value and Extent of an *Univerſitas Bonorum* diſponed can only be underſtood *deductis Debitis*. This Caſe is no ways parallel to a Husband's giving his Wife a Bond or Legacy with a Faculty to burden his Heretage: For there the Husband diſpones or legates his own; whereas here a Wife pactions the Return of her own Means or Value thereof, which muſt be underſtood with Deduction of Debts.

The Lords found, That the Debts due by the Purſuer the Time ſhe entred into the Contract of Marriage with the Defender's Father are to be deduced off the whole Head of the Means ſhe brought to her Husband, and that the Defenders are obliged to reſtore to her only the Half of the free Gear.

January 29, 1713.

UPon Report of the Lord *Minto*, the Lords allowed a Quaker to give a Declaration in the Terms of the Statute of *England* upon the Truth of his Debt in a Ranking of Creditors, as equivalent to an Oath.

Eodem Die. Andrew Cheap *Brother-german to the Laird of* Roſſie, *againſt* Thomas Cleugh *Brewer in* Portsburgh.

IN the Proceſs at the Inſtance of *Andrew Cheap*, againſt *Thomas Cleugh*, anent a Bargain of Victual ſold by *Cheap* to him, conform to Samples given to him by the Seller: The Lords found, That the Samples not being ſealed at the making of the Bargain, and the Buyer having then declined to ſeal them, they were not the Rule of the Bargain; but the Buyer relyed upon the Faith of the Seller.

February 4, 1713. ACT *of* SEDERUNT *Directing the Manner of ſigneting Summonſes and other Writs paſſing the Signet.*

THE Lords of Council and Seſſion conſidering, That the affixing and ſetting down the Day of the Month and Year of GOD by Figures, upon Summons, Letters and other Writs paſſing the Signet-Office, hath been the Occaſion of counterfeiting the Signet: For Remeid whereof, and preventing the ſame in Time coming, The Lords of Council and Seſſion appoint and ordain the Day of the Month and Year of GOD to be expreſſed, and ſet down in Words written at Length, and not in Figures, upon all Summons, Letters and other Writs paſſing the Signet; And alſo bearing underneath the ſamen theſe Words, *(Signed by me)* to which the Keeper or his Deputes is to ſubjoin the ordinary Subſcription of his Name. And prohibite and diſcharge the Keepers of the Signet, and all imployed under them, to expede any Summons, Letters, or other Writs under the Signet otherways than in Manner foreſaid, as they will be anſwerable at their higheſt Peril. And appoint theſe Preſents to be publiſhed and printed, and Copies thereof affixed on the Signet Office and the Parliament Houſe, that none pretend Ignorance.

February 5, 1713. *Sir* Alexander Don *of* Newtoun, *againſt* James Don *ſecond Son to* Patrick Don *of* Ottenburn.

IN the Competition mentioned *ſupra November* 28, 1712, betwixt Sir *Alexander Don* and *James Don*, for the Eſtate of *Rutherfoord*.

Alledged for the Purſuer. The Eſtate of *Rutherfoord* being provided, failing Sir *Alexander Don* of *Rutherfoord* and the Heirs of his Body, to old Sir *Alexander Don* of *Newtoun* and his Heirs-male, Tailzie and Proviſion in his Infeſtments of the Lands of *Newtoun*, the preſent Sir *Alexander Don* younger as only Heir-male, Tailzie and Proviſion to his Grand-father in theſe Lands, hath undoubted Right to the Lands of *Rutherfoord*.

Anſwered for the Defender. 1. The Purſuer is not Heir of Tailzie of the Eſtate of *Rutherfoord*; not being Heir-male, Tailzie and Proviſion to old Sir *Alexander*, nor capable to be ſo by the Inveſtiture of the Eſtate of *Newtoun*. In ſo far as, the Purſuer is not within the Deſcription of Heir to Sir *Alexander* in the firſt Line of the Tailzie of *Newtoun*: Becauſe Sir *Alexander* was in that Line a ſimple Liferenter, and the Purſuer injoys the Eſtate as Heir to Sir *James* his Father, who was Fiar, *Stair*, *Inſtit. Pag.* 449 *Pr.* Nor can the Purſuer be Heir to Sir *Alexander* in the ſecond Line of that Tailzie of *Newtoun*, for that Sir *Alexander* is there called to ſucceed as an Heir of Proviſion to the Purſuer; and no Man can be Heir and Predeceſſor ſo much as deſignative to one and the ſame Perſon in the ſame Tailzie. But on the contrary, the expreſs Words of the Inveſtiture (which are the Rule of Succeſſion in feudal Rights, eſpecially in Tailzies) carry the Eſtate of *Rutherfoord* to the Defender. For taking the relative Clauſe in the Tailzie of *Rutherfoord* with the Clauſe referred to in the Tailzie of *Newtoun*, they run thus; Whilks failing, to the ſaid Sir *Alexander* and his Heirs-male and of Tailzie and Proviſion contained in his Infeſtments of the Barony of *Newtoun*, *viz.* To *Patrick Don* his Third Son and the Heirs-male of his Body (ſeing Sir *Alexander Don* the ſecond Son mentioned as immediate Succeſſor to his Father in the Tailzie of *Newtoun*, cannot be underſtood to be repeted in the Tailzie of *Rutherfoord*) and the Defender is Heir-male of *Patrick*'s Body. 2. Suppoſe upon the Foundation of the Charter of *Rutherfoord* 1685, the Purſuer were intitled to the Eſtate, as Heir to old Sir *Alexander Don* in the Charter of *Newtoun*; yet the Defender muſt be preferred, ſeing Sir *Alexander Don* of *Rutherfoord* altered the Tailzie 1685 by a later Tailzie in Favours of the Defender.

Replyed for the Purſuer. 1. The Defender a remote Subſtitute can have no Claim as Heir of Tailzie to old Sir *Alexander*, while the Purſuer his Grandchild by his eldeſt Son an interjected nearer Perſon is alive, who is the firſt Subſtitute in the Tailzie of *Newtoun* and only Succeſſor in that Eſtate. It's frivolous to pretend that becauſe old Sir *Alexander* died a naked Liferenter in the Eſtate of *Newtoun*, the Purſuer could neither be ſerved Heir-male nor Heir of Line to him therein. For the Clauſe of Return of the Eſtate of *Rutherfoord* to Sir *Alexander* and his Heirs, muſt be underſtood *cum Grano & Temperamento*: Not of Heirs actually ſerved, becauſe being a Liferenter when the Tailzie of *Rutherfoord* was made, he could have no ſuch Heirs, but of the Heirs inſtitute and ſubſtitute in the Infeſtment of *Newtoun*, that is, ſuch as by their Blood might have been ſerved Heirs, and are actually Succeſſors in the ſaid Lands. As to *Patrick Don* old Sir *Alexander*'s Third Son and the Deſcendents of his Body, they are not called to the Succeſſion, but in the Event of the Return of the Fortune of *Newtoun* to Sir *Alexander*, which never happened, nor could happen, ſo long as there is a Male Deſcendent of Sir *James* the eldeſt Son. 2. The deceas'd Sir *Alexander Don* of *Rutherfoord* having not a ſimple *Dominium* or abſolute Fie, but a Fie qualified with Proviſions, Limitations and Conditions contained in the Tailzie of *Newtoun*, that is, not to do any Deed whereby the Eſtate or any Part of it might be evicted from Sir *James Don*, or any other Heirs in the Infeftment of *Newtoun*; and conſequently was not in a Capacity to make the ſecond Tailzie of *Rutherfoord* founded on by the Defender.

Duplyed for the Defender. 1. The Purſuer's Alledgeance, That he is Heir-male to old Sir *Alexander*, and enjoys the Eſtate of *Newtoun* by the Tailzie 1681, is no better Argument than the exploded Sophiſm, *Eſt Hæres, & eſt Maſculus, ergo eſt Hæres Maſculus.* The Purſuer, for inſtructing that he is Heir of the Tailzie of *Rutherfoord*, muſt take the whole Clauſe complexly, and then find it in the Charter of *Newtoun*, agreeing therewith both in the Stile and Propriety of Language. 2. The general Reference founded on by the Purſuer, is no habile Way to reſtrain Sir *Alexander Don* of *Rutherfoord* from making a new Tailzie. For, 1. Infeftments can be affected with nothing but what is expreſly therein contained, *Craig Feud. Pag.* 140. which is agreeable to the Deciſion in the Caſe of the Lady *Monbuddo*, and to the *Act* 22. *Parl.* 1685, which requires Conditions in Tailzies to be expreſs'd. Beſides, the Reference is defective, for not mentioning what Charter of *Newtoun* it reſpects, there being two, *viz.* one in the 1665, and another in the 1681: And the Clauſe may refer to the former, wherein the Conditions and Proviſions are not ſo hard upon the Proprietar, as to abridge him of the free Diſpoſal of the Eſtate. 2. The relative Clauſe doth not hinder Sir *Alexander Don* of *Rutherfoord* to make the Tailzie in Queſtion, but concerns only thoſe called in the ſecond Line to ſucceed upon the failing of Heirs of his Body, as the immediate Antecedent to this Relative. 3. The irritant Clauſes in the Tailzie 1681 of *Newtoun*, are only *de non alienando, & non contrahendo Debitum*, and that the Heirs-female ſhould not marry contrary to the Proviſions therein. But there is no prohibitory or irritant Clauſe as to the making a new Tailzie, or altering the Order of the Succeſſion: And Clauſes irritant are of ſtrict Interpretation, not to be extended by Inference or Implication, beyond the Caſes expreſs'd. There may alſo be apparent Reaſons for prohibiting a Fiar to alienate *extra Familiam*, and yet to leave him at large to chuſe his own Heir within the Family: As if the Perſon called in order to ſucced were unworthy, or ungrateful to the Proprietar, or the like. The civil Law doth alſo afford us Inſtances of this Diſtinction, *L.* 38. §. 3. *ff. de Legat.* 3. 4. Albeit there be a Reference to Proviſions, Limitations and Conditions, (which import only Deſtination) there is no Mention of Prohibitions, Irritancies, or Reſtrictions, and only ſuch could incapacitate Sir *Alexander Don* of *Rutherfoord* to alter the Succeſſion. 5. *Eſto*, the Proviſions in the Tailzie of *Newtoun*, were underſtood to be repeted, that could not hinder Sir *Alexander Don* of *Rutherfoord* the firſt Fiar from the free Diſpoſal of his Eſtate: For however it might deſcend to the Heirs with Qualities and Conditions, that by their Acceptance could bind them; the original Conſtitution of the Fie in the Perſon of him who firſt acquired it, was without any Reſtriction, except what is made by Law, as in the Caſe of Minority, Furioſity, or the like; or by the Diligence of Creditors; And any Condition that he could impoſe upon himſelf, might be taken away *contraria Voluntate.* Nor could theſe Prohibitions flow from any Power in the Perſon of old Sir *Alexander*, who was never Fiar; ſince no Body can reſtrict Property, but the Proprietar, who cannot *ſibi imperare*, nor bind when he cannot looſe himſelf, if he ſtill retain the Property. The Statute 1685 provides, That Clauſes irritant in Tailzies ſhall begin upon the Heirs, which tacitly confirms the Power of the Proprietar in all other Caſes, leaving Inhibitions and Interdictions as they ſtood before. The Deciſion of *Leſlie* and *Johnſton* of *Knockhill* againſt *Dick* of *Grange*, and the Caſe of the Creditors of *Riccartoun*, confirm, That the Maker of a Tailzie cannot, by the

Nature of the Thing, be bound to himſelf, and the Heirs of Tailzie, to make effectual the irritant and prohibitory Clauſes thereof. For, if he doth not incur an Irritancy, his Deed muſt be good againſt his Heirs who take under him: If he doth incur, then he can have no Heirs; And what ſhall become of the Fie? The Notion, That it may be conveyed by a Declarator is a Chimera, directly againſt the moſt eſſential Parts of our Law, which require, That Heirs be entered by their Superiors, and that Lands be bruiked by Service and Retours, or Charters and Infeſtments: For, tho' Declarators may annul Rights, they can never convey them. Nor is it conſiſtent with Senſe, that a Precept ſhould be directed for ſerving Heirs upon a Declarator declaring their Right to which they are to be ſerved, void. The only Way to make Tailzies effectual, is by ſerving Heir to the Perſon laſt infeſt before the Contravener. But this will never agree to the Caſe of a Fiar Maker of a Tailzie, altering the ſame, who can never be ſaid to have a Predeceſſor, to whom, upon the Irritancy of his Fie, an Heir of Tailzie may be ſerved. Again, Sir *Alexander Don* of *Rutherfoord* was no more tied up from granting gratuitous Deeds, than he was from doing onerous Deeds: For that Diſtinction hath been only received, where there was a Proviſion in Favours of an Heir of a Marriage, who is in the Conſtruction of Law a Creditor, with Reſpect to other Heirs; or in the Caſe of Obligations in Favours of onerous Creditors. And here the Queſtion is as to the Power of the Maker of a Tailzie, reſtrained by nothing elſe but an Act of his own Will, without the Colour of an onerous Cauſe; unleſs the giving a Liferent to his Father where none ſeems to have been due, can be thought ſuch.

Triplyed for the Purſuer. By our Law and Form, relative Clauſes, eſpecially ſuch as refer to Writs in publick Records, where no Ambiguity can be pretended, are ſuſtained as effectual; which ought far more to be ſuſtained in this Caſe, where both Conveyances make but one Settlement of a Father's Eſtate by diviſion among his younger Sons, and in that View to be conſidered as Parts of one another, with Relation to the different Branches of the ſame Family. Whatever might be pretended, were the Purſuer competing with Creditors who had contracted *bona Fide* for an onerous Cauſe, and were not perhaps obliged to ſearch other Peoples Charter Cheſts, or notice any Rights not ſtanding upon Record; It's quite another Caſe here, where the Debate is with a gratuitous Aſſigny, who by the very Acceptance of his Diſpoſition effectually repreſents Sir *Alexander Don* of *Rutherfoord*: And this obviates what may be pleaded from the Prattick betwixt the Lady *Monbuddo* and *Newmains*. The Act of Parliament 1685 meets not the preſent Caſe, being long poſterior to both Tailzies; and relative only to the original Settlement: And yet there is no Inſinuation therein, that one Writ may not effectually relate to another, as effectually as if the Writ referr'd to were *Verbatim* inſert. Again, the Reference cannot be thought uncertain, tho' there be two Charters of the Eſtate of *Newtoun*; becauſe, where-ever a Perſon hath different Rights to one Subject, the laſt not only alters but abſorbs, and on the Matter extinguiſheth all former Securities; eſpecially when the laſt is Sovereign and Univerſal, with the Addition of a Tailzie: Therefore the Charter of *Newtoun* referr'd to, muſt be the laſt Charter. 2. If the Heirs of *Newtoun*'s being called immediately before the relative Clauſe, were a good Reaſon to find Sir *Alexander Don* of *Rutherfoord* and the Deſcendants of his Body not affected with the Irritancies; then in every Tailzie the whole Heirs would be free, except the Branch ſubſtitute in the laſt Place: Whereas it is evident, That ſuch reſtrictive Clauſes affect the whole Chain of Succeſſion, from the firſt Inſtitute to the laſt called by the Nomination. 3. It is of no Weight to ſuggeſt, That the Tailzie of *Rutherfoord* mentions not Irritancies, but only Conditions, Reſtrictions and Limitations; ſeing it muſt be allowed, That tho' all Conditions are not Irritancies,

tancies, yet all Irritancies are Conditions, and comprehended under that more general Word: Albeit by the anxious Exuberance of Style, the *Modi* and Conditions of tailzied Fies be ordinarly branched out into Limitations, Reſtrictions and Irritancies. 4. It is a new Poſition unknown in Law, That the firſt Fiar in tailzied Settlements is free of Limitations. Is not the original and main Deſign of all Tailzies, eſpecially in Contracts of Marriage, to bind up the firſt Inſtitutes, whom the Maker of the Tailzie hath Ground to ſuſpect as inclinable to do Deeds prejudicial to the ſtanding of his Family or Eſtate; and not ſo much calculated to reſtrict thoſe Subſtitutes, who, being commonly *naſcituri*, and preſumed in Law to prove frugal and provident till the contrary appear, cannot with ſo much Ground be ſuſpected of Miſmanagement. It hath indeed been ſometimes diſputed (tho' on no ſolid Ground) whether a Perſon once ſtated in the abſolute Right of Fie, could, by reſigning in his own Favours, and failing of him to his Heirs under Irritancies, ty up his own Hands, ſo as he ſhould not have a Power to diſpone. But that's not the preſent Caſe: For Sir *Alexander Don* of *Rutherfoord* never was in the abſolute Fie of that Eſtate, but had it diſponed to him by another, under Conditions and Limitations. And it was never queſtioned but a Man could burden another with Irritancies, whatever he could do as to the tying up himſelf. The Statute 1685 declares it lawful for Men to convey their Eſtates, in what Manner, and under what Conditions they think fit, without Diſtinction of Inſtitutes or Subſtitutes. Every one is more capable to bind and oblige himſelf, than any other Perſon: It is not eaſie to conceive how it can enter in Thought, That a Perſon can have greater Power over another, than he hath over himſelf. Nature and Experience dictate, That every Man hath, or ought to have, more Power at Home than Abroad. *Qui poteſt majus poteſt minus*: Whoever can abſolutely give away his Eſtate, or denude himſelf intirely, can do it in Part, or reſtrict himſelf. As to the Queſtion, What becomes of the Fie, if the Fiar incur an Irritancy? It is anſwered, The Fie devolves immediately upon the next called to the Succeſſion, as if the Contravener were naturally dead: So that upon a Declarator of Contravention, the next Succeſſor ſerves Heir to the Contravener, in the ſame Way as if he were dead, without Danger of a paſſive Title, ſeing the Heir repreſents him only in Deeds compatible with the Inveſtiture; The Warrant of which Service is the Will of the Maker of the Tailzie. But tho' *James Don*'s Right be null, the Granter's Right could not be irritated thereby in his own Time, but ſtood valid *ad ultimum Spiritum*: Conſequently, the next Heir of the Tailzie of *Rutherfoord* may be duly ſerved Heir to Sir *Alexander Don* of *Rutherfoord* of late deceas'd. For Deeds of Contravention do not irritate the Contravener's Right, till they come to affect the tailzied Eſtate: Seing otherwiſe the tailzied Fiar were not at Liberty to buy a Suit of Clothes, or any Neceſſaries for himſelf in Truſt. Farther, *eſto*, the laſt *Rutherfoord* had irritated his Right in his Lifetime, the Purſuer being ſerved Heir in general, might have declared, That he had Right to the Fortune, as if Sir *Francis Scot*'s Diſpoſition had been originally granted to himſelf, and might thereafter infeſt thereon, as if the laſt *Rutherfoord* had died uninfeſt: Seing the Declarator would *funditus* remove his Infeſtment.

The Lords found, That Sir *Alexander Don* now of *Newtoun* is next Heir of the Tailzie of *Rutherfoord* by the Failure of Heirs of Sir *Alexander Don* of *Rutherfoord*, his Body. And found the Clauſe in the Tailzie of *Rutherfoord* mentioning the prohibitory and irritant Clauſes in the Tailzie of *Newtoun*, hath Reſpect to Sir *Alexander Don* of *Rutherfoord* and the Heirs of his Body, as well as old Sir *Alexander Don* of *Newtoun* and the Heirs after him; and that the ſaid Tailzie of *Newtoun* referred to in the Tailzie of *Rutherfoord* is the laſt Inveſtiture in the Year 1681. And found, That the Diſpoſition of *Rutherfoord* bearing the Price to be paid by Sir *Alexander Don* elder, and the

Right being taken to him in Liferent, and to his Son in Fie, the Fie was ſo qualified in the Perſon of the Son, that he could not gratuitouſly alter the Order of Succeſſion. And further found, That the Tailzie of *Rutherfoord* relating to the Conditions, Limitations, and Proviſions in the Tailzie of *Newtoun*, doth alſo comprehend the Irritancies; and that theſe Clauſes irritant, tho' not expreſſed, but only related to in the Tailzie of *Rutherfoord*, do affect that Tailzie, ſo as Sir *Alexander Don* of *Rutherfoord* could not gratuitouſly alter the Order of Succeſſion.

Eodem Die. Robert Balfour *Son to* John Balfour *Skipper in* Kirkaldie, *againſt* Henry Greig.

Angus *Linklatter* in a Contract of Marriage betwixt *Catharin Linklatter* one of his four Daughters, and *John Balfour* her ſecond Huſband, having, *for himſelf, and as Burden-taker for his ſaid Daughter, obliged himſelf to make her a Bairn in his Houſe, and that ſhe ſhould ſhare equally with his other Daughters of his Lands and Heretages, reſerving Power to himſelf to uſe and diſpoſe as he thought fit*; And the ſaid *Catharin* having obliged her ſelf to provide her Share of her Father's Eſtate *to her ſelf and the ſaid* John Balfour, *and the longeſt Liver in Liferent, and to Heirs of the Marriage in Fie*: The Father died without making any Settlement, and *Catharin* his Daughter who ſurvived him, neglected to enter Heir-portioner with her three Siſters. After her Death, *Henry Greig* her Son of the firſt Marriage procured himſelf, as come in Place of his Mother, to be cognoſced and infeſt in a Tenement in *Kirkaldie*, as one of the four Heirs-portioners of *Angus Linklatter* the Grand-father. Whereupon *Robert Balfour Catharin*'s Heir of the ſecond Marriage, purſued *Henry Greig* as Heir to his Grand-father, to denude of that fourth Part of the Land wherein he was infeſt.

The Lords found that *Henry Greig*, as Heir to *Angus Linklatter* the Grand-father, muſt fulfil his Obligement to the Purſuer Heir of the Proviſion of the ſecond Marriage, and denude of a fourth Part of the Grand-father's Land, unleſs he inſtruct where the Purſuer is to get the reſt made up by the other Heirs-portioners, having more than their own Shares.

Albeit it was alledged for the Defender, 1. The Grand-father's Obligement to make his Daughter a Bairn in the Houſe, and that ſhe ſhould Share equally with his other Children in his Lands, did not oblige him to diſpone his Lands to his Daughters: But imported only, that he was to do nothing to hinder them to Share equally; and he having left them to ſucceed according to Law, had performed all that was incumbent on him; eſpecially conſidering, that the reſerved Power to uſe and diſpoſe, inabled him to diſpone to a Stranger, notwithſtanding the Proviſion. It was *John Balfour* the Purſuer's Father that ſhould have ſerved his Wife Heir to her Father: And ſeing *per eum ſtetit*, that it was not done, no Burden-taker for her could be liable. It can never be imagined, That *Angus Linklatter* took Burden upon him for his Son in Law's ſerving his Wife Heir: He was bound only that his Daughter, being ſerved, ſhould denude. 2. *Eſto* the Defender were liable as repreſenting his Grand-father, yet ſince he is but one of four Heirs-portioners, he can only be liable to implement a fourth Part of his Grand-father's Obligement, *L.* 86. §. 3. *ff. de Legat.* 1.

In Reſpect it was anſwered, 1. As *Angus Linklatter* ſtood obliged, that *Catharin* his Daughter ſhould ſhare equally: So the Daughter obliged her ſelf, That how ſoon ſhe fell to have Right, ſhe ſhould provide her Share to the Bairns of the ſecond Marriage; the Father was bound as Burden-taker for her to make her Obligement effectual. The reſerved Power to uſe and diſpoſe, was intended only for alienating to Strangers, as his Circumſtances might require: Which not having happen'd, the Obligement in Favours of *Catharin*'s Bairns of that Marriage ſtands binding. In whomſoever the Neglect was in not entering *Catharin* Heir to her Father, the Heirs of the Marriage ought not to be prejudiced. The *bona Fides* in contracts of Marriage, obligeth the Grandfather as Burden-taker for his Daughter, to ſupply that Defect, which is ſtill practicable by the Defender his Heir. 2. The Doctrine is good in the general, That Heirs-portioners are liable only *pro virili Parte*: But there is this Speciality in the preſent Caſe, that the other three Heirs-portioners ſtand only infeſt in their own fourth Parts; Whereas the Defender ſtands wrongfully infeſt in that fourth Part which by the Contract was provided to belong to the Purſuer as Heir of his Mother's ſecond Marriage. The Text brought out of the civil for the Defender doth not come home to this Caſe: For there were ſeveral Heirs equally inſtituted, and the Teſtator bequeath'd a Piece of Land belonging to one of them, to a third Party, which the whole Co-heirs were obliged to redeem, or pay the Price; Whereas here there was no Inſtitution of Heirs, nor Settlement made by the Grandfather, but only he provided his Daughter's fourth Part of his Land to the Heirs of her ſecond Marriage, and thereby in Effect diſinherited the Defender.

February 10, 1713. *Earl of* Levin, *againſt* Theodore Moriſon *of* Bognie.

IN the Compt and Reckoning at the Inſtance of the Earl of *Levin* againſt *Moriſon* of *Bognie* mentioned 21 *December* 1710, the Defender alledged, That *Burgie*'s Adjudication to which the Earl had Right, is null, and ſo could not be a ſufficient Warrant for making the Offer to *Bognie* of ſufficient Caution in the Terms of the Act of Parliament 1661, in Order to reſtrict him to his Annualrents, and oblige him to hold Compt for the Superplus.

Replyed for the Purſuer. The Intention of the Act of Parlament being not ſo much to ſtate and fix the Title of the Perſon who might make this Offer, as the Security of the Wadſetter, it appoints his Poſſeſſion to be ceded in Favours of the Debtor, or any deriving Right from him. And ſeing *Solutio fieri poteſt a quolibet, etiam Creditori invito*; the Sufficiency of the Security is more to be regarded, than who made the Offer. 2. *Bognie* being obliged in all Events to compt, it is *Jus Tertii* to him, who will be effectually ſecured, to quarrel the Adjudication, ſeing the common Debtor acquieſceth. 3. Suppoſe *Burgie* had been only a perſonal Creditor, he was entitled to make the Offer, that the Debtor's Effects for his Payment might be enlarged: As any Creditor, tho' perſonal, has an Intereſt to remove fraudulent Alienations upon the Act of Parliament 1621, and to purſue Reduction of a Diſpoſition *ex Capite Lecti*, *November* 25, 1669, Creditors of *Coupar* and *Balmerino* contra Lady *Coupar*, or to redeem an Appriſing that ſtands in his Way: So it is more the Intereſt of a poſterior Creditor to redeem an exorbitant Wadſet. This is further clear from the Extenſion that hath been made of another Clauſe in the Statute, *viz.* the Benefit allowed to a poſterior Appriſer to redeem a prior expired Appriſing in the Perſon of an apparent Heir, hath been extended not only to Annualrenters, *January* 9, 1677, *Hay* contra *Gregory*, but to any Creditor, *Mackenzie Obſerv.* on the Act 1661, ſeing they may Appriſe, *ergo a pari*, any true Creditor that may adjudge, may make the Offer.

Duplyed for the Defender. The Security mentioned in the Act muſt be given or offered by the Debtor or others deriving Right from him to the Reverſion; and a perſonal Creditor is neither Debtor to the Wadſetter, nor hath

Right to the Reverſion, not having affected the Subject with a real Right, whereby he could have Acceſs to the Mails and Duties, in Caſe the Wadſet were ſatisfied. 2. None can make the Offer, but he who can require the Wadſetter to cede the Poſſeſſion in his Favours: Yea, properly ceding the Poſſeſſion is firſt required, and the Offer of Security for the Annualrents, is but the Condition upon which the Poſſeſſion can be demanded. Now a perſonal Creditor could not claim the Poſſeſſion, nor could the Wadſetter ſafely cede it to him. 3. It is more reaſonable to allow a perſonal Creditor to redeem an Appriſing coming in the Perſon of an apparent Heir, which can only be done within 10 Years, than to allow ſuch to alter the State of proper Wadſets, which have a perpetual Reverſion.

The Lords found, That an Adjudication intrinſically null, was no ſufficient Title for uſing the Offer of Caution in the Terms of the Act of Parliament 1661.

Eodem Die. *Sir* Thomas Burnet *of* Leys, *againſt the Heretors and Freeholders of the Shire of* Kincardin.

SIr *Thomas Burnet* having, upon Application to the Lords by Bill, obtained a Warrant for general Letters of Horning, to charge the whole Freeholders, Heretors, and Liferenters, within the Shire of *Kincardin*, except Noblemen and their Vaſſals, to meet and ſtent themſelves according to their reſpective Valuations, for Payment of his Fees as their Commiſſioner at the Convention of Eſtates, and all the Seſſions of King *William*'s Parliament; and having charged them, they ſuſpended upon the Act 13. *Seſſ.* 2. *Parl. K. W.* diſcharging general Letters.

The Lords found the Letters orderly proceeded againſt the Suſpenders for meeting and ſtenting themſelves. In reſpect Commiſſioners Fees are to be raiſed as the Exciſe, *Act* 35. *Parl.* 1. *Seſſ.* 1. *Ch.* 2. which is a Part of the King's Revenue, and that is excepted in the Statutes diſcharging general Letters.

February 11, 1713. Margaret Lundy *and Mr.* George Henry *Miniſter of the Goſpel her Husband, againſt* Henry *Lord* Sinclair.

IN an Action at the Inſtance of *Margaret Lundy* and her Husband, as Executor to *George Lundy* Clerk of *Dyſert*, againſt *Henry* Lord *Sinclair*, as repreſenting *John* Lord *Sinclair*, for Payment of 2000 Merks contained in Lord *John*'s Bond granted to *George Lundy*: The Lords found, That the Defender could not be allowed to propone Preſcription of the Bond, without acknowledging the Paſſive Titles.

Albeit it was alledged for the Defender. That any Perſon conven'd upon the paſſive Titles in a Conſtitution of a Debt due by a Defunct, may not only deny the paſſive Titles; but alſo his being called as Defender, intitles him to object againſt the Relevancy of the Libel, and Manner of Probation. And tho' the Debt purſued for be conſtituted againſt the Defunct by a Bond, the Defender may, without repreſenting, object any Nullities *in Jure* that are inſtantly verified, *December* 10, 1674, *Auchintoul* contra *Innes*, *December* 12, 1672, *Brody* contra *Douglaſs*, and Preſcription is ſuch a Nullity.

In Reſpect it was anſwered for the Purſuer. Proponing a peremptory Defence, liberates him from proving the paſſive Titles: Seing, if the Defender do not repreſent the Defunct, he hath no Manner of Intereſt to object againſt the Purſuer's Title. There is no Parity betwixt the Deciſion, *November* 10, 1674, *Auchintoul* contra *Innes*, and the preſent Caſe: For there the Defence upon the King's Proclamation diſcharging Annuities, was in Favours of all the King's Lieges liable in Annuities; and the Defender's denying the paſſive Titles was ſuperfluous in that Caſe; whereas proponing Preſcription upon a Bond, is the ſame upon the Matter, as to alledge upon a Diſcharge thereof; Preſcription being in Law a virtual or implicite Diſcharge, no leſs inconſiſtent with denying the paſſive Titles, than an expreſs one. Again, there is far leſs Parity betwixt the Caſe of a good Bond, and that of a null one, which in effect is no Bond. Nor doth the calling a Perſon as Defender, warrant him to act as a Contradictor, and yet to be no Contradictor; which behoved to be owned, if one were allowed to propone a peremptory Defence, and at the ſame Time to deny the paſſive Titles. But that this cannot be, is cleared by a notable Deciſion, *December* 15, 1671, *Hamiltoun* of *Kinkell* contra *Aytoun* of *Kinaldy*.

February 12, 1713. *The Poor and Kirk-ſeſſion of* Air *Supplicants.*

THE Lords granted the Benefit of the Poor's Roll to the Poor and Kirkſeſſion of *Air*, for proſecuting two depending Actions at their Inſtance, againſt the Magiſtrates of *Air*, which they could not otherwiſe do without incroaching upon the Poor's Stock.

Eodem Die. *Colonel Erskin, againſt Sir* George Hamiltoun.

IN the Competition betwixt Colenel *Erskin* and Sir *George Hamiltoun*, mentioned *ſupra*, *February* 8, 1709, Sir *George* having now founded upon a Decreet of Adjudication led againſt the ſaid Eſtate in the Year 1680, by Sir *Robert Miln* his Author, for the modified Avails of the Wards and Marriages of three ſucceſſive Heirs of *Duncan Lindſay*, gifted to *James Loch*, and by him transferr'd to the Adjudger: The Lords found, That *Duncan Lindſay* being denuded by the regiſtred Diſpoſition of the Appriſing within the Legal in Favours of *Patrick Wood* the Reverſer, no Caſuality out of the Lands appriſed fell by his Death; and that the Earl of *Kincardin* Colonel *Erskin*'s Author having in the Year 1663, long prior to the Gift, obtained from the King a Charter containing a *Novodamus* and Change of the Holding from Ward to Blench, with the Words, *non obſtante quod eadem Terræ per Servitium Wardæ et Relevii antea tenebantur, quam Tentionem et omne Beneficium ejuſdem nos in perpetuum renunciamus et exoneramus*; the ſaid Charter did import a Diſcharge of theſe Caſualities, albeit they had fallen.

Albeit it was alledged for Sir George Hamiltoun. 1. That *Duncan Lindſay* (who ſtood in the Fie with Reſpect to the Superior) was in this Caſe Vaſſal, notwithſtanding his Diſpoſition to *Patrick Wood*, who was not thereby Vaſſal, tho he had *Jus ad Rem.* Nor yet was Sir *John Blackadder* Vaſſal, *quoad* whom the Appriſing and the Infeſtment thereon was in the ſame State as before the Diſpoſition. The Act of Parliament eſtabliſhing the Regiſter of Reverſions doth not concern the Superior's Right, which cannot be altered by any Deed of the Vaſſal regiſtred or not, without his own Concurrence in acknowledging the Diſpoſition by granting a Charter or otherways. 2. The general Clauſe in the *Novodamus* granted by the King, cannot extend againſt his Majeſty, to any Caſuality of the Superiority, except ſuch as are particularly expreſs'd, *Stair Inſtit. Lib.* 2, *Tit.* 3. §. 19.

June

June 17, 1672, Lord *Hatton* contra Earl of *Southesk*, and the Caſuality of Marriage is not expreſs'd in the Earl of *Kincardin*'s Charter.

In reſpect it was anſwered for Colonel Erskin. 1. The Regiſtration of *Duncan Lindſay*'s Diſpoſition of the Appriſing to *Patrick Wood* within the Legal, ſufficiently expreſs'd his Intention never to make Uſe of the Right diſponed as a real Right to carry the Property of the Land. For Payments by Intromiſſion or otherways, naturally extinguiſh an Appriſing during the Legal, which till that be expired is but a *Pignus prætorium*: And *Patrick Wood* coming in Sir *John Blackadder*'s Right by the Diſpoſition, had the ſame Right to redeem as he had. An Appriſer of Lands is not Vaſſal to the Superior thereof, if the Appriſing happen to be redeem'd within the Legal: For ſuch a Redemption removes all Effects of the Appriſing *retro* as if it had never been led. So that *Lindſay* whoſe Right was extinguiſhed, or at leaſt became only a Security to *Patrick Wood* for the Price of the Redemption, could not be Vaſſal: But the true Vaſſal was Sir *John Blackadder*, againſt whom the Appriſing was led; and after him *Henderſon*, whoſe Appriſing and Infeſtment thereon came into the Perſon of the Earl of *Kincadin* by Reſignation, Charter and Seaſin *Anno* 1676. 2. The Words of the Earl's Charter 1663, expreſly Diſcharge all Caſualities of Marriage formerly fallen, and the Change of the Holding hinder'd any to fall thereafter. So that there is a Difference betwixt the Caſe of the *Lord Hattoun* 1672, and this, which could not paſs of Courſe becauſe of the Change of the Holding. Beſides, *Hattoun*'s Gift was of the Marriage of my *Lord Dundee*, upon whoſe Reſignation *Northesk* ſtood Infeſt: Whereas the Defender founds on a Gift of the Marriage of thoſe from whom the Earl of *Kincardin* derived no Right. And it's much eaſier for Parties to inquire into the State of their own Author's Rights, than of other ſeparate collateral Conveyances. But after all, the Deciſion 1672 was ſingular and wants a Precedent.

Eodem Die. Alexander Forbes *of* Blacktoun, *againſt* John Abernethy *of* Mayen.

ALexander Forbes *of* *Blacktoun* entered into a Contract of Separation with *Iſobel Hacket* his Spouſe, and *John Abernethy* her Son of a firſt Marriage, whereby the Man and Wife agreed to live ſeparately. *Alexander Forbes* renounced in Favours of the ſaid *Iſobel Hacket* her Heirs, Executors and Aſſignies, all Right he had or could pretend to the Jointure provided to her by her firſt Husband, and obliged him never to moleſt her in her Perſon or Goods, and thereby renounced his *Jus Mariti* as if he had never been married to her: *Iſobel Hacket* renounced and diſcharged in his Favours, all Right or Claim of Right which ſhe had or could pretend to his Means or Eſtate, by Contract, *Jure Relictæ*, or otherways, as if their Marriage had never been. Both Parties obliged themſelves never to quarrel or revoke this Deed; and *John Abernethy* took Burden for and obliged himſelf conjunctly and ſeverally with his Mother for her Performance of the Premiſſes. After the Parties had thus ſeparated *bona Gratia*, *Iſobel Hacket* agreed with *John Abernethy* her Son to reſtrict her Annuity of 600 Merks, which he was obliged to pay her, to 300 Merks. Many Years after this, *Alexander Forbes* and *Iſobel Hacket* thought fit to go together again, and purſued *John Abernethy* for Payment of the full 600 Merks of Annuity for all Years and Terms bygone, notwithſtanding the Contract and Rights following thereupon.

The Lords found the Lady's Agreement with *Mayen* her Son during the ſtanding of the Contract of Separation, reſtricting her Jointure to 300 Merks yearly, is binding from the Date of that Reſtriction; but found the Reſtriction to fall with the Contract, and the Lady and her Husband to have Right to her former Jointure of 600 Merks *per Annum*, how ſoon the Separation was by mutual Conſent paſt from, and the Parties came to be reconciled and cohabit.

Albeit it was alledged for the Defender. That Man and Wife may contract, *L.* 7. §. 6. *ff. de Donation. inter Vir. et Vxor.* And tho' true Donations were revocable, remuneratory Donations, ſuch as this, are not, tho' the Wife ſhould have ſquandered away what ſhe received, *L.* 7. §. 2. *ff. eod. Blacktoun*, who diſponed his Wife's Jointure to her, her Heirs and Aſſignies, cannot quarrel the ſame after it is come in the Aſſigny's Perſon who *bona Fide* contracted for onerous Cauſes with the Wife. Eſpecially conſidering, That Husbands are liable *inſtitoria Actione* for Contracts entred into with their Wives, while *præpoſitæ Negotiis.* Laws both divine and humane allow of conjugal Separation *bona Gratia*, when neither Party can live comfortably together: And our Cuſtom ſuſtains Pactions upon that Head, *March* 14, 1634, *Gib* contra *Miller*.

In Reſpect it was anſwered for the Purſuers, That ſuch a Contract of Separation is *contra bonos Mores & Fidem Nuptiarum*, reprobated by the civil Law, *L.* 8. *C. de Divor. & Repud. Novel* 117. *C.* 10. & 12. and by our Law, *February* 11, 1634, *Drummond* contra *Rollock*, *February* 6, 1666, *Livingſtoun* contra *Begg*. The Renunciation of the *Jus Mariti* by the Contract, doth ſtill redound upon and accrew to the Husband, *Stair*, *Inſtit. Pag.* 32. *July* 14, 1709, *Vallange of Poſſils* contra *M'dowal of Freugh*: So that we need not run to the civil Law, to diſtinguiſh betwixt pure and remuneratory Donations. The Deciſion betwixt *Gib* and *Miller* doth not meet this, for there the Woman who had judicially ratified the Contract, died without quarrelling the ſame, and her Executor who impugn'd it, refuſed to reſtore what ſhe received.

February 13, 1713. Robert Stuart *Merchant in* Aberdeen *and others, againſt Captain* William Collier *Commander of Her Majeſty's Ship the* Mermaid.

THE Ship the *Joanna* of *Aberdeen* being taken in her Voyage to *Virginia*, *May* 17, 1710 by the *Pontchartrain* a *French* Privateer, who took Four Bales and Two Casks of Goods out of her, and Twenty ſix Guineas out of the Skipper's Pocket, and detained him Priſoner till an agreed Ranſom of Two hundred Guineas was paid; *May* 28 the Privateer was taken, as ſhe was ſtill hovering upon the *Scottiſh* Coaſt, by Captain *Collier*, and adjudged Prize. *Robert Stuart* and Company Fraughters, and Mr. *Alexander Inglis* Maſter of the *Joanna* purſued Captain *Collier*, for Reſtitution of the Goods and the Twenty ſix Guineas, with the Two hundred of Ranſom found by him on Board the Privateer. In Reſpect the Privateer had not attained to the abſolute Property of the Mony and Goods, being retaken with them before he return'd *intra Præſidia Hoſtium*, that is, the *French* Ports and Harbours, or their Fleet, where the Captor is reckoned in Security without Danger of having the Goods recovered from him, *Grotius de Jure Belli & Pacis*, *Lib.* 3. *C.* 6. §. 3. *C.* 9. §. 16. *Voet. de Jure militari*, *C.* 5. §. 23. *Molloy de Jure maritimo Tit.* 1. *of Ships of War*, §. 7.

Alledged for the Defender. 1. There is a Difference between Goods found aboard a Privateer and Mony: For Mony being a Fungible, it is impoſſible to diſtinguiſh what Species belong'd to the Privateer, and what to the Purſuers. Beſides, even as to the Change of the Property of Goods, the Purſuers have not only the expreſs Words of the civil Law againſt them, *Res ab Hoſtibus captæ ſtatim fiunt capientium* §. 17. *Inſtit. de Rerum Diviſ.* but even the Authors whom they cite, *Sed recentiore Jure Gentium, inter Europæos populos introductum videmus, ut talia capta cenſeantur ubi per Horas* 24 *in Poteſtate Hoſtium fuerint, Grotius, Lib. 3. C. 6. §. 3. in Fine.* And *Zieglerus* in his Obſervations upon that Place of *Grotius*, confutes the Opinion, That the Dominion of the Goods was not chang'd till they were carried *intra Præſidia.* What *Grotius* ſays, *Cap.* 9. §. 16. is to be underſtood with Conſiſtency to what he advanceth in the forecited Place, where he treats the Subject expreſly, *Viz. De Jure acquirendi Bello capta*, and ſo doth *Voet. de Jure militari, Cap.* 5. §. 23. take the Matter, joining theſe Two Places of *Grotius* together. A little after he ſays, The *Dutch* made a ſpecial Regulation different from the common Rule: But that doth not alter the general Rule. So the naval Laws of *France* provide, That any of their Subjects Goods retaken from their Enemies after having been 24 Hours in their Hands, ſhall be good Prize. The Authority of *Molloy* doth alſo turn upon the Purſuers, and *Loccenius de Jure maritimo, Lib.* 2. *C.* 4. *N.* 4. is alſo of the ſame Mind. 2. There is no Shadow of Reaſon for Repetition of the Mony and Goods found aboard the Privateer, that had been given to him by Way of Ranſom: Becauſe, Agreements for Ranſom are lawful Tranſactions, whereby the Property of Things given in Ranſom become the Privateer's immediately, and want not to be declared Prize before a Court of Admirality when carried *intra Præſidia* as other Goods do. Both Lawyers and Caſuiſts agree, That ſuch Pactions with Enemies ought to be obſerved and fulfilled even after Peace, unleſs expreſly diſcharged by the Treaty. The Ranſom Brieve being an abſolute Security to the Ships ranſomed againſt all the Enemies Ships, as well as her that received the Ranſom, and the Purſuers having had the Benefit thereof; the Ranſom which is the Price of their Ships and Goods did belong to the Privateer, by the equitable Rule of a mutual Contract. 3. By the 6 *Anna Cap.* 13. for the better ſecuring the Trade of the Kingdom, it is ſtatuted, That all Prizes taken by any of Her Majeſty's Ships of War or Privateers, ſhall, after Condemnation, ſolely belong to the Takers without their being farther accountable for the ſame, and be diſtributed according to certain Rules by an Agent or Factor to be appointed for that End: And the Defender had *bona Fide* delivered the Ship and Cargo, after Condemnation, to an Agent whom they may purſue as accords.

Replyed for the Purſuers. 1. To take off the Inſinuation that Mony is *Res fungibilis*, and ſo periſheth upon Payment, it is offered to be proved, That the individual Species of Gold partly pillaged, and partly paid to the Privateer, were retaken from him in ſo much Specie of Gold: And it's having been once in the Captain of the Privateer's Pocket, cannot be a Ground to hinder Reſtitution to the Owner. The Property of a Prize ſeems never transferred to the Enemy till it be carried *intra Præſidia*, or otherways ſecured from Recovery out of their Hands. As to the Citation out of the Inſtitutions of *Juſtinian*, Lawyers obſerve, that at that Time, the Matter of Sea-capture was not ſo well aſcertained, as it came afterwards to be by the Law of Nations when Commerce increaſed. Beſides, the Word *ſtatim* there is to be underſtood *civiliter* when the other Requiſites concurred, that is when there was no Hope of Recovery left, which came to be determined by a certain Indication. *Grotius* gives his Opinion in Law, that Moveables *Dominum nondum mutarunt*, till they be taken *intra Præſidia*; and narrates only Matter of Fact concerning the 24 Hours, as the Rule in ſome Places. *Zieglerus* is indeed of another Opinion, but ſtands therein ſingular. *Voet.* again takes Notice of and rejects the Rule of 24 Hours obſerved in ſome Places, and approves the Conſtitution of *Holland*, whereby *nulla Temporis habita Ratione*, a Ship recovered from the Enemy before it was carried *intra Hoſtium Præſidia* ought to be reſtored to the Owners for a proportionable Reward to the Recoverers. *Molloy* doth plainly reprobate the 24 Hours, calling it a new Law againſt the ancient and modern Practice of the common Law: But is indeed not very diſtinct betwixt his Poſition, and his Caſes. The late *French* Conſtitution, making 24 Hours the Rule, argues that it was not determined before, at leaſt ſo doubtful that it wanted a Conſtitution. And where there is any Dubiety or Unfixedneſs as to the Rule, the Favour of Reſtitution, and that none of Her Majeſty's Subjects be inriched with the Loſs of others ought to predomine. As the Purſuers are thus founded in the general Argument: So this ſpecial Circumſtance differenceth them from the common Caſe, that the Privateer was taken not *in alto Mari*, but hovering upon the *Scottiſh* Coaſt, and ſo in a Manner within the Confines of Her Majeſty's Dominions, who is Sovereign of the narrow Seas; So that neither Hours nor Days could ſtate him without the Reach of Her naval Force. 2. It doth not alter the Caſe that the Ship was ranſomed; For the Goods pillaged and Twenty five Guineas taken out of the Skipper's Pocket fall not under the Ranſom-bill. Seing theſe are uſually taken away when the Ship is firſt ſeiz'd, and nothing is underſtood to have been ranſomed but what remained unpillaged; unleſs the Defender will prove that what was pillaged was expreſly ranſomed. As particular Perſons Goods plundered fall not under Contribution in the Caſe of *Jactus Navis levandæ Gratia*, but only what is given by common Conſent for the Safety of the Ship, *L.* 2. §. 3. *ff. ad L. Rhod. de Jactu*. And in this Caſe the Ranſom paid by Bill would indeed fall upon the Owners and Fraughters proportionably, but the Plunder would not, unleſs ſpecially pactioned. Again, even the proper Ranſom falls under Repetition: Becauſe the Purſuers conſented thereto only *Rebus ſic ſtantibus*. And albeit in the Caſe of *Jactus* in a Storm, the Owners Goods are thrown over with their Conſent, yet if they be fiſhed up by others or caſt aſhore, they muſt be reſtored to them: So the Purſuers conſented to the Ranſom as *minus Malum*, but not irreverſibly or abſolutely, ſo as they might not recover *Jure Belli*, what was thus transferred in a Caſe of Neceſſity. Suppoſe, in ſtead of paying the Ranſom, a Hoſtage had been taken till the Bill had been anſwered at *Dunkirk*, the Recapture of the Privateer with the Hoſtage aboard, would have exonered the Purſuers from Payment. Beſides, whatever Allies might pretend by the Capture, yet what is ſo recovered by Her Majeſty's own Subjects, who have a common Intereſt in weakning the Enemy, and preſerving their own, ought by the Rule of Fraternity to be underſtood done for the Benefit of the true Owners. The Law of Nations doth alſo diſtinguiſh betwixt what is thus recovered by private Captors, who ſail upon their own Charges, and Her Majeſty's Ships of War who (being maintained by the Publick and ſet out for a Safeguard to the Perſons and Goods of the State they belong to) to protect their Trade, muſt reſtore to the Owners what they recover from the Enemy, upon Payment of the allowed *Præmium*, commonly called Salvage Mony, *Voet. Comment. ad Pandect. Tit. de Captiv. & Poſtlim.* §. 4. and his Book *de Jure militari*, and *Molloy* in the forecited Place. Now the Defender is more particularly bound to Reſtitution: Becauſe, he was ſpecially commiſſioned and ſent down by the Admirality-board, to protect the *Scottiſh* Coaſt, to prevent the Enemy's making Seizures there; and it were againſt Reaſon for him to pretend to make Benefit of the Subject of his Truſt. 3. The late Statute for incouraging Men of War and Privateers to be diligent in ſcouring the Coaſts, and protecting the Trade, gives the Captors the Whole of any Seizures they make; whereas before they had only a Proportion and compted to the Publick for the reſt: But then that is the whole of what properly was the Enemy's, *Viz.* The Ship and Armature, the proper Subject of Diviſion formerly betwixt the Government and the Captors, without Prejudice to any Subjects Right to claim Reſtitution of their own Goods.

Duplyed for the Defender. That the Privateer was taken within the narrow Seas, doth not alter the Caſe: For the Reward allowed by Law to the Queen's Ships, reſpects chiefly Prizes taken upon the Coaſts of *Great Britain*, the chief Reſort of Privateers. Privateers would be but a ſorry Prize, if the Goods taken on board them did not belong to the Captors: Seing all the World know, that Privateers ſet out very ill furniſhed, and can have nothing aboard upon our Coaſt, but what they have taken from the Queen's Subjects, *Grotius Lib.* 3. *C.* 9. §. 13. ſays, *Paſſim tradunt Morum periti Res mobiles poſtliminio non redire.* 2. Captain *Collier*'s Commiſſion to protect the Coaſts, and defend the Merchants from Privateers, doth not infer that any Thing recovered by him that formerly belonged to the Merchants ought to be reſtored, unleſs he could ſuppoſe what cannot hold, *Viz.* That Captain *Collier* lay under ſuch an Obligation to protect all the Merchants from being taken with Privateers, that he was liable for their being taken. It's acknwledged that he was bound to do ſuch Diligence as Law requires in other Commanders of Ships: But it will not follow, That, if, without his Fault, Ships were taken, and the Property of the Merchant Goods or Mony ſtated in the Perſon of the Privateer by Seizure or Tranſaction; ſuch Goods or Mony re-taken by him, ſhould not follow the common Fate of Goods taken from the Enemy. If it were true, That Goods re-taken from an Enemy can belong to Ships of War, all Debates about how long Goods muſt be in the Poſſeſſion of the Enemy before they become their Property, are uſeleſs; or at leaſt can bind none but Privateers or private Parties, which is abſurd in the Opinion of all Lawyers that ever wrote.

The Lords found, That the Property of the Mony and Goods which were taken from the Purſuer by the Privateer, and not contained in the Ranſom-bill, remained ſtill with the Purſuer; and therefore that the Privateer having continued upon the Coaſt of the Kingdom, and been taken there by the Defender as Commander of one of Her Majeſty's Ships of War, within the Bounds of his Cruiſe, he ought to reſtore ſuch Mony and Goods to the Purſuer. But delay'd to adviſe the Debate as to the Contents of the Ranſom-bill.

Eodem Die. *The Earl of* Dalhouſie, *againſt Lord and Lady* Hawley.

IN the Reduction and Improbation at the Inſtance of the Earl of *Dalhouſie* againſt the Lord and Lady *Hawley*, mentioned *ſupra* 13 *November* 1712, the Purſuer call'd for Production of an Adjudication of the Eſtate of *Dalhouſie*, led at the Inſtance of *William Paton* Merchant in *Edinburgh*, contained in a Bond granted to him by *William* Earl of *Dalhouſie* the Lady *Hawley*'s Father, whom the Purſuer repreſents as Heir-male, upon a Decreet *Cognitionis Cauſa*, againſt *George* Earl of *Dalhouſie*, as charged to enter Heir to the Granter of the Bond, which Adjudication was purchaſed from *William Paton* by Earl *George*'s Factor, with the Rents of the Lands adjudged that were *in Hæreditate jacente*, and a Diſpoſition taken thereof blank in the Aſſigny's Name, that continued in the Factor's Hand till the Year 1701, after Earl *George*'s Death, when *William* laſt Earl of *Dalhouſie*, Brother to Earl *George* and to the Lady *Hawley* audited the ſaid Factor's Accompts, and allowed to him what was paid to *William Paton* for the Diſpoſition, and filled up his own Name in the Blank. The Lady *Hawley* claimed Right to this Adjudication, as ſerved Heir of Line to Earl *William* her Brother.

The Purſuer inſiſted to reduce the Adjudication upon this Ground, That the Creditor Adjudger having got Payment out of the very Subject adjudged, his Debt and Diligence became extinct.

Anſwered for the Defenders. 1. She the Lady *Hawley* had a Bond or Diſpoſition of Tailzie from her Brother Earl *William* laſt deceas'd; whereby, failing Heirs of his Body, he is bound to reſign the Eſtate in Favours of her *nominatim*, which plainly excludes the Purſuer's Title. In regard the Granter having been more as three Years in Poſſeſſion, the Purſuer who paſt him by, is liable to pay and fulfil his Debts and Deeds in the Terms of the Act 24 *Parl.* 1695: Conſequently cannot quarrel the Right ſtanding in the Lady's Perſon. Now *fruſtra petit qui mox eſt reſtituturus.* And *Lites non ſunt multiplicandæ.* 2. No Man hath Right to declare an Adjudication extinct, but he that hath Right to the Reverſion, who either muſt be a Creditor, or Heir to the Reverſer: And the Purſuer hath none of theſe Capacities. He doth not pretend to be a Creditor, nor is he Heir to the Reverſer: For ſince Earls *George* and *William* died in the State of Apparency, without entering Heir in the Eſtate to their Father the Debtor, upon whoſe Bond the Adjudication was led; the acquiring the Adjudication for the Behoof of Earl *George* in the Year 1691, made no Confuſion or Conſolidation of the Reverſion with the Property, and could not extinguiſh it in his Perſon. Nor doth it alter the Caſe, that the Adjudication was acquired with the Rents *in Hæreditate jacente*: For theſe being uplifted by Earl *George*'s Factor, and become his Property as apparent Heir before Acquiſition of the Adjudication, the Factor's applying the ſame to purchaſe the Adjudication, could no more extinguiſh it, than if Payment had been made out of Earl *George*'s other Effects. Becauſe, albeit an apparent Heir's Intromiſſion with the Rents of his Predeceſſor's Eſtate might infer a Behaviour, and ſubject him to the Payment of his Predeceſſor's Debt; yet his applying the Rents to acquire an Adſudication upon the Eſtate, could not hinder that Acquiſition to ſubſiſt in his Perſon a good Title to poſſeſs the Eſtate by, as if he had been a Stranger, to exclude a remoter apparent Heir; tho' it did not hinder Creditors to redeem within the Legal.

Replyed for the Purſuer, 1. He hath good Intereſt to reduce and extinguiſh the Adjudication, becauſe ſerved Heir to Earl *William* his Couſin the Granter of the Bond on which it was led, and ſo perſonally liable for the Debt. Nay, further, ſince the Purſuer ſtands infeſt in the Eſtate adjudged, he hath good Title to reduce all real Rights affecting the ſame, whatever Force the Tailzie may have as a perſonal Obligement againſt him. 2. An apparent Heir hath no Property in the Rents, but only a Faculty to continue his Predeceſſor's Poſſeſſion, and intromet when no better Right competes. Beſides, Earl *George* having renounced to be Heir in Favours of *Paton*, who adjudged *Hæreditatem jacentem* in Satisfaction of his Debt, the Eſtate and Rents of it belong'd to him till he was paid, and ſimply if not paid within the Legal; and *Paton* being paid by the Factor out of theſe Rents, the Adjudication became extinct. The Diſpoſition of the Adjudication was in that Caſe no more but an Inſtruction and Voucher of the Payment whereupon Extinction followed *ipſo Jure*; or like an Aſſignation to the Debtor of his own Bond: And Earl *George* being *paſſive* liable to *Paton* the Creditor, by his Intromiſſion with the Rents as apparent Heir, Payment of the Debt by the Earl's Factor did extinguiſh it *ipſo Facto*.

The Lords found, That the Purſuer being Heir to the Granter of the Bond, on which the Adjudication was led, and ſerved in ſpecial to him in the Eſtate adjudged; hath good Intereſt to extinguiſh the Adjudication by Payment, notwithſtanding of the Diſpoſition to the Defender by her Brother the laſt Earl *William*, without Prejudice to her uſing the ſaid Diſpoſition or any other Right as accords. And found, That the Adjudication being led on a Decreet *Cognitionis Cauſa*, Earl *George*'s Factor's purchaſing and retiring it by the Rents of the Lands adjudged which were *in Hæreditate jacente*, and Earl *William*'s admitting and accepting that Article in the ſaid Factor's Accompts, to exoner him of his Intromiſſions with theſe Rents, is relevant to extinguiſh the Adjudication by Payment.

February 17, 1713. *Mr.* John Kennedy *of* Kilhinzie *Advocate, againſt Sir* James Agnew *of* Lochnaw, *and Others.*

MR. *John Kennedy*, as Aſſigny by his Father to a perſonal Bond and Inhibition thereon, granted to the Cedent by the late Earl of *Caſſills*, purſued Reduction *ex Capite Inhibitionis*, of ſeveral Rights of Superiority granted by the Earl to Sir *James Agnew* and Others, completed by Infeſtment.

Anſwered for the Defenders. No Proceſs can be ſuſtained againſt them at the Inſtance of the Purſuer, who is only a Creditor to their Author by a perſonal Bond. Becauſe, 1. If a removing from Poſſeſſion only cannot proceed without an active Title by Infeſtment, far leſs ſhould real Rights clothed with Infeſtment, be removed and taken out of the Way by a perſonal Creditor, conform to the Rule, *Unumquodque diſſolvitur eodem Modo quo colligatur.* 2. As no heretable Right whereupon Infeſtment hath paſt, can be arreſted till it be made moveable, for that till then the Arreſter cannot inſiſt in a Furthcoming: So *a Paritate Rationis*, a perſonal Creditor cannot reduce real Rights, becauſe he hath no Right to the Subject conveyed. 3. Inhibition being only a prohibitory Diligence, to hinder the Perſon againſt whom it is ſerved to alienate Heretage, to the Inhibiter's Prejudice, the Inhibiter cannot reduce any ſuch Alienation, till he hath affected the Subject by ſome real Diligence: Becauſe till then he can qualifie no Prejudice. And Inhibition at the Inſtance of one perſonal Creditor, doth not hinder another perſonal Creditor by bond before Inhibition adjudging thereafter the common Debtor's Eſtate, to be preferr'd to the Inhibiter, *Stair, Inſtit. Lib.* 4. *Tit.* 50. §. 19. *Quia ſibi vigilavit*: So that Reduction at ſuch an Inhibiter's Inſtance would be *Vos non Vobis*, &c. 4. If a perſonal Creditor ſhould be allowed to reduce *ex Capite Inhibitionis* Rights completed by Infeſtment, the Property of Heretage would hang *in Pendenti*, there would be *Dominium ſine Domino*, till the Inhibiter were pleaſed to make up a Title, Vaſſals could not be entered, or the Superior would want a Vaſſal, and the Land be either laid waſte, or the Rents ſuffered to periſh in the *interim* in the Tenants Hands: Seing the Reducer hath no Title to poſſeſs; the Perſon whoſe Right is reduced, is barr'd by the Reduction; and the common Debtor denuded in his Favours could not return to poſſeſs.

Replyed for the Purſuer. His Inhibition intitles him to reduce the Rights in the Defenders Perſons, tho' Infeſtment hath followed thereon. Becauſe, 1. The *Act* 119. *Parl.* 1581, bears, That Inhibitions and Interdictions are uſed againſt the Liedges for reſcinding Contracts, Infeſtments, *&c.* and Preſident *Spotſwood, Page* 178, obſerves a Prattick betwixt *Monteith* and *Halyburton*, where Inhibition was found to give one Intereſt to reduce any poſterior Deed in Prejudice thereof, albeit Infeſtment had followed upon that Deed. Thus in parallel Caſes, Reduction *ex Capite Lecti* is competent to perſonal Creditors, *November* 25, 1669, the Creditors of *Cowper* againſt the Lady *Cowper*: And Reduction upon the Acts of Parliament 1621 and 1696, concerning Bankrupts, may be purſued by any Creditor. 2. The Nature and Stile of Inhibition, prohibites not only perſonal Alienations, but alſo the granting private and publick Infeſtments: Conſequently Law affords Action for reducing ſuch Rights granted *Lege prohibente.* 3. It would expoſe Inhibiters to a vaſt Inconveniency, to oblige them to expede Adjudications before they know the Import and Effect of their Inhibition, on which all their Intereſt in the Subject depends: But it is more agreeable to the Rules of Reaſon, firſt to bring back the Property to the Debtor by Reduction, and then to adjudge.

Duplyed for the Defenders. It is true, apparent Heirs without Service or Infeſtment, have Intereſt to reduce Rights whereupon Infeſtment hath followed, ed, either *ex Capite Lecti*, or upon the Head of Idiotry. Becauſe, 1. They have a preſent Prejudice in being excluded from their poſſeſſory Right, which otherwiſe would intitle them to Mails and Duties, and ſo is *aliquale Jus in Re.* 2. When the heretable Right is reduced at an apparent Heir's Inſtance, there is no *Vacuum in Dominio*, but the Reducer *ſuſtinet Perſonam Defuncti.* 3. Till the heretable Right granted be removed, he cannot ſerve Heir: Since the Inqueſt cannot return Anſwer to that Head of the Brieve, That the Perſon to whom he craves to be ſerved died laſt veſt and ſeiſed. None of which Reaſons take Place in the Preſent Caſe of a Reduction at the Inſtance of a perſonal Creditor, *ex Capite Inhibitionis*, who hath no real Prejudice till he acquire *Jus in Re*, which he may do in the Courſe of Law, without any Neceſſity of a previous Reduction; and ſo long as he declines to make up a Title to the Subject, it were hard to oblige Third Parties to open their Charter Cheſts to him by Production of their Writs. The Alledgeance, That perſonal Creditors may reduce real Rights upon the Act of Parliament 1621, is redargued by the late Deciſion, *June* 24, 1709, *Brown* younger of *Thornidykes*, againſt *Brown* his Brother.

The Lords found, That the Inhibition is a ſufficient Title to reduce the Inſeftments granted by the Earl to the Defenders.

Eodem Die. Jean Livingſton *and Mr.* William Tait *her Husband, againſt* Robert Forreſt *Merchant in* Edinburgh.

IN the Reduction *ex Capite Inhibitionis*, at the Inſtance of *Jean Livingſton* and her Husband, againſt *Robert Forreſt*: The Lords ſuſtained an Inhibition upon a general Charge to enter Heir, given by Mr. *David Lyon* Writer to the Signet, to *John Robertſon*, apparent Heir to *Gilbert Robertſon* of *Whitehouſe*, in ſo far as concerned Three thouſand and fifty Merks of Principal, libelled in the general Charge to be due by *Gilbert Robertſon* to Mr. *David Lyon*, by ſeveral Bonds produced; and in ſo far as concerned the Annualrents of the ſaid Sum, ſince the Date of the Execution of the general Charge; but not as to preceeding Annualrents, nor yet as to the Penalties in the Bonds.

Albeit it was alledged for the Defender, That Inhibitions do regularly proceed upon liquid Obligements to pay or perform, granted by, or upon a depending Proceſs againſt the Perſon inhibited: Whereas a general Charge to enter Heir, is no Obligement of the apparent Heir, nor a Dependance againſt him, but a preparatory Step to an Action upon the paſſive Titles, without any Concluſion of Payment.

In Reſpect it was anſwered. It is true, when Inhibition is uſed upon a general Charge, it doth not ſuffice, that the Letters of Charge bear only in general, That the Charger had diverſe and ſundry Claims; but they ought to mention the Debt, for certiorating the Liedges, as to the Sums in Prejudice whereof they were not to contract with the Inhibited Perſon, which is done in this Caſe. 2. *John Robertſon*, having, upon the Charge to enter Heir preceeding the Inhibition, refuſed to renounce, and ſuffered thereafter a Decreet upon the paſſive Titles, to paſs againſt him, he is underſtood to have been Heir *retro* from his Predeceſſor's Death, and the Inhibition raiſed and execute againſt him, is the ſame in Law as if it had been raiſed upon his own perſonal Bond: He being in all Reſpects *una & eadem perſona cum Defuncto.* Therefore it was, That *July* 5, 1623, *Kirkwood* contra *Belſhes*, the Lords ſuſtained an Inhibition againſt the apparent Heir, tho' neither charged to enter, nor decerned upon the paſſive Titles, in Regard he entred Heir *ex poſt Facto*. 3. A Charge to enter Heir, is conſidered as the Commencement of a Proceſs; in ſo far as it renders the Matter Litigious, and interrupts Preſcription;

tion. Again, if a Creditor who hath charged his Debtor's apparent Heir to enter, could not ſecure himſelf by Inhibition, the Charge would alarum the Heir, and put him upon Methods to diſappoint it. 4. It is more convenient to uſe Inhibition upon a general Charge, than upon a Summons of Conſtitution: Partly, for that the Inhibition upon a Summons would fall therewith if the Summons ly over Year and Day without inſiſting; Partly, becauſe a a general Charge may be executed againſt an apparent Heir within the *Annus deliberandi*, and Inhibition thereon ſecures againſt his Deeds in the *interim*.

February 18, 1713. Mary *Counteſs of* Caſſills, *againſt the Earl of* Ruglen.

THE Counteſs of *Caſſills*, as Donatar of the Taxtward-duties of ſome Lands holden by the Earl of *Caſſills* of the Crown, purſued the Earl of *Ruglen* as Intrometter with the Rents of the ſaid Lands the Years libelled.

Alledged for the Defender. Any Intromiſſion he had being as Tutor to the Earl of *Caſſills*, he could not be liable to pay the Taxtward-duties, unleſs he had as much of his Pupil's Rents in his Hand, as would ſatisfie the ſame. Becauſe, 1. The Caſualties gifted being *Debitum Fundi* and not *Fructuum*, Intrometters with the Rents are not properly liable but the Ground: As preferable Annualrenters will have no Action of Repetition againſt Intrometters with bygone Years Rents, but only a poinding of the Ground, which is reſtricted by Law even againſt Tenants, to the Value of certain Terms Rents. 2. The Defender's Intromiſſion was neceſſary, which his Office obliged him to, and alſo to apply the ſame to the Suſtenance of his Pupil, Payment of his Debts, and his other neceſſary Exigences: Nor could the Purſuer have repeted from the Creditors whom the Defender paid, had theſe arreſted or done other Diligence, according to the Nature of their Rights, and as little can ſhe repete from the Defender.

Anſwered for the Purſuer. The Taxtward-duties being *Debitum Fundi*, affect all Intrometters, as well as the Ground. And as a Maſter hath Hypotheck upon the Fruits for the current Years Rent, much more is this competent to the Superior for his Feu-duty or other Services, contained in the *Reddendo* of his Vaſſal's Charter. Now, the Purſuer inſiſts only for the Taxtward-duties of the ſeveral Years intrometted with by the Defender, who cannot pretend to be free, except *in Quantum intus habet* of the Rents not diſpoſed of for his Pupil's Uſe: Seing he as Tutor could not be ignorant of the Taxtward-duties belonging to the Sovereign, which are preferable to all Creditors, and *bona Fide* diſpoſe thereof to other Uſes.

The Lords found, That the Earl of *Ruglen* having intrometted as Tutor to the Earl of *Caſſills*, is no further liable to the Purſuer, than for what of the Pupil's Rents was in his Hands.

Eodem Die. Thomas Gordon, *Son to the deceas'd* Thomas Gordon *Writer to the Signet, againſt the Duke of* Gordon.

THE Duke of *Gordon* having granted a Bond of Corroboration of other two Bonds to *Thomas Gordon* and his Curators, for the accumulate Sum of Seventeen thouſand three hundred and one Pounds *Scots*, with this Proviſion, *In caſe his Grace ſhould betwixt and the Term of* Martinmas 1707, *make appear and inſtruct, That he had at any Time made Payment of any Part of the Sums, for which the Bond was granted, the ſame ſhould be diſcompted, and allowed* pro tanto; *without Prejudice of any Action of Recourſe competent in Law for Repetition of any Part of the Sums above-mentioned; even after elapſing of* *the ſaid Term: Declaring nevertheleſs, That the above Proviſion ſhould not afford or furniſh any Ground of Suſpenſion after the ſaid Term.* *Thomas Gordon* charged the Duke to pay the Remainder of the ſaid Sum, after Deduction of partial Payments, who ſuſpended upon this Ground, That he made ſome Payments before the Date of the Bond of Corroboration; and for inſtructing thereof, produced ſeveral Writs.

Alledged for the Charger. No Payments of the Sums corroborated, that were not inſtructed before *Martinmas* 1707, can in the Terms of the Bond be now a Ground of Suſpenſion. Becauſe *Pacta dant Legem Contractui*, unleſs where they are *contra bonos Mores*, or reprobated by our municipal Law: Which cannot be pretended in this Caſe. For why may not a Man oblige himſelf not to ſuſpend upon ſuch Reaſons? Nay, ſince our Law doth not allow Compenſation to be received after Decreet, may not this very well be the Ground of a Stipulation? 2. Albeit Law allows Purgation of legal Penalties, after elapſing of the pactioned Term, that holds not in the Caſe of conventional Penalties incurred; Eſpecially ſuch as do irritate Property or heretable Rights. 3. A Bond of Corroboration doth naturally ſtop Suſpenſion upon preceding Grounds of Compenſation, which a Party is underſtood to have renounced by the granting ſuch a Bond, *June* 28, 1672, *Murray* contra *Spalding*; and much more ſhould this hold, where the Reaſon of Suſpenſion is expreſly excluded by Paction.

Anſwered for the Suſpender. 1. Albeit juſt and equal Pactions are to be regarded, captious and inſidious Pactions are not, *L.* 7. §. 16. *ff. de Pactis.* Nor was the Compenſation here renounced, but only it was provided, That nothing ſhould furniſh a Ground of Suſpenſion, ſave legal Inſtructions of Payment at the Term above-expreſt. The refuſing ſuch Grounds of Compenſation *hoc Statu per Modum Exceptionis*, would render them ineffectual: For, being conſtituted allennerly by holograph Writs, they would be excluded by Preſcription, if purſued *Via Actionis*; and *iniquum eſt aliquem locupletari cum alterius Jactura.* No Diſtinction is to be put betwixt Penalties concerning Heretage, and theſe concerning Moveables and Contracts: Since in all moveable Bonds, the Penalties, when exceeding Damage and Intereſt, are conſtantly reduced thereto; and Mr. *Gordon* can qualifie no Prejudice by the not producing thoſe Grounds of Compenſation ſooner. 3. The Deciſion cited for the Charger, differs from the preſent Caſe: For, there the Bond of Corroboration was taken with an expreſs View to ſhun the Compenſation; whereas here it was ſpecially pactioned, *That no Suſpenſion ſhould be offered, but upon inſtructing Payments received.*

The Lords allowed the Compenſation proponed by his Grace by Way of Suſpenſion; notwithſtanding the Writs were not offered before the Term of *Martinmas* 1707.

February 19, 1713. William Blair *of that Ilk, againſt Mr.* Adam Cuninghame *Advocate.*

THE Laird of *Blair* having purſued Mr. *Adam Cuninghame* for Exhibition and Delivery of Writs contained in an Inventory, bearing at the Bottom theſe Words, *I Mr.* Adam Cuninghame *Advocate, grant me to have received the Writs above-mentioned from* Mungo Campbell *of* Burnbank, *and I oblige me to reproduce them to him upon Demand; In witneſs whereof, I have ſubſcribed theſe Preſents at* Edinburgh *the laſt Day of* July, *One thouſand ſeven hundred and ſix,* A. Cuninghame.

Alledged for the Defender. 1. The Receipt and Obligation is null, as neither Holograph, nor mentioning the Writer's Deſignation, nor yet ſigned before

Witneſſes: For not being a Receipt granted to any Clerk's Office, nor yet in the ordinary Form of a Receipt of Papers, but in the Form of an Obligation; it cannot be ſuſtained, unleſs it were ſolemn according to Law. 2. Seing Papers paſs between Clients and Advocates without Receipts, the Receipt in Queſtion hath no more Force, than if it were prov'd by the Defender's Oath that he received theſe Writs: And his Receipt could not oblige him to more, than to purge himſelf by Oath, That he had not fraudfully put them away, nor ſuppreſs'd them. It ought to be preſumed, That Writings not in a Lawyer's Hand are returned; Becauſe Perſons are not in Uſe to give Receipts for their Writs to their Lawyers. And if it were otherwiſe, Lawyers were in a miſerable Condition; it being hard for them to inſtruct the returning of all Writs that might be prov'd to have been in their Hands in the Courſe of their Imployment.

The Lords having conſidered the Defences, and particularly that the Receipt is not Holograph, wanting Writer's Name and Witneſſes, and not granted to a Perſon in a publick Office; they found the Defender no further liable for the Papers in the Inventory whereto the Receipt is ſubjoined, than to give his Oath what he knows concerning them, what became of them, and how they were diſpoſed of.

Eodem Die. Iſobel Allan, *Relict of* James Cleghorn *Merchant in* Dalkeith, *againſt his Creditors.*

I*Sobel Allan* having moved an Edict before the Commiſſaries of *Edinburgh*, for confirming her ſelf Executrix Creditrix to *James Cleghorn* her Husband, for the Proviſion in her Contract of Marriage; ſeveral of the Defunct's Creditors craved to be conjoined in the Office: But the Commiſſaries, conform to their uſual Cuſtom, preferr'd the Relict to them. The competing Creditors brought the Cauſe by Advocation before the Lords, where it was alledged for the Relict, 1. Contracts of Marriage being *uberrimæ Fidei*, and Wives Proviſions alimentary, and often remuneratory for the Tocher, which goes to the Husband, they ought to be privileged. If it were otherwiſe, the Relict would be poſtponed to all other Creditors: Becauſe, her being *ſub Poteſtate Viri*, diſables her, during the Marriage, to do any Diligence againſt her Husband's Perſon or Eſtate, both which ly expoſed to the Diligence of other Creditors; So that ſhe muſt be either firſt or laſt. Upon this Account it is, that the Husband's Poſſeſſion is reckoned the Wife's Poſſeſſion, in Order to make a baſe Infeftment in her Favours effectual. 2. By the civil Law, the Wife was preferable to all her Husband's Creditors, and had a tacit Hypotheck in all his Means for her Tocher to be reſtored, *L.* 12. *C. Qui potiores in Pign.* And our Dowries come in Place of the Tochers, ſhould be alike privileged. 3. The ancient Deciſions of the Seſſion, and the conſtant Cuſtom of the Commiſſaries, give the Relict a Preference upon her Contract of Marriage.

Anſwered for the Creditors. 1. As a Wife comes in for a Liferent-infeftment only conform to the Date and Regiſtration; ſo ſhe cannot claim any Privilege for any other Liferent-proviſion in her Favours. For otherwiſe, the Widows of Merchants and Tradeſmen, whoſe Subſtance conſiſts in Moveables, ſhould find more Favour in Law, than Country Ladies who generally bring great Portions with them, which is abſurd. It was no Privilege, but a Piece of common Juſtice, That the Husband's Poſſeſſion was reckoned the Poſſeſſion of the Wife, who could poſſeſs no other ways till her Husband's Death. Law hath ſecured her in a Share of her Husband's free Moveables, and a Terce of his Lands after his Death: But if ſhe take her ſelf to conventional Proviſions, ſhe deſerves no Privilege in Competition with Creditors, which is regulated by the Maxim, *Prior Tempore, potior in Jure.* It is groundleſs to pretend that ſhe was not *valens agere* by her Contract *ſtante Matrimonio*: For it is an ordinary Clauſe in Contracts of Marriage, That Diligence may paſs at certain Friends Inſtance for Implement in Favours of the Wife, and where that is omitted, the Lords, *Cauſa cognita*, if the Husband is *vergens ad Inopiam*, or the like, will authorize Diligence in the Wife's Name for her Security. 2. The Wife, who, by having a Communion of Goods, and being in Society with her Husband, is *Particeps utriuſque Fortunæ*, ought to ſuffer by the diminiſhing of his Eſtate, as ſhe reaps Benefit by the Increaſe of it, according to the Rule, *Ejus eſt Incommodum, cujus eſt Commodum*. 3. To allow ſuch a Privilege to Wives, would tempt them to ſpend and waſte as faſt as their Husbands gain, knowing, that (come what will) they will get all their ſwinging Proviſions, if there be ſo much left; and, were it not unreaſonable to prefer a Woman that helps to diſſipate her Husband's Means, to his juſt and lawful Creditors, who are ignorant of his Circumſtances. 4. Who would deal or trade with a Merchant, if a latent Contract between him and his Wife could ſweep away all at his Death, to the Prejudice of third Parties, who could not have Occaſion to know thereof? Therefore, tho' the civil Law prevail much in the *Netherlands* and in *Germany*, the Wife has no Preference for her Dowry, *Gudelm. de Jure Noviſſ.* 4, 9, 18. *Vinn. Comment. ad* §. 29. *Inſt. de Action.* And this holds generally where-ever the Communion of Goods between Man and Wife obtains, as it doth in *Scotland*. 5. The Commiſſaries Practice in this Matter, and ſome few concurring Deciſions of the Lords, that proceeded without Debate, could not hinder them to correct a Cuſtom which had neither Law nor Reaſon to ſupport it: And ſo it is, that after a full and learned Debate, *February* 17, 1688, *Keith* contra *Leith*, the Lords found no Preference due to a Relict.

The Lords found, That *Iſobel Allan* the Relict had no Preference to the other Creditors, but according to the Priority of her Diligence: And therefore remitted to the Commiſſaries, with this Instruction, *To determine accordingly.*

Eodem Die. John White *late Baillie of* Kirkaldy, *againſt* Daniel Reid.

IN the Competition for the Mails and Duties of the Lands of *Birkhil*, betwixt Baillie *White* and *Daniel Reid*; The Lords having *January* 10, 1712, found, That the Baillie, as deriving Right to an Adjudication of the ſaid Eſtate, by Diſpoſition from Sir *David Arnot*, after his ſingle and liferent Eſcheat was gifted and declared in Favours of Sir *Patrick Scot Daniel Reid*'s Author, could not quarrel the Gift upon the 125 *Act*, 12 *Parl. Ja.* 6. as ſimulate and null by the Donatar's allowing the Rebel to continue in Poſſeſſion. Baillie *White* obtained a ſecond Gift of Sir *David*'s Eſcheat, and inſiſted for Preference upon the foreſaid Ground, That the Gift to which *Daniel Reid* pretends Right, was ſimulate and null by the ſaid Act 125; in ſo far as Sir *Patrick Scot* Obtainer thereof, and Sir *William Bruce* his Aſſigny, uſed no Diligence thereupon, but ſuffered Sir *David* the Rebel to poſſeſs his Lands of *Pitlethy* for ſeveral Years.

The Lords repelled the Qualification of Simulation; in Reſpect Sir *William Bruce* the Aſſigny did proſecute his Right, ſo far as to obtain Poſſeſſion of the great Part of the Rebel's Eſtate, by Virtue of the Gift and other Rights in his Perſon: And found the Rebel's continuing to poſſeſs a ſmall Part of the Eſtate at a Diſtance from the reſt of it, is not relevant to infer Simulation.

February 20, 1713. Theodore Moriſon *of* Bognie, *againſt the Earl of* Levin.

IN the Reduction and Improbation at the Inſtance of *Bognie*, againſt the Earl of *Levin*, for ſweeping away all Rights affecting the Eſtate of *Frendraught*: The Lords, upon a Report made by the Lord *Arniſtoun*, found, 1. That a Decreet of Appriſing recovered from a Third Party, and produced *ad Modum Probationis* in a Decreet of Conſtitution, againſt one as charged to enter Heir in general, was not to be conſidered as a Ground and Warrant of the Decreet. So that in a Reduction and Improbation of the Decreet of Conſtitution, and an Adjudication following thereon, the Adjudger was not bound to produce that Appriſing which was the Right of a Third Party, in which the Adjudger had no Intereſt: And therefore the Lords refuſed to grant Certification againſt the Decreet of Appriſing. 2. The Lords refuſed to grant Certification againſt a general Charge to enter Heir, with the Executions thereof after 20 Years, conform to the Deciſion, *February* 18, 1675, *Brown* contra *Hume*. As after ſo long Time there is no Neceſſity of producing a Summons of Adjudication with the Executions thereof.

Eodem Die. William Grierſon *of* Bargaton *Supplicant*, *againſt the Magiſtrates of* Dumfries.

UPon adviſing a Supplication preſented by *William Grierſon*, craving an Order to the Magiſtrates of *Dumfries*, either to let him at Liberty out of their *Priſon*, where he lay incarcerated at the Inſtance of *John Kennan* Baillie, and *John Rae* Merchant in the ſaid Burgh, or to modify an Aliment to him payable by the ſaid *John Kennan* and *John Rae*, and take Security for the ſame in the Terms of the *Act* 32. *Par.* 1696: The Lords ordained the Magiſtrates, either to modify an Aliment to the Priſoner, payable by the Perſons who did incarcerate him; or to aliment him themſelves. For the Lords thought, That Magiſtrates had not, by the ſaid *Act* of *Parliament*, a diſcretionary Power to liberate or detain as they thought fit, a Priſoner, whom the Creditor or Perſon at whoſe Inſtance he was committed to Priſon declines to aliment; but behoved either to aliment ſuch a Priſoner themſelves, or let him go free.

February 28, 1713. *Mr.* Alexander Duncan *of* Lundy, *againſt* William Innes *Writer to the Signet*.

IN a Competition for a Sum due by *John Scrimzeour* of *Kirktoun* betwixt the Laird of *Lundy*, as having Right thereto by Aſſignation from *Kilmahew* the Creditor, and *William Innes*, who, after Intimation of *Lundie*'s Aſſignation, obtained another Aſſignation from *Kilmahew* to the ſame Mony. At calling of the Cauſe before the Lord *Polwarth* Ordinary, *William Innes* having objected againſt the Intimation of *Lundie*'s Aſſignation that it was null, as wanting ſubſcribing Witneſſes in the Terms of the Act of Parliament 1681; and the Objection being ſuſtained; *Lundie* procured from the Notary a new Inſtrument of Intimation of the ſame Date with the former duly ſigned by him, and the Witneſſes deſigned in the firſt Intimation, who were willing to depone upon the Verity of the Intimation.

Alledged for Mr. Innes. *Lundie*'s firſt Inſtrument of Intimation having been regiſtred and judicially produced, and an Interlocutor paſt thereupon, there was a *Jus quæſitum* thereby to Mr. *Innes*, which could not be taken away by the Notarie's giving a new more formal Inſtrument. The Fact of intimating and taking Inſtrument before Witneſſes, is not the eſſential Solemnity, but the Inſtrument it ſelf duly ſigned by a Notary and Witneſſes. And no Body ought to take an Inſtrument from a Notary till it is ſigned *de recenti*, for fixing the Facts of Solemnity in the Memory of the Witneſſes. Again, it were as reaſonable to allow the Intimation and Solemnities to be proved judicially by Witneſſes: As to allow the Defect of the Inſtrument in Queſtion to be ſupply'd by any new Deed of the Notary and Witneſſes.

Anſwered for Lundie. Albeit the firſt Intimation was regiſtred thro' Inadvertency, that could not alter the Caſe: Seing Law required it not to be regiſtred; and it was inſerted in the Extract only becauſe indorſed on the Aſſignation.

The Lords preferred Mr. *Innes*, in reſpect the laſt Inſtrument was not produced till after the firſt was regiſtred, and an Interlocutor in the Action founded upon it.

June 5, 1713. *The Duke of* Roxburgh *againſt the Magiſtrates, Town-Council and Community of* Dunbar.

IN the mutual Declarators, one at the Inſtance of the Duke of *Roxburgh* againſt the Town of *Dunbar*, concluding a Declarator of Property of the Links of *Broxmouth*, *uſque ad Mare*, free of all Servitude of Paſſage; and the other at the Town's Inſtance againſt the Duke, concluding, That it ought to be found and declared, That they had Right to all High-ways through the Links of *Broxmouth*, poſſeſs'd by them paſt Memory of Man, and to ſtop the Incloſure by a Dike his Grace was building: The Lords, by their Interlocutor *February* 19 laſt, found, *That no publick Way can be made upon the Duke's Property without his Conſent, or the uninterrupted Preſcription for Fourty Years. But found it prov'd, That when by high Winds Fiſhers on that Coaſt cannot make* Dunbar *Harbour with their Boats, they are in Vſe of landing on the Duke's Ground, and the Liedges of leading Fiſhes and Neceſſaries for fiſhing to and from* Dunbar *and the neighbouring Country through that Ground, upon Payment of Eight Penies* Scots *for the loaded Horſe, and Sixteen Penies for the loaded Cart; And therefore declared the Duke's Property with the ſaid Quality, That there ſhould be ſtill Acceſs to the Liedges for paſſing through the ſaid Ground, for the ſaid Ends, for Payment of the ſaid Duties, and aſſoilzied from the Town's Declarator accordingly.* It was obſerved at adviſing, That in High-ways through a private Subject's Ground, the Crown acquires the Property of the Road, which makes the Preſcription of Fourty Years neceſſary. And it might prove inconvenient, ſhould every Uſe of going through a private Man's Ground conſtitute a High-way.

The Town of *Dunbar* reclaimed againſt this Interloquitor, upon the Grounds following, 1. Fourty Years Preſcription is not neeeſſary to the Conſtitution of a High-way: Becauſe, That being *Juris Gentium*, the Rules concerning it fall not under Statutes made concerning Preſcriptions of Obligations, Property, or Servitude. And tho' a High-way may be particularly aſſign'd, meaſured out by the civil Magiſtrate, where no Way formerly hath been; yet the Original of all High-ways is *Vtilitas*, *juſti prope Mater & Æqui*, and the Manner of Conſtitution is *Vſus*, without the Addition of any Number of Years, or Period of Time, *Act* 53. *Parl.* 6. *Q. M.* *Act* 156. *Parl.* 12. *Ja.* 6. For the Law of *Scotland* allows of no Preſcription but what is eſtabliſhed by Statute, and no ſuch Statute comprehends High-ways. The Words *Vſe* and *Cuſtom*, can only be underſtood of ſuch a Frequency of Acts, or *diuturnus Vſus*, as renders the Poſſeſſion certain, tho' much leſs than Fourty Years, which ſufficeth to make a Cuſtom. Yea, according to the Law of the *Twelve Tables*, *Vſus & Authoritas Fundi Biennium eſto, cæterarum Rerum Annus Vſus eſto.* The Crown hath no Property in High-ways, becauſe theſe in the Conſtruction of Law, are *Nullius*, and *Jure Gentium omnibus vacant*, *L.* 21. *ff. de Religioſ.* The Property remains in the Heretor, with Reſervation of the Uſe of the Superfice: As he would have Right to Mines of Coal or Lead found under the High-way. 2. The Duke's Park-dike, which he is building, doth take in the *Littus Maris*, which cannot be incloſed: For *naturali Jure communia ſunt Aer, Aqua profluens & Mare, & per hoc Littora Maris*; *& Nemo ad Littus Maris accedere prohibetur*, *Inſtit. de Rer. Diviſ.* And the Act ſecond of the Parliament 1705, aſſerts the Right of the Subject to take, buy, and cure Herrings and white Fiſh, in all Seas, Channels, Bays, Lochs, Rivers, &c. and authorizeth them for Conveniency to have free Uſe of all Ports, Harbours, Shores, Forelands, and others, for bringing, pickling, drying, unloading and loading the ſame, for Payment of the Dues, where Harbours are built: Which cannot take Place, if the Roads along the barren Links on the Shore-ſide be cut off by Incloſures carried on to the Sea. The civil Law decides the Matter plainly in a like Caſe: A Liferent being left by Teſtament of certain Lands, where the Teſtator forgot to charge his Heirs with the Servitude of a Way to the liferented Lands; the Law ſays, *Vſus fructus Legatus Adminiculis eget, ſine quibus uti frui quis non poteſt, ideo neceſſe eſt ut ſequatur eum Aditus*, *L.* 1. §. 1, 2, 3. *ff. Si Vſusfructus petatur.* And therefore, the Act of Parliament, which gives the Shore for the aforeſaid Uſes of buying, curing, drying, &c. doth neceſſarly import, That ſuch Acceſs be left to the Shore, as the Nature of the Trade requires. 3. The Inconveniencies to the Liedges in general, and to the Town of *Dunbar* in particular, are not ſalved by the Quality of the Interlocutor allowing a Paſſage thro' the Duke's Ground for leading Fiſhes and Materials for Fiſhing in Caſes of Neceſſity. For, 1. Who is to be Judge of this Neceſſity? When the Duke is in Poſſeſſion of ſuch an Incloſure, Perſons in Diſtreſs by Storms, perhaps in the Night-time, muſt go a great Way off to his Grace's Houſe to repreſent this Neceſſity, and obtain a Liberty of Paſſage. 2. This Liberty is only allowed upon Payment of a certain Duty: Whereas, the Act of Parliament 1705, allows the free Uſe of all Ports, Harbours, Shores, Forelands and others; *That is*, ſuch as are next adjacent to the Shores, without Payment of any Manner of Duty, except where Harbours are built.

Anſwered for the Duke. It was needleſs for the Town to mention the Acts of Parliament of Queen *Mary* and King *James* the Sixth, concerning the Preſervation of Ways leading to and from Royal Burghs: For, where ſuch are conſtituted and known, no Queſtion publick Policy requires the Preſervation of them; but the Queſtion is, Whether the Way in Debate is one of theſe publick High-ways? Which is not made appear, all the Town's Acts of Poſſeſſion being precarious, and by Toleration. They have a common High-way leading from the Town to all Places on that Side, and People uſed only to go this private Way through the Links in the Winter-time for a dryer Paſſage, which can never introduce a Servitude of Paſſage, let be the heavy Burden of a High-way. No Right of whatever Denomination is conſtituted in Law, without either Paction, or Preſcription. To take up other Names, as *Vſe* and *Cuſtom*, are but Words, which in the Matter of acquiring a Right come juſt to an Uſe or Cuſtom of Fourty Years, the Term prefix'd by Law. To ſay that Preſcription is but ſtatutory in Matter of private Right, and doth not concern High-ways which are *Juris Gentium*, is but giving the Thing another Turn: For our publick High-ways are not *Juris Gentium* with us; they are regulated by our own Laws, require the ſame Length of Time to conſtitute them thro' another's Property, as any other Right by meer Time; and a High-way can no more unjuſtly incroach upon another's Property, than any other private Servitude of Paſſage. 2. The Duke does not pretend to incloſe the *Littus Maris*, which is only *quatenus hybernus Fluctus maximus excurrit*, and not to be extended upon the Account of extraordinary Flowings or Outbreakings of the Sea by Storms and high Winds. Nor is the *Littus Maris* any further publick than it is ſubſervient to the Uſe of the Sea, *viz.* For Fiſhing and Navigation: So that the Duke having his Right *uſque ad Mare*, may fence his Property, if that publick Uſe be provided for, and no ways hindred. 3. As to the Inſinuation, That the Townſmen will be ſtraitned, by having Acceſs only in Caſe of Neceſſity to paſs through the Links, upon Payment of a Piece of Mony, of which Neceſſity the Duke would be ſole Judge, and by being put always to apply for opening of Gates. It is anſwered, There being no Harbour nor Conveniency for landing at that Part, Neceſſity is ſtill preſumed. And ſince the Interlocutor orders free Acceſs, the Duke is bound to obſerve; and is for that End to build a Lodge at the Gate, that when Boats or Barks arrive upon any Part of his Sands, the Gate may be opened. Again the ſmall Duty is prov'd to have been cuſtomary, and no Man is bound to ſuffer the Loſs and Prejudice of his Graſs without ſome Recompence.

The Lords adhered to their former Interlocutor: But further found, That the Duke could not run his Dike within the *Littus Maris*; and remitted to the Lords *Ormiſtoun*, *Forglen* and *Pancaitland*, to viſit the Ground, and take Probation how far the Sea flows, and to fix March-ſtones. Upon whoſe Report, *June* 19, Inſtant, the Lords found, That the *Littus Maris* comes to the Foot of the green Brae, and that there is no Paſſage either for Horſe or Cart, betwixt the Foot of that green Brae and the Rock in the Sea; and therefore, that the Duke had Right to build the Wall of the Incloſure upon the ſaid Rock, but with ſuch Steps over the Wall within the *Littus Maris*, as will allow a Paſſage for walking on Foot upon the *Littus Maris*, for publick Uſe allennerly; and decerned and declared the Duke's Right and Property in theſe Terms, according to this and the former Interlocutor, *February* 19 laſt.

June 11, 1713. John Chalmers *Merchant in* Dumfermling, *againſt* Grant *of* Dalrachny.

UPON Report of the Rord *Cullen*, in the Action at the Inſtance of *John Chalmers*, againſt the Laird of *Dalrachny*, the Queſtion being, Whether in the Modification of the Expences of a Witneſs, he ought to have Allowance for the Charge of a Horſe? The Lords found, That if the Witneſs depone, That he uſed to ride when he travelled, and that he came on Horſeback to depone in this Cauſe, he ought to have the Expence of his Horſe allowed him.

June 12, 1713. *Mr.* John Stuart *of* Aſcog, *Baillie* Hope, *and other Creditors of the deceas'd* James Muirhead *of* Stevenſon, *againſt the Earl of* Orkney *and* William Hamilton *of* Wiſhaw.

A*Scog* and others confirmed before the Commiſſaries of *Edinburgh* Executors *qua* Creditors to *James Muirhead* who died in *Flanders*, purſued the Earl of *Orkney* as having intrometted with their Debtor's Mony, and the Laird of *Wiſhaw* who received it from the Earl.

Alledged for the Laird of Wiſhaw. He cannot be obliged to repete or pay back the Mony. Becauſe, 1. He as Creditor to *James Muirhead* had, by Virtue of Letters of Adminiſtration from the Prerogative Court of *Canterbury*, uplifted the Mony from the Earl of *Orkney*, reſiding in *England* as Colonel of an *Engliſh* Regiment before the Purſuers Confirmation in *Scotland*. And *James Muirhead* having died an Officer in a Regiment under *Engliſh* Pay in a foreign Country, without having *Larem & Focum*, or any Effects in *Scotland* (whereby he had chang'd his *Domicilium*) there was no other Way to affect the Mony which he left behind him, but by adminiſtrating to him conform to the Law of *England*. 2. An Adminiſtration in *England* being a Title of Intromiſſion, equal to a Confirmation in *Scotland*, *February* 1687, *Eliot of Dunlabyres* contra *Dryden*; and the Defender being *prior Tempore* in Diligence, is *potior Jure*. But again, 3. Whatever might be ſaid, were the Mony ſtill *in Medio* unuplifted; yet after the Defender, inveſted with a lawful and effectual Title, hath *bona Fide* uplifted the Mony, and got Payment, it were ſtrange to make him refound it, *qui ſuum recepit!* And as by our Law, an Executor, tho' not *qua Creditor*, uplifting the Defunct's Mony, may exhauſt the ſame by Debt due to himſelf before the Confirmation, merely *Exceptione Compenſationis*, *Stair*, *Inſtit. Tit. Executry*, §. 73. *January* 26, 1628, *Adie* contra *Gray*: *Multo magis* may this be done by the Defender who is Adminiſtrator *qua Creditor* for Debt due long before the Adminiſtration.

Anſwered for the Purſuers. Had the Subject of the Competition been *Res mobiles* (which we call properly *Goods* as diſtinct from Sums of Mony or Obligations for Mony) a Title behov'd to have been made up to them in *Flanders*, where *Muirhead* died, and the Goods were. But here the Queſtion is concerning a Sum of Mony belonging to a *Scotſman* dying abroad, which, as *Res fungibilis*, *Uſu perit*, and can be no otherways affected than by a Confirmation in *Scotland*, which is *Aditio Hæreditatis Mobilium*. The Defunct's dying in *Flanders* at the Time of Payment, will make no Alteration in the Point of Law: For the Maxim *Mobilia ſequuntur Perſonam*, muſt be underſtood either of the Place where he died, and then it excludes the *Engliſh* Adminiſtration, as well as the Confirmation in *Scotland*; or it muſt be underſtood of the *Locus Originis*, which affords Preference to the Purſuers, who have made up their Title in *Scotland*. Nor doth the *Engliſh* Adminiſtration concern the Earl of *Orkney*, who made Payment to the Defender; the Earl being a *Scottiſh* Man, and a *Scottiſh* Peer, and Commander of a Regiment originally levied in *Scotland* (tho' under *Engliſh* Pay) and ſubject to anſwer before the Courts in *Scotland*. The Prattick in *February* 1687, *Eliot of Dunlabyres* contra *Dryden*, is a quite different Caſe, for an *Engliſh* Adminiſtration might be a colourable Title to excuſe from vitious Intromiſſion, and yet not ſufficient to prefer in a Competition. 2. Where can there be a legal *bona Fides* with ſuch Defects, which might as well be pretended from a Title made up in any foreign Country? Again, *bona Fides* doth liberate a Man from Repetition of Annualrents, Fruits and Profits, but never from anſwering for the Stock, or Inheritance. And the Brocard *ſuum recepit* holds only, 1. Where Payment is made by the Debtor, and not where it is recovered by Diligence out of his Effects. 2. Where the Diligence is juſt in the Form of Law, tho not preferable. Neither of which can be apply'd to this Caſe.

The Lords ſuſtained *Wiſhaw*'s Alledgeance, and Defence, That he a true Creditor of the Defunct did *bona Fide* uplift the Mony by Virtue of an Adminiſtration in the Prerogative Court of *Canterbury*, before any Proceſs or Confirmation in *Scotland*.

June 18, 1713. Alexander Montgomery *of* Kirktounholm, *againſt* Enſign William Brown.

IN a Proceſs at the Inſtance of *Alexander Montgomery* againſt Enſign *William Brown*, for Payment of 1000 Merks contained in a Bond granted to the

Purſuer, by the deceas'd *Alexander Moodie* as Principal, and *Adam Brown* late Provoſt of *Edinburgh* as Cautioner: The Lords ſuſtained Proceſs againſt the Defender, as repreſenting the ſaid *Adam Brown* his Father, without Neceſſity to diſcuſs previouſly the principal Debtor; albeit *Adam Brown* the Cautioner was not bound conjunctly and ſeverally with the Principal. In Reſpect he was bound as full Debtor with and for him; and the Principal died inſolvent. Now the Benefit of Diſcuſſion is not competent to a Cautioner, but where the Creditor may have *paratam Executionem* againſt the principal Debtor: And by the *Novel.* 4. *C.* 1. the Privilege of Diſcuſſion is not neceſſary, in Caſe of the principal Debtor's Abſence, or Inſolvency.

Eodem Die. *Sir* Thomas Burnet *of* Leys, *againſt the Heretors of the Shire of* Kincardin.

IN the Suſpenſion at the Inſtance of the Heretors of the Shire of *Kincardin*, of a Charge given to them by Sir *Thomas Burnet*, to meet and ſtent themſelves for Fees due to him as their Commiſſioner to the Parliament, from the Year 1689 to the 1703: The Suſpenders produced a Letter from the Charger to *James Miln* of *Hatton* one of the Suſpenders, bearing theſe Words, *I confeſs I had never any Occaſion to do you any Act of Kindneſs; but I hope I have ſerved the Shire faithfully, and burdened them with no Expences, and I do fully diſcharge you of any Expences upon the Account of my repreſenting your Shire.*

The Lords found the Letter imported a full Diſcharge and Exoneration to the whole Heretors of the Shire, as well as to *James Miln* to whom it was directed, of all Commiſſioner-fees preceding the writing of the ſaid Letter, and therefore ſuſpended the Letters.

Albeit it was alledged for the Charger, 1. *Illud non agebatur* in that Letter to diſcharge the Shire, but to diſcharge *James Miln*, to whom only the Compliment was intended. This appears from the adjected Words, *Of which I diſcharge you*, which were ſuperfluous, had a Diſcharge to the whole Shire been imply'd in the preceeding Words, *That he had not been burdenſom to the Shire: Et Actus agentium non operantur ultra eorum Intentionem.* 2. Theſe Words, *I have burden'd them with no Expences*, import no more a Diſcharge to the Heretors of the Commiſſioner-fees due by them, than a Creditor's writing to his Debtor, *I have not been burdenſom to you in calling either for principal Sum or Annualrents*, can infer a Diſcharge of both.

In Reſpect it was anſwered, 1. If the general Conſideration of the Shire was not then in View, but only *James Miln*'s Concern, why did the Letter bear, *That he had ſerved the Shire faithfully, and burden'd them with no Expences?* Theſe Words, *I do fully diſcharge you*, afford no Argument for reſtricting the Effect of the Letter to *Hatton*, but are the particular Inference to him the Letter was directed to, from the general Premiſſes in Favours of the whole Shire. 2. The Parallel is not juſt betwixt a Creditor ſignifying to his Debtor that he hath not been burdenſom in calling for his Mony, and the Charger's writing to the Suſpenders that he hath not burdened them with any Expences: For in the one Caſe the Creditor declares wherein he hath not been burdenſom, *Viz.* In calling for his Mony; in the other the Charger declares that he hath not burdened them with the Debt it ſelf. But then again, ſhould a Creditor write to his Debtor with whom he is compting, that he has not burdened him with ſuch a Sum, and thereupon plead Favour in other Particulars, ſuch a Letter would come little ſhort of a Diſcharge. So that theſe Words, *I have burdened the Shire with no Expence*, can imply no leſs than the upgiving all Claim to them: Seing it is not a Delay to ſeek Expences, but a Diſcharge of them, that could make the Shire not to be burden'd.

June 19, 1713. *The Creditors of the deceas'd* William Hamilton *of* Orbiſtoun, *againſt* James Hamilton *of* Dalziel.

IN a Reduction *ex Capite Lecti* of a Diſpoſition made by the deceas'd *William Hamilton* of *Orbiſtoun*, to *James Hamilton* of *Dalziel*, purſued againſt him by the Granter's Creditors: The Lords, upon Report of the Lord *Royſtoun*, refuſed to admit the Defender's Uncle as a Witneſs for him to prove that *Orbiſtoun* was *in Liege Pouſtie* when he granted the Diſpoſition; albeit he was an inſtrumentary Witneſs therein. Becauſe, the inſtrumentary Witneſſes were choſen of Conſent only for inſtructing the Verity of the Deed: And the Purſuer did not quarrel that, but only it's being granted on Death-bed, which Alledgeance of Death-bed ought to be redargued by unexceptionable Witneſſes.

Eodem Die. Alexander Murray *of* Burghtoun, *againſt* Robert M'clellan *of* Barclay.

IN a Reduction and Improbation at the Inſtance of *Alexander Murray* of *Burghtoun* whoſe Predeceſſor was Heretor of the Lands of *Barclay*, againſt *Robert M'clellan*, for reducing a Wadſet of theſe Lands with Infeſtment thereon in the Defender's Perſon, flowing by Progreſs from the Lord *Kirkcudbright*; there being a Certification granted againſt the Lord *Kirkcudbright*, the Defender's Author: The Purſuer would have the Defender's Right to fall in Conſequence. The Defender, for ſupporting his Wadſet, founded on Preſcription: In ſo far as the Lord *Kirkcudbright* the Reverſer poſſeſs'd by a Backtack from the Wadſetter as his Tenant from the Year 1651, till the 1668, when the Wadſetter obtained a Declarator of Irritancy of the Back-tack; after which Time the Wadſetter himſelf poſſeſs'd, and in the 1680 adjudged for the Back-tack Duties unpaid; which Adjudication was equivalent to a Diſcharge of *Kirkcudbright*'s Right of Reverſion.

Alledged for the Purſuer. 1. The Defender's Right being only a Wadſet, a limited Right of Security can produce but a limited Effect. For tho' Fourty Years Poſſeſſion conform to a Wadſet Right might exclude Action upon perſonal Back-bonds, or Queſtions concerning Payment of the Mony, or Exceptions or Reaſons for reducing the Wadſet Infeſtment it ſelf: Yet Poſſeſſion by Virtue of ſuch a Title, could never make an abſolute Right of Property, to cut off the Proprietar from the Right of Reverſion, or make the Wadſet Right become any Thing elſe than a Wadſet Right. No Right can be acquired by Preſcription, but what is poſſeſs'd: Therefore a Wadſetter poſſeſſing only *Jus Pignoris* (which differs from a Right of Reverſion) can never acquire by Preſcription a Title to the Reverſion. This agrees with the Principles of the civil Law, *Pignori Rem acceptam Vſu non capimus, quia pro alieno poſſidemus*, *L.* 13. *ff. de Vſurp. & Vſucap.* and the Right by *Vſucapio* or Preſcription of Pledges or Hypothecks, accreweth to the Debtor, *L.* 33. *§.* 4. *ff. eod.* Now an improper Wadſet with a Back-tack to the Granter (ſuch as this in Queſtion) is in the ſame Caſe with a *Pignus* or *Hypotheca* in the civil Law: Seing in both the Creditor *poſſidet pro alieno*, in ſo far as his Poſſeſſion exceeds the Sum for which the Right was granted. The Caſe of Wadſets containing Reverſions incorporated are excepted from the Act of Preſcription 1617: Therefore no Preſcription can give the Wadſetter a Right to the Reverſion, or an irredeemable Property, tho' it might render the Wadſet it ſelf unquarrellable as ſuch. So that 2. If Preſcription were competent in this Caſe, it behoved to accrew to the Lord *Kirkcudbright*'s Repreſentatives, whoſe Right is reduced by the Certification ; and the Wadſet Right falls in Conſequence : According to the Rule, *Reſoluto Jure Dantis, reſolvitur Jus Accipientis.* It can no more ſubſiſt after the principal original Right is removed, than *Accidens ſine Subjecto*, or a Relative without a Correlate. 3. There can be no Preſcription in this Caſe, for Want of a continued Poſſeſſion by the Wadſetter. 4. The Adjudication againſt the Lord *Kirkcudbright* can afford no Defence, becauſe it carries only the Lord *Kirkcudbright*'s Right, which the Purſuer hath reduced. Beſides, the Back-tack-duties adjudged for were ſatisfied by Intromiſſions within the Legal.

Anſwered for the Defender. 1. A Wadſet Right is certainly a Right of Property, and a good Title for Preſcription, except againſt the Reverſer. The Reaſon of the Exception is the *Pactum de retro-vendendo*, which hinders the Wadſetter's *bona Fides* with Reſpect to the Reverſer, and all deriving Right from him : But as to all other Perſons who have no Intereſt in that *Pactum* or Reverſion, the Wadſetter's Right of Property is abſolute and unlimited. And when the Reverſion comes to be diſſolved by Diſcharge and Renunciation, or Tranſmiſſion in Favours of the Wadſetter, his Right turns as full and abſolute as can be, and is underſtood to be ſo even *retro* from the Date of the wadſet Infeſtment. So that here the Reverſion being perſonal to the Lord *Kirkcudbright* and thoſe deriving Right from him, the Purſuer who has no Right from him, cannot queſtion the Defender's Title in whoſe Perſon any Right of Reverſion belonging to the Lord *Kirkcudbright*, ſtands eſtabliſhed by his Adjudication, which is equivalent to a Diſcharge of the Reverſion. 2. The Brocard *Reſoluto Jure Dantis*, &c. takes no Place againſt the long Preſcription. For one who pleads Preſcription is ſuppoſed to derive his Right *a non Domino* ; ſeeing otherways he needed no Preſcription to ſupport it. The *L.* 13. *ff. de Uſurp. et Uſucap.* imports only that the Poſſeſſor of a *Pignus* cannot preſcribe a Right againſt the Reverſer, 'cauſe he knows it to be reverſible : But he can preſcribe it as to all others. It's true that conform to the *L.* 53. §. 4. *ff. eod.* Poſſeſſion of a Wadſetter is alſo Poſſeſſion of the Granter of the Wadſet : But that can never hinder the Wadſetter to plead that ſame Poſſeſſion for himſelf againſt all others except the Reverſer. 3. The Reverſer's Poſſeſſion by the Back-tack, was the Wadſetter's Poſſeſſion. And as a Wadſetter's Poſſeſſion is imputed to make up Preſcription in Favours of the Reverſer : So the Reverſer's Poſſeſſion by a Back-tack, may be aſcribed to make up Preſcription to the Setter, who hath the Diſpoſition under Reverſion. For Poſſeſſion by virtue of a ſubaltern Right from another, is aſcribed to the Granter's Title : And by the Act of Parliament 1617, Poſſeſſion by Perſons themſelves, or others having their Right, ſufficeth to found Preſcription. 4. Albeit the Defender's Adjudication were ſtill open to the Lord *Kirkcudbright* (as it is ſhut by Decreets and Preſcription) yet the Purſuer hath no Intereſt to propone Payment of the Sums therein, by Intromiſſion within the Legal : In Regard, he the Purſuer doth not repreſent the Lord *Kirkcudbright*, nor hath any Right from him to the Reverſion of the Adjudication, and the Defender, by entring to the Poſſeſſion, had Right to the whole Rents.

Replyed for the Purſuer. Granting that a Wadſet is a Right of Property reſtricted only by the Clauſe of Reverſion, and that the Clauſe is conceived in Favours of the Reverſer and his Aſſignies ; *Ergo quid?* A third Party not having Right to the Reverſion, cannot quarrel the Wadſet : But it doth not follow, That a Wadſetter poſſeſſing as ſuch, may acquire the irredeemable Right by Preſcription. The Diſtinction, that tho' a Wadſetter cannot preſcribe againſt the Reverſer, he may againſt other Parties, is without the Authority of Law or Deciſion. A Wadſetter's Right is, like *Ager limitatus*, a limited Title of *Pignus* for Security of a Debt, incapable of Addition by Preſcription : Seing the Reverſion in the Boſom of his Right doth perpetually hinder him to poſſeſs *bona Fide pro ſuo*; and tho' Preſcription may render a weak Title good, it can never alter the Nature of a Right, and make a redeemable *Pignus* become irredeemable Property. 2. As the Wadſetter cannot acquire by Preſcription: So neither is the Right of Reverſion perſonal to the Reverſer's Heirs and Aſſignies, but 'tis real, *inhærens Solo*, being (as the Word implies) a Return to the ancient Property. So that the Purſuer, by diſcuſſing the Right of the Reverſer and his Heirs, may as Proprietar quarrel the Defender's Wadſet, as flowing *a non Habente Poteſtatem*, and remove that Incumbrance affecting his Property. 3. Albeit in the Matter of Preſcription, Poſſeſſion of the Creditor completes the Title in the Perſon of the Debtor, *L.* 13. *L.* 34. §. 4. *ff. de Uſucap.* And a Wadſetter's Poſſeſſion is the Reverſer's, 18 *July* 1667, Lady *Burgie* contra *Strachan*: Yet Poſſeſſion of the Proprietar is not, in the Conſtruction of Law, the Wadſetter's Poſſeſſion, ſuch a fictitious Poſſeſſion is not ſufficient to found Preſcription, which requires a real and continued Poſſeſſion: For the Words in the Act 1617, *By themſelves and others having their Rights by Virtue of their heretable Infeftments*, can never be extended to an Heretor or Reverſer poſſeſsing Lands contained in his own Infeftments.

The Lords ſuſtained the Defence of Preſcription, to ſupport the Wadſet Right, and found the Reverſer's Poſſeſſion by a Back-tack, ought to be conjoin'd with the Wadſetter's, to make up the Preſcription: But repelled the Alledgeance, That the Back-tack Duties for which the Adjudication was led, were ſatisfied within the Legal; the ſame not being proponed by the Repreſentatives of the Lord *Kirkcudbright*, and in Regard the Wadſetter having entred to the Poſſeſſion, had thereby Right to the whole Rents.

Eodem Die. Patrick Buchanan *Merchant in* Glaſgow, *againſt* John French *Merchant there.*

William Thomſon, *John Story*, and *John French* as Principals, and *Patrick Buchanan* as Cautioner for them, having granted Bond conjunctly and ſeverally for 1000 Merks to *John Acheſon*, wherein the three Principals obliged themſelves to relieve one another *pro rata*, and to relieve the Cautioner in general Terms, without mentioning either *pro rata*, or *conjunctly and ſeverally*: In a Proceſs at the Inſtance of *Patrick Buchanan* the Cautioner, who paid the Debt upon Diſtreſs, and took Aſſignation from the Creditor for his Relief, againſt *John French* one of the Co-principals.

The Lords found *John French* liable to relieve *Patrick Buchanan in ſolidum*, and not *pro rata* for his own third Part only: Albeit the Co-principals ſtood not obliged in the Bond to relieve him conjunctly and ſeverally, but only to relieve him in general. In Regard, the Co-principals being bound to the original Creditor conjunctly and ſeverally, were alſo bound ſo to the Cautioner, who interpoſed conjunctly and ſeverally for them, and by Payment upon the Aſſignation, came in Place of the Creditor. For the Cautioner's Relief muſt be equal to his Obligation.

June 20, 1713. Iſobel Moncrief *and her Huſband, againſt* Catharin Monipenny *Relict of* George Moncrief *of* Sauchop.

IN the Action at the Inſtance of *Iſobel Moncrief* and her Huſband, againſt the Lady *Sauchop*, mentioned *ſupra* 27 *January* 1713, the Defender claim'd, *Jure Relictæ*, the Half of all the Defunct's Moveables, free of the Expences

65. §. 9. ff. pro Sotio. ſecundum quam Sententiam judicatum fuit in Curia noſtra, 7 *October* 1618.

The Lords found, 1. That the funerary Expence doth not affect the Dead's Part only, but comes off the whole Head of the Executry. 2. The Lords found, That the building of the Monument, being by Warrant of a teſtamentary Deed, the Expence thereof comes off the Dead's Part. But they ſeem'd in their Reaſoning to be of Opinion, That a Monument erected to a Defunct, whoſe Character and Fortune deſerved one, would be conſidered as a Part of the funerary Expences; and ſo come off the whole Head. 3. The Lords found, That the Expence of the Confirmation comes off the whole Head. 4. They found, That the Expence of the Aliment and Mournings do alſo affect the whole Head of the Executry: Becauſe, they thought theſe to be Debts of the Defunct, for which the Heir might be purſued, if there were no Executry; and that the Defunct was under an Obligement for his Wife's Mournings, tho' the Extent thereof was not known till after his Death.

June 23, 1713. William Scot *of* Raeburn *and his Tutors, againſt* Walter Scot *of* Hycheſter *and his Tutor.*

IN the Year 1686, The deceas'd Sir *William Scot* of *Harden* made a *Tailzie of his Eſtate in Favours of himſelf in Liferent, and to Sir* William Scot *elder of* Harden *his Father in Fie, and failing of him by Deceaſe, to the Heirs-male lawfully to be begotten of his own Body; which failing, to* Robert Scot *his Brother-german, and the Heirs-male of his Body; which failing, to the Heirs-male of Sir* William Scot *elder his Body, which failing, to the Heirs-male of* Raeburn *his* Body. Which Tailzie was made with the ordinary Prohibitions and Irritancies, and particularly, *That it ſhould be no ways lawful to the ſaid Sir* William Scot *elder, and the Heirs of Tailzie and Proviſion above-written ſucceſſive, in no Time coming to alter or infringe the ſame, nor to ſell, anailzie, diſpone or put away,* &c. *And in Caſe the ſaid Sir* William Scot *elder, or the Heirs of Tailzie above-mentioned, ſhould happen to contravene, then and in that Caſe the Deeds done by them ſhould not only be null, but they and their Deſcendants ſhould loſe and forfeit their Right, and the Eſtate devolve upon the next Heir of Tailzie.* This Bond of Tailzie was regiſtred, *July* 15, 1691, and Inhibition ſerved thereon, at the Inſtance of ſome of the Heirs of Intail. In the Year 1698, young Sir *William Scot*, with Conſent of old Sir *William* revoked the firſt Tailzie before it was completed by Infeſtment, and made a new Tailzie, wherein *Hycheſter* is brought in before *Raeburn*, and thereupon *Hycheſter* is ſerved Heir and in Poſſeſſion.

William Scot of *Raeburn*, to whom the Eſtate of *Harden* would have now fallen by the firſt Tailzie, purſued Reduction and Improbation of the ſecond, upon this Ground; That the firſt Tailzie being perfected by all the Solemnities of Regiſtration and Publication, and containing no Reſervation to alter or revoke, but on the contrary, ſeveral ſpecial Reſervations of Power to provide particular Sums in Caſe of a ſecond Marriage, *&c.* The Revocation thereof, and the new Tailzie are intirely void and null. Eſpecially conſidering, That Sir *William Scot* younger ſtood obliged in the firſt Tailzie to reſign to himſelf in Liferent allennerly, whereby he excluded himſelf from doing any Deed in Relation to the Fie, except in ſo far as he had reſerved Power to burden it: *Et Exceptio firmat Regulam*, &c.

Anſwered for Hycheſter the Defender. 1. The firſt Tailzie while it remained in the naked Terms of a gratuitous Obligation, without being perfected by Charter and Seaſin, was no more than a Deſtination of Succeſſion, with a

View to the hard Circumſtances, that young Sir *William Scot*, and the Earl of *Tarras* Repreſentative of the Family of *Hycheſter* lay under at the Time, by the Diſpleaſure of the Government; and ſo was alterable at the Maker's Pleaſure, when his Affairs took another Turn. And in a reſembling Caſe of *James Muirhead* of *Breadiſholm*, the Lords ſuſtained the retiring and cancelling of a Diſpoſition after Infeſtment taken thereon, tho' not regiſtred, as being a ſimple Deſtination of Succeſſion, with ſpecial Views. It doth not import, That young Sir *William* was obliged to reſign to himſelf only in Liferent. Had the Tailzie been completed by Infeſtment, he could not indeed have altered the ſame: Not as if he had been tied up by the gratuitous Deſtination, but becauſe he would then have been denuded of the Fie, and none but a Fiar can alter the Succeſſion. But notwithſtanding the uncomplete Bond of Tailzie in Queſtion, young Sir *William* remained Proprietar, with a Power to alter the Succeſſion. It is of as little Moment to object, That Sir *William* reſerved a Power to himſelf to burden the Eſtate in certain Events, and not to alter totally: For that was neceſſary upon Suppoſition of his intending to have the Tailzie ſtand, that the Heirs by their Acceptance might be liable; but it cannot be thence inferr'd, That Sir *William* could not totally annul the Bond of Tailzie, and appoint different Heirs, which Power belonged to him *ex Natura Rei*, without any Reſervation. 2. Old Sir *William* the firſt Inſtitute, or rather firſt in the Fie, did concur and conſent to the Revocation by young Sir *William*. And tho' old Sir *William* could not by himſelf alter the Tailzie, having got the Right *ſub Modo*: Why might he not, with Conſent of the Granter, who impoſed that Qualification upon him, renounce ſuch an uncomplete Deed, whereby the remoter Heirs had only *Spem Succeſſionis*? As had young Sir *William* made the Right to himſelf, and failing Heirs-male of his Body, to his Father, and ſubjected himſelf as well as the other Heirs, to all the prohibitory Clauſes: Could not he, while the Tailzie continued uncomplete, alter the ſame? No doubt he could: For a Perſon cannot, by ſuch a gratuitous Deſtination, where he lyes under no Obligation to another, tie himſelf up from the free Exerciſe of his Property; and *Nemo poteſt ſibi imperare, nec efficere ne Leges obtineant Locum in ſuo Teſtamento*. As to the Act of Parliament 1685, anent Tailzies, whereby Heirs of Tailzie are hindered to Sell, Analzie, *&c.* That reſpects only Heirs of Intail, and not the firſt Fiars.

Replyed for the Purſuer. 1. A Perſon may diveſt or oblige himſelf as firmly by a gratuitous Deed, (while the Queſtion, as in this Caſe, remains betwixt the Diſponer or Obligant, and the Perſon to whom the Diſpoſition or Obligement is granted) as he may do for onerous Cauſes. Our Law makes no Diſtinction betwixt Obligements in Relation to Succeſſion, and thoſe relating to any other Subject. Could a gratuitous Bond bearing no Faculty to alter, be revoked after Delivery to the Creditor? I ſuppoſe not: *Neſcit Vox miſſa reverti.* The Performance of the voluntary Obligement becomes neceſſary. Our Lawyers diſtinguiſh betwixt Bonds of Tailzie, and Infeſtments of Tailzie, where the Deviſer is ſtill Fiar: Holding that in the *laſt* Caſe, he may freely uſe his Property where he hath not tied up himſelf; but can never be free of a Bond of Tailzie without implementing. It detracts nothing from the Strength of the Obligement, that no Reſignation or Infeſtment followed upon it: Seing the following it out by reſigning and infeſting, were Deeds concerning, not the Granter of the Tailzie, but the Perſons in whoſe Favours the Obligements and Procuratories were conceived; and it had been in vain for Sir *William*, who obliged himſelf without reſerving a Faculty to alter, to interpoſe for ſtopping Reſignation or Infeſtment. If the firſt Tailzie was made, as the Defender alledgeth, to ſerve a Turn, and protect the Eſtate from any Incumberances that might ariſe upon young Sir *William*'s Facts: This argues a Deſign to have it permanent, and to exclude all Power of Revocation

Expences of her Huſband's Funerals, and the building a Monument to him, and the Confirmation of his Teſtament, and her own Mournings, and the Aliment of the Defunct's Family till the next Term after his Deceaſe: All which ſhe alledged muſt affect the Dead's Part only, and could not leſſen her legal Share. Becauſe, 1. Nothing diminiſheth the whole Head, but what is due by the Huſband before his Death; and he could not properly be Debtor for his funerary Charges before his Deceaſe, when theſe had no Being, and there was not a Creditor. Now a Relict hath Right to her Share of the Huſband's Moveables at the Moment of his Death; not by any Succeſſion, but *Jure proprio* by Diviſion of the Goods that were in Communion during the Marriage, under the Huſband's Adminiſtration: Upon Diſſolution whereof the Wife acquires no new, but continues her former Right *tanquam Domina*, without Neceſſity to confirm her Share. And as ſhe could claim no Part of any Thing that fell due to the Huſband at the Minute of his Death: So neither ſhould ſhe be burden'd with Debts to which his Repreſentative became liable by Diſſolution of the Marriage. Sir *John Nisbet* in his *Doubts and Queſtions Tit. Funeral Charges*, is clear of this Opinion, That the funerary Charges ſhould affect only the Dead's Part, theſe not being a Debt contracted during the Communion. And therefore the Huſband's funerary Charges muſt be paid out of the Dead's Part, as the Expence of the Wife's Funerals would come off her own Share. 2. The Expence of building the Monument falls to be conſidered and determined upon the ſame Grounds of Law with the funerary Charges: The former having had no Foundation till after Diſſolution of the Marriage, and being of the Nature of Legacies or Donations *Mortis Cauſa*, that are payable only out of the Dead's Part. 3. The Expence of confirming the Defunct's Teſtament can burden only his Executors: Becauſe it was not a Debt of the Defunct. For if it were a Debt of the Defunct, it would be due whether there were a Teſtament or Confirmation, or not, which cannot be pretended. Confirmation is a Deed of the Executor, whom Law obligeth to confirm, before he can have a Title: And the Relict, who has Right to her Part without Confirmation, cannot be burden'd with making up the Right of a third Party. As ſhe hath Right to her Terce of Lands, and to her Share of the Moveables, without any Burden of the Expence of the Heir's Service: She can as little be burden'd with the Expence of the Executor's Confirmation, which is *Additio Hæreditatis Mobilium*. 4. The Lady's Aliment to the Term ſubſequent to her Huſband's Death can affect only his Executors, and the Dead's Part, being due only by his Repreſentatives for the Maintenance of his own Family: Seing otherways the Relict would be obliged not only to maintain her ſelf, but alſo her Huſband's whole Family in that Interval. My Lord *Stair* in the cloſe of his Title *Conjugal Obligations*, ſays, *Wives have not only a Half or Third of their Husband's Moveables, but have their Aliment till the next Term after their Huſband's Death*: Which is the ſame thing, as if he had ſaid, their Aliment is not payable out of their own Share of the Moveables: Seing otherways, they could not be ſaid to have their Aliment over and above that Share. The Origine of Aliments due to Relicts, ſeems to have proceeded from the ſame Cauſe that obligeth a Huſband's Succeſſors to pay the Expences of Child-bed to them: And as the Relicts themſelves were never burdened with any Part of the Expence of the latter, neither can any Part of the Charges of the former lie upon them. 5. The Relict's Mournings burden the Huſband's Executors, and not her ſelf, *Stair Inſt. Tit. Conjug. Oblig.* §. 10. 12 *November* 1684, Lady *Kirkhouſe* contra *Neilſon*, 7 *July* 1675, *Wylie* contra *Moriſon*: Becauſe, theſe were no Debt due by the Defunct when he died, and the Relict's Share of the Moveables belongs to her from the Moment of her Huſband's

Death, free of all ſubſequent Debt. Nothing being ever claimed upon the Account of Mournings unleſs they uſed and worn, ſhews that the Price thereof is not the Defunct's Debt, which muſt be certain and fixed at the Moment of his Death. Again, where there are no Moveables, Mournings are due by the Heir, which demonſtrates theſe to be a Burden only upon the Defunct's Succeſſor: And the Relict draws her Share without any paſſive Title of Repreſentation. In fine, there being no civil Obligation upon Wives, Children, or Servants to wear Mournings, and the ſame being uſed only *ex Pietate*, out of Deference to the Defunct's Memory, the Burden ought to lie upon his Succeſſors, and not upon his Relict.

Anſwered for the Purſuer. 1. Albeit the Expence of the Funerals falls not due till after Diſſolution of the Marriage, yet it is properly the Defunct's Debt. *Qui propter Funus aliquid impendit, cum Defuncto contrahere creditur, non cum Hærede, L.* 1. *ff. de Religioſ. et Sumpt. Fun.* and *Momentum primum Mortis annumeratur Vitæ*: Therefore the Defunct's whole Moveables muſt be burden'd with his funerary Charges; in the ſame Manner as with a Bond whereof the Term of Payment fell due after his Deceaſe. Eſpecially conſidering, That funerary Charges are a Debt preferable to all other moveable Debts. Nor can it be controverted, That, were not the Dead's Part ſufficient to ſatisfie the funerary Expence; whatever Moveables are extant may be ſubjected to the Payment thereof, before the Heir can be reached. 2. Since the Expence of the Monument aroſe from the Defunct's Will in his Lifetime, and the Relict occaſion'd the ſame; there's very good Reaſon for laying it upon the whole Head. 3. It's the univerſal Practice of all the Commiſſary Courts in *Scotland*, to deduce the Expence of Confirmation off the whole Head, founded on this good Reaſon: Becauſe, tho' the Wife needs not to confirm her Share of the Moveables for eſtabliſhing a Title thereto; yet it is impracticable to make the Diviſion till the Subject be confirmed, and the whole Moveables brought fairly in the Teſtament, that Creditors or others concerned be not injured. 4. There is the ſame Reaſon for deducing the Aliment and Mournings off the whole Head, as for deducing the funerary Expences: The Former, as well as the Latter, being a Debt of the Defunct. The Queſtion in the Place cited out of the Lord *Stair's* Inſtitutions for taking the Relict's Mournings off the Dead's Part, is not, Whether ſuch Debts ſhall come off the whole Head of the Executry, or the Dead's Part only; but whether, ſeing the Wife received the Goods from the Furniſher, ſhe be liable for the ſame *proprio Nomine*, or if the Executry be affectable?

Replyed for the Defender. The *L.* 1. *ff. Relig.* makes nothing for the Purſuer. For the Poſition appears to be a Fiction in Law from the Word *Creditur*: And *qui contrahere creditur, de Facto non contrahit.* This is further evident from the beſt Gloſs on that Law, which adds, *Ab Hærede tamen recipit, ut et a Patre vel Domino, L.* 12. §. 2. *ff. eod.* And *datur hec Actio adverſus eos ad quos Funus pertinet, utputa adverſus Hæredem cæteroſque Succeſſores*: Whereas the Relict draws not herShare by Succeſſion, or *tanquam Hæres.* That the funerary Charges are a preferable Debt, cannot be apply'd to this Caſe, where there is a valuable Executry, and the Queſtion is not concerning the Preference thereof, but only concerning the Fund of Payment. So 'tis an Amuſement, to pretend that if the Dead's Part be not ſufficient, the Wife muſt bury her Husband out of her Share: For that preferable Debt falling firſt to be paid, if the Dead's Part come ſhort, the Wife can have nothing. Upon the whole, it may be noticed, That the learned *Joannes a Sande* ſays, *Quod apud Friſios Societas conjugalis non cenſetur continuata uſque dum Inventarium fuerit confectum, Senatuſque noſter hanc Quæſtionem definiendam exiſtimavit ex Jure Romano, L.* 59. *L.* 63. §. 8. *L.*

65,

cation by him, That the Crown might not, by his being forfeited, ſucceed to the Power of Revocation, and deſtroy the whole Project. 2. Old Sir *William*'s Concurrence could not enable young Sir *William* to alter, as is clear from what was lately decided betwixt Sir *Alexander Don* of *Newtoun* and *James Don*: where Irritancies not inſerted in the Charter of the Lands under Debate, but only referred to, as in a Charter of other Lands, were found to affect the Inſtitute and firſt Fiar. The Pretence, That the Act of Parliament reſpects only Heirs of Intail, is of no Weight: For by Heirs there are underſtood, all Members of the Tailzie affected with the Limitations and Irritancies therein; and not ſimply ſuch Heirs as ſucceed by Service. And albeit a Tailzie with Reſpect to Superior and Vaſſal, may not be counted a real Right or Right of Feu, till once perfected by Charter and Seaſin; yet the Tailzie is a ſimple and real Right, by ſimple Production and Regiſtration, as to Queſtions betwixt Members of it, and Rights made in Prejudice thereof. 3. The firſt Tailzie was not ſimply gratuitous, but partly onerous; in ſo far as, by a Clauſe therein, it is declared, That if *Raeburn* or any of the other Heirs ſhall break the Tailzie of their Eſtate to Heirs-male, they ſhall then forfeit the Right of Succeſſion to this tailzied Eſtate, which in Effect imports a mutual Tailzie.

Duplyed for the Defender. A Deſtination of Tailzie, which is always by Way of Obligement, is not of that irrevocable Force with a Bond to pay a Sum, or perform a Deed: For in the one Caſe, the Granter transfers a Right of Exaction to the Creditors; whereas a Man in ordering his Succeſſion is preſumed to intend to have it ſtill at his Diſpoſal; unleſs there be an onerous Cauſe for the Tailzie, as where there is a mutual Tailzie, or where a Sum of Money is given for the making a Tailzie, which fixeth the Obligation. In all other Caſes, *Hæredis Inſtitutio eſt ambulatoria uſque ad ultimum Vitæ Spiritum.* 2. The late Deciſion in Sir *Alexander Don*'s Caſe, cannot be applyed here: For the Tailzie of *Rutherford* had been completed by Charter and Seaſin, and ſo the Fie upon the Eſtate was qualified; The Alteration was made by *Rutherford*, without the Concurrence of old Sir *Alexander* the Father, from whom the Eſtate was derived, and who impoſed the Conditions upon his Son. Whereas the Queſtion is here only concerning a naked Bond of Tailzie, without Infeſtment, altered by the Maker of the Tailzie, without Conſent of the firſt Inſtitute. 3. It is plain that the firſt Tailzie was young Sir *William*'s voluntary free Deed, without any Payment of Mony, Paction, or mutual Tailzie. Sir *William*'s providing, That the Heirs of Intail ſhould tailzie their Eſtates to the Heirs-male, and do no Deed to evacuate the ſame, was not the onerous Cauſe of his Tailzie, no not ſo much as the Motive thereof, but only a Condition adjected to his own voluntary Deed, which qualified it upon the Accepter's Part.

The Lords found, That there being no antecedent onerous Cauſe made or done to Sir *William Scot* younger of *Harden*, for making the former Tailzie of his Eſtate, eſpecially in Favours of Heirs to be begotten and born; and that ſeing the ſaid former Tailzie did remain in the Terms of a perſonal Right, without being perfected by Charter and Seaſin; it is revocable by Sir *William* the Maker thereof, with Conſent of Sir *William* his Father the firſt Inſtitute, and is actually revoked by them conform to the Revocation in Proceſs: And therefore aſſoilzied from the Reduction of the ſecond Tailzie.

Eodem Die. Agnes Colquhoun *Lady* Montbuddo, *againſt the Laird and Lady* Newmains.

IN a Proceſs of Mails and Duties, Compt, Reckoning and Payment, at the Inſtance of the Lady *Montbuddo*, againſt *Newmains* and his *Lady*; The Purſuers having inſerted the Firſt and Tenth Days of *January* laſt, which fell within the Chriſtmas-vacation, for the Days of Compearance in her Summons: The Lords refuſed to caſt the Proceſs upon that Head, but allowed the wrong Days filled up to be amended. Albeit it was alledged for the Defenders, That ſuch a Favour us'd only to be indulged, when a Summons given out blank in the Days is filled up by the adverſe Party with wrong or unlawful Days.

June 25, 1713. John Gib *of* Caſtletoun, *againſt* David Robertſon *of* Touchie.

IN a Declarator of ſingle Eſcheat, upon a Gift flowing from the Crown at the Inſtance of *John Gib*, againſt *David Robertſon*.

Alledged for the Defender. The Gift in Favours of the Purſuer, cannot carry Right to the Defender's ſingle Eſcheat: Becauſe, he lives within the Regality of *Kinroſs*, and Sir *William Bruce*'s Heirs have Right to all Eſcheats of Perſons within that Regality, conform to a Charter from the Sovereign in the Year 1685. Whereby the Lands of *Kinroſs*, a Part of the Church-Regality of *Aberdour*, were disjoined from that Regality, and erected with other Lands in Favours of Sir *William Bruce* and his Heirs-male, *in unam integram Baroniam nuncupand. Baroniam & Regalitatem de* Kinroſs, *cum plenario Jure, Privilegio & Juriſdictione liberæ Regalitatis, liberæ Capellæ, & Cancellariæ, ac Juſticiariæ infra prædictas integras Bondas Regalitatis.* And the ſaid Sir *William Bruce* and his Heirs-male are conſtituted *hæreditarii Balivi dictæ Regalitatis, cum omnibus & ſingulis Privilegiis, Immunitatibus, Caſualitatibus, Commoditatibus, Proficuis & Divoriis quibuſcunque; & cum omnibus Honoribus, Dignitatibus, Emolumentis & Libertatibus quibuſcunque, ſimiliter & adeo libere in omnibus Reſpectibus, ac ullus alius Dominus Regalitatis, infra dictum Regnum Noſtrum* Scotiæ *utitur, potitur & exercet, Virtute ſuarum Cartarum, Jurium & Infeofamentorum earundem Legum & Conſtitutionum hujus Regni Noſtri uti & exercere poterint: Cum Eſchetis Vitalibus, Reditibus & Foriſfacturis omnium Perſonarum quæ infra dictam Regalitatem quæ ſub prædictis Criminibus eorumve aliquo caderint, aut Rebelles denunciati, convicti aut foriſfacti fuerint, aut alio quocunque Modo caderint, intromittendi, levandi, aſſignandi, & inſuper donandi, eademque cum omni Jure quod nos ad eadem habuimus, habemus, vel pretendere poterimus*, &c.

Replyed for the Purſuer. 1. Sir *William Bruce*'s Charter doth not comprehend ſingle Eſcheats: Becauſe not expreſly mentioned; and Eſcheats, being *inter Regalia majora*, are not carried under general Words, *Stair, Inſt. Lib.* 2. *Tit.* 3. §. 60. Now that ſingle Eſcheats are not expreſs'd, is obvious: Seing the Words *cum Eſchetis Vitalibus Reditibus*, if they have any Senſe, can be underſtood only of liferent Eſcheats by joining the Word *vitalibus* to the preceding Word *Eſchetis.* For ſingle and liferent Eſcheats are uſually diſponed thus, *cum Eſchetis tam vitalibus quam ſimplicibus.* And if there was any Ambiguity in the Clauſe, it ought to be favourably interpreted for the Crown: Eſpecially conſidering, that by the Act of Annexation all Eccleſiaſtical Regalities were extinguiſhed, and the Power of Juriſdiction by heretable Baillies only reſerved to be given by the Sovereign. 2. *Eſto* the Charter comprehended ſingle Eſcheats, yet at the Time of granting the Gift to the Purſuer, Sir *William Bruce*'s Right of diſpoſing of Eſcheats was, by his neglecting to take the Oath of Alledgeance, void and vacated during his Incapacity in the Terms of the Act of Parliament 1693.

Duplyed for the Defender. 1. The Word *Eſchetis* ought unqueſtionably to be join'd to the ſubſequent Word *Reditibus*: Becauſe, liferent Eſcheats belonging naturally to Sir *William* as Superior, whether the Rebel's Lands ly within his Regality or not, needed not to have been particularly diſponed; and the Lands being erected with all the Privileges of a Regality, the Clauſe containing a Diſpoſition of Eſcheats, muſt be ſo underſtood as to agree with the Erection. 2. The Act of Parliament requires only Baillies, and not Lords, of Regality, to qualifie by taking the Oath: Therefore Sir *William Bruce*, in whoſe Favours the Regality of *Kinroſs* was erected with all the Privileges competent to any Lord of Regality, could not, through his not qualifying, fall from his Privilege of gifting Eſcheats, which is competent to a Lord of Regality as ſuch, and not to Baillies of Regality, but by ſpecial Grant from their Lord. And tho' Sir *William* be named in the Charter only *heretable Baillie of Regality*, yet having annexed to his heretable Right all the Privileges competent to any Lord of Regality: His not qualifying according to Law, could only deprive him of the Exerciſe of Juriſdiction *qua* Baillie of the Regality; ſuch as holding of Courts, the Benefit of Sentence-mony, and other Perquiſites or Dues of Court; and could not cut him off from diſpoſing of the Caſualty of Eſcheats, which is no Exerciſe of Juriſdiction, but a Part of his Property, that belongs to him, as to a Lord of Regality, tho' the Rebel be judged and his Lands ly within another Juriſdiction, *June* 26, 1680, *Young* contra L. of *Raploch*, *Mackenzie*, *Crim. Part* 2. *Tit.* 11.

The Lords found, That Sir *William Bruce* had Right to gift ſingle Eſcheats fallen within the Regality of *Kinroſs*; and that by not taking the Oaths, he did not loſe that Right.

Eodem Die. Walter Carmichael, *againſt* Thomas Lockhart *Her Majeſty's Land Surveyor at* Leith.

THE Eſtate of *Muir* of *Anniſtoun*, being ſold by a judicial Roup to the Earl of *Hyndfoord* in the Year 1700; and in a Ranking of *Anniſtoun*'s Creditors competing for Payment out of the Price in the Purchaſer's Hand, *Walter Carmichael*, who had Right to a perſonal Debt not bearing Annualrent, upon which Inhibition was uſed, being preferred to the reſt in the Year 1707: The Lords found, That *Walter Carmichael* the Inhibiter, being no real Creditor affecting the Subject of the Eſtate at the Time of the Sale, hath no Right to Annualrent of the Sum for which Inhibition was uſed preceeding the Ranking, he not having adjudged till after it.

Albeit it was alledged for *Walter Carmichael*, That *utcunque* the Purchaſer be not obliged to pay the Price to any Creditor, till he make up a real Title for his Security; yet the *Quota* of the Price among the Creditors themſelves is determined according to the Ground of Preference. So that he being claſs'd with Preference in the Decreet of Ranking ſimply upon the Foot of his Inhibition, that intitled him to a Share of the Price as it lay in the Purchaſer's Hand at the Time of the Sale; and conſequently to draw Annualrents thereof as Acceſſory to the Stock. Had *Walter Carmichael* adjudg'd never ſo ſhort While before the Sale, he would certainly have drawn his Share of the Price with Annualrents of it from the Date of the Sale: And yet his Preference could not have proceeded upon the Adjudication, which had been poſterior by the Space of ſeveral Years to other Adjudgers. Now how could he loſe the Annualrents of his Share of the Price for not adjudging, and yet could not be preferr'd upon an Adjudication, but only upon his prohibitory Diligence of Inhibition? The Caſe is to be ſuppoſed, as if the Price were immediately to be divided at the Sale, ſeing the Ranking was declaratory, and added no new Right: If then the Price had been divided at the Sale, the Inhibiter would have been preferr'd for the Sums ſecured by his Inhibition, and the Purchaſer's Power of retaining for his own Security, till the other had eſtabliſhed a real Title, is *Jus tertii* to the Creditors.

In Reſpect it was anſwered for *Thomas Lockhart*, That had *Walter Carmichael* adjudged a little before the Sale, he would have got Annualrent becauſe of his Adjudication, tho' late, and drawn the Principal by Virtue of his Inhibition out of the Hands of prior Adjudgers, *cum omni Cauſa*, or with it's Acceſſory, that is Annualrent falling due by the ſubſequent Adjudication: But the Inhibition intitled him to Preference for no more than the Sum therein, which did not bear Annualrent; and the Ranking him *Fictione brevis Manus* gave him no new Right. Let it be ſuppos'd that the Price of a common Debtor's Lands were to be divided among his Creditors at the Sale; the Adjudgers would properly get the whole Price as a *Surrogatum* of the Subject affected by their Diligence: All a perſonal Inhibiter could do if he did preſently inſiſt, were to force the Adjudgers poſterior to his Inhibition to pay him his Mony; and if he did not inſiſt, but ly off for the Space of Seven Years (which is the preſent Caſe) he would ſtill get no more than his Mony. Again, had the Ranking preceded the Sale, no Doubt the Inhibiter inſiſting had got his Mony either *brevi Manu* from the Purchaſer, or *longa Manu* from the Adjudgers after they had drawn the Price, and then might have lent it for Annualrent. But ſtill ſo long as he doth not inſiſt for Payment, his Mony can bear no Annualrent, more than it would have done againſt the Debtor, while there was no Sale intended. The Inhibiter hath no Right to the Lands or Rents, and therefore no Right to the Annualrent of the Price, which belongs to the Adjudgers, as the Annualrent of the Price of their Lands.

July 1, 1713. Alexander Stuart *Merchant*, *againſt* Patrick Haliburton.

Alexander Stuart Creditor to *Patrick Haliburton*, intented a Proceſs of fraudulent Bankrupt upon the Act of Parliament 1696, againſt him, wherein the Lords *found it proved, That the Defender contracted great Sums of Mony within Three Months of his abſconding; and that he did not keep, or at leaſt produce any Compt-books of his Dealing, nor any Copy-book of Letters written by him, nor Letters written to him for clearing the Courſe of his Correſpondence, nor Invoice of the Goods ſent him from abroad. But found it not proved that he hath withdrawn his Effects from the Diligence of his Creditors, farther, than that there appears no viſible Cauſe for exhauſting his Stock, and contracting ſuch conſiderable Debts. And found, That the ſaid Qualifications proved are relevant to infer, that the Defender is fraudulent Bankrupt.*

Then when the Lords were about to adviſe what Puniſhment to inflict upon the Defender, he pleaded the Benefit of Her Majeſty's Indemnity.

Alledged for the Purſuer. The Indemnity (which extends only to the publick Concerns) cannot take Place here in a Proceſs at the Inſtance of a private Party, without the Concourſe of the Fiſk: For *Indulgentia generalis nec concedi debet, in Præjudicium Partis, nec facienda cum Detrimento alterius, Perez ad Tit. Cod. de Sentent. Paſſis & Reſtit.* And for the ſame Reaſon, the Puniſhment of Cutters of green Wood, hath been found not to fall under the Indemnity, the Party injured having Intereſt in the Fine.

Anſwered for the Defender. The Indemnity would not free an Offender from any pecunial Fine appointed by Law to be paid to the Party injured, in Lieu of his Damages: Yet where Puniſhment is inflicted, not for repairing the Parties Damages, but ſimply *per Modum Pæna*, the Indemnity muſt take Place. *V. G.* The Pains of deſtroying green Wood being Ten Pound for the firſt Fault, Twenty Pound for the ſecond, and Death for the third, *Act* 11. *Par.* 4. *Ja.* 5. the pecunial Pains for the firſt and ſecond Faults fall not under the Indemnity, becauſe they ſeem to be calculated for the injured Party's Reimburſement; but capital Puniſhment which Law inflicts for the third Fault from a

Regard to the publick Utility, without any Conſideration of private Intereſt, would certainly be indemnified. Now the Puniſhment of fraudulent Bankrupts by the Act of Parliament 1696, being Infamy, Baniſhment or otherwiſe, Death excepted, is no Ways adapted to the Intereſt of private Parties, but merely *ad Vindictam publicam*; and conſequently doth without Queſtion come under the Indemnity, which pardons every Thing that may be pardoned, except ſuch as are therein particularly excepted, among which Exceptions fraudulent Bankrupcy is not found.

The Lords ſuſtained the Defence founded on the Act of Indemnity, relevant to exempt *Patrick Haliburton* from the Penalty of the Act of Parliament 1696 upon fraudulent Bankrupts.

July 3, 1713. *Mr.* William Cochran *of* Kilmaronock *and* George Napier *of* Kilmahew, *againſt Sir* John Houſtoun *of that Ilk and* Robert Cuningham.

K*Ilmaronock*, who ſtood obliged to relieve *Kilmahew* of all Debts he might be ſubject to as Heir to Sir *Patrick Maxwel* of *Newark*, raiſed Reduction and Declarator of Extinction of a Bond for 17800 Merks of Principal bearing Annualrent from the Date, ſubſcribed by Sir *Patrick* blank in the Creditor's Name in the Year 1670, and aſſigned by *Robert Cuningham* to Sir *John Houſtoun* for an onerous Cauſe: Which Bond the Purſuer contended ſhould make no Faith, but ought to be reduced, and declared void for the Reaſons following, 1. The Bond continued blank in the Creditor's Name and never heard of by any repreſenting the Debtor for Thirty nine Years. And tho' there be Inſtances that a Bond for ſome Time upon certain Conſiderations hath been kept blank in the Name of the Creditor: Yet there is no Inſtance that a Bond of this Conſequence has gone about by *Legerdemain* ſo long without ever being ſo much as heard of, or any Evidence given what Steps it has taken, or by what Hands it has come about at any one Period. 2. Sir *Patrick Maxwell* Subſcriber of the Bond and his firſt Heir had an opulent Fortune, and were in that Condition, that they could not probably have ſuffered this Bond to ſtand out unpayed to an uncertain Creditor. 3. *Robert Cuningham*, in whoſe Hand it ſeem'd firſt to appear, being ordained to ſhew the Manner how he came by it, ſaid he found it among *Agnes Montgomery* his Mother in Law's Papers when ſhe died in the Year 1689: Which *Agnes Montgomery* lived and died in a poor Condition, without any poſſible Means of acquiring ſuch a Sum; and tho' ſhe lived to a great Age, and died of a lingring Sickneſs, never made any Settlement or Conveyance, or the leaſt Mention of this Debt. 4. Again *Robert Cuningham* for about Eighteen Years after his Mother in Law's Death conceal'd it, *Viz.* Till the Year 1708, when it was forc'd into Light by this Proceſs. Albeit he was not only conſcious of the Neceſſity of doing Diligence in the *interim* if he had a Mind to ſecure his Mony, *Patrick Maxwel* the laſt Heir's Eſtate becoming then mightily incumbred: After whoſe Deceaſe he was called and compearing as Factor for the Eſtate in all the Proceſſes wherein it was wholly diſcuſs'd and ſold. Nay, he did not produce or found upon ſuch a Bond in a Purſuit againſt him at the preſent Heir's Inſtance, wherein he was decern'd for and paid a great Sum: Which he might have avoided in a great Part by founding upon his Intereſt in the Bond. And what could this be attributed to, but only a Deſign to keep Things quiet till the Writer and inſtrumentary Witneſſes were all dead, who could tell Tales, and give Light in the Matter, as they now are? 5. *Robert Cuningham* had many Occaſions of getting this Bond into his Hand from among the Writs of the Family of *Newark*, where probably it lay undelivered, or retired: He being many Years Factor, Truſtee, and Manager for the ſaid *Patrick Maxwel*, an eaſie interdicted Perſon; and having after his Death poſſeſs'd the Houſe where the Charter Cheſt ſtood, which ſuffered manifeſt Alterations and Handling in that Time. Now a blank Writ in a Servant's Hand, is underſtood in Law to be the Maſter's, unleſs he not only condeſcend, but prove how he came to the Poſſeſſion of it. 6. He uſed other Writs belonging to the Family, to the Prejudice thereof. Nay further had threatned, That this, tho' the firſt, ſhould not be the laſt blank Bond, he would attack them with. From all which Circumſtances of Fact, the Purſuer pleaded, That the Preſumption of Verity, Solemnity, and Delivery with which Law hath favoured completed Writs out of the Granter's Hand, is taken off. So that not Delivery, or retiring, or any Thing is rather to be preſumed, than that a Writ liable to ſo much Suſpicion, ſhould have the Authority and Force of a binding Obligation.

Anſwered for the Defenders. All the Qualifications urged for annulling the Bond in Queſtion, are at moſt but vagrant and uncertain *Præſumptiones hominis*, which, however they may create Suſpicion in the Mind of a Judge, can never elide the *Præſumptio Juris* for Delivery of a Writ, by its being out of the Hands of the Granter. For otherwiſe all Preſumptions ſhould be rendred equal, that is equally uncertain, and at the Arbitrement of the Judge. Whereas *Præſumptio Juris* can only be taken off by a contrary poſitive Proof, and doth not depend ſolely upon the Judge. *Facti Quæſtio in Poteſtate Judicantium, Juris Authoritas non eſt*, L. 1. §. 4. ff. *ad Senatuſc. Turpil.* *L.* 15. *In fin. Pr. ff. Ad Municip. cum Judex Legis ſit Miniſter Legis Opinionem et Præſumptionem ſequi debet, Vinn. in Not. ad Weſemb. Tit. de Probat.* In the Opinion of all Lawyers *Præſumptio Judicis*, which at moſt is but *ſemiplena Probatio*, or *Suſpicio*, muſt cede to the Preſumption of Law, *Maſcard. Concluſ.* 1227 §. 4. *Menoch. de Præſumpt. Lib.* 1. *Quæſt.* 29. In the next Place the Preſumption of Law for the Delivery of a Writ, from its being out of the Granter's Hand, is yet ſtronger in the Caſe of blank Writs, than in thoſe where the Creditor is fixed from the Beginning: Blank Writs being intended to circulate as ready Mony, without any ſuch Incumbrance in their Tranſmiſſion by Writ and Witneſſes, as other Writs labour under. The Proof of Delivery in the Caſe of blank Writs is abſolutely impracticable, and can leaſt of all be required by the Debtor in the blank Writ, who muſt know that he is bound to every Haver, and can object nothing, but againſt the Validity of the Writ it ſelf. The Objections againſt the Bond are particularly anſwered, thus, 1. The Bond's being near preſcribed before it was founded on, is of no Moment, ſeing Preſcription is not run, and there might be other Cauſes for not ſeeking after the Debt ſooner, than a Suſpicion or Doubtfulneſs of the Juſtneſs thereof: As it being a blank Bond paſſing from Hand to Hand, might have been ſhort Time in any one Perſon's Poſſeſſion. During the Lifetime of Sir *Patrick* and Sir *George Maxwels*, the Havers might have thought their Mony well ſecured, and many Accidents might have hindered a Proſecution againſt *Patrick Maxwel*. *Agnes Montgomery*'s Silence about the Bond might have been owing to her Ignorance, or to that ſuſpicious Humour, whereby ſhe concealed from her Friends moſt Things that concerned her. *Robert Cuningham*'s Taciturnity after the Bond came in his Hand, can as little derogate from the Credit of it; for he knew ſo much of the Circumſtances of exhauſting the Eſtate by Adjudications within Year and Day, as that Diligence then was unneceſſary; and it was a pure Accident that one or two Adjudgers about that Time got ſome Share of the Price, which he did not foreſee. Yea, unleſs *Kilmahew* had entered upon his Tranſaction with *Kilmaronock*, which was as little then in View, the Bond would never have appeared, but been looked upon as a loſt Debt. There is ſmall Weight in the Preſumption drawn from the Subſtantiouſneſs of the Debtors Sir *Patrick Maxwel* and Sir *George* his Son: For as Men of the beſt Condition will ſometimes need Credit; ſo it is certain that the Family of *Newark* was under a conſiderable Burden before *Patrick Maxwel* came to the Eſtate. Again, tho' *Agnes Montgomery* was a Woman in Straits, and the Bond might have been a Fund of Credit and Advance of Mony to Sir *Patrick Maxwel* at the Beginning: Yet being blank, it might have gone through many Hands upon different Accounts before it came to *Agnes Montgomery*. And even if Accident brought it to her, 'tis ſtill good againſt the Debtor. In a Queſtion of this Kind it is not ſufficient to bring Preſumptions from the Circumſtances of the Haver, without offering ſomething that ſtrikes directly againſt the Bond it ſelf, ſhewing that it was never binding upon the Granter: Unleſs there were a Competition betwixt the Haver and another Creditor claiming Right to the Blank-bond. Thus, tho' the Circumſtances of Perſons who have Bank Notes may found a Preſumption, That they do not belong to them, or were not fairly come by: The Bank being Debtor and only concerned to get in the Notes, could not thereupon refuſe to pay, unleſs they could prove that the Notes were ſtollen from them. And albeit Law hath now diſcharged blank Writs, for preventing Prejudice to Creditors by clandeſtine Tranſmiſſion thereof: Yet the Obligement, whether to a blank Perſon or to one named, is equally binding upon the Granter, who ſtill owes the Debt, albeit the Perſon who claims it may not be the true Creditor. So that the firſt four Preſumptions againſt the Bond are ſufficiently taken off: Albeit the Defenders had not lately diſcovered Sir *George Maxwel*'s miſſive Letter to *John Rae* Writer in *Edinburgh* his Agent, deſiring him to ſearch for the Bond in Queſtion, that they might underſtand who was Creditor, and expreſſing his Trouble about it, for that he knew not how ſoon it might come upon him, or what rigid Creditor might be filled up in it: Which Letter leaves no Ground of Doubt about the Bond. 2. As to the Alledgeance, That the general Preſumption of Delivery ought not to take Place in this circumſtantiate Caſe, of a blank Writ appearing in the Hand of a Factor or Servant, this is not to the Purpoſe, for the Nature of blank Writs exclude all Inquiry about the original Creditor: And this in Queſtion, might have been tranſmitted through 20 Hands before it came into *Robert Cuningham*'s Poſſeſſion, who was not Factor till the 1683. Again, *Robert Cuningham*'s being Factor can have no Influence to preſume that the Bond was retired, and afterwards taken out of the Charter Cheſt, till ſuch time as it be made appear by ſome good Evidence, That the Bond did truly return, and was ſeen in the Charter Cheſt of *Newark*, or in the Poſſeſſion of the Debtor in the Bond. So a Factor having a blank Writ in his Hand, was not preſumed to have taken it from among his Conſtituent's Writs, until its being there was proved, 9 *July* 1678, *Henderſon* contra *Monteith*. And tho' it were made appear, That the Bond was lying retired in the Debtor's Charter Cheſt, ſhall a Factor or Servant immediately lie under the Imputation of Diſhoneſty, becauſe he has a better Opportunity for it? This neither Law nor Charity preſumes. But upon the whole, the Preſumptions relating to the Antiquity of a Debt never purſued for, and the Quality aud Condition of the Debtor and Creditor are over-ruled by a Deciſion, obſerved by *Dirletoun*, 7 *January* 1675, Laird of *Luſs* contra Earl of *Nithſdale*.

Replyed for the Purſuer. Blank Writs are moſt ſuſpected by our Law and Lawyers, *Stair Inſtit. Lib.* 3. *Tit.* 1. §. 5. *Dirletoun Deciſ.* 334. And therefore where ever any Cauſe of Doubt occurr'd concerning the filling up of blank Writs, the Lords have allowed Expiſcations and Trials, and have preferred Inhibiters, Donatars, Arreſters, to Perſons whoſe Names have been filled up in blank Aſſignations, bearing Dates anterior to the

Rebellion, Arreſtment or Inhibition: And at Length the Act of Parliament 1696, declared blank Bonds void. The Defender's Title is not founded on preſumed Delivery, which properly ſpeaking cannot agree to a Blank or no Body; the Havers of blank Writs are preſumed to have them as theirs, as Poſſeſſion preſumes Property in Moveables. And as the latter is elided by contrary Preſumptions, *Stair Lib.* 4. *Tit.* 45. §. 8: So may the preſumed Intereſt of the Haver of a blank Writ. Beſides, the Defenders are in the weakeſt Caſe of Havers, ſeing their Title is derived from a Place, and not from a Perſon in any Form of direct Conveyance or Delivery: It was found among the Papers of *Agnes Montgomery*, and no better than that of ſuch as find ſtollen or ſtray'd Goods. The Weakneſs that attends blank Writs may be further confirm'd hy the ſubſcribed Opinion of *Meſſieurs Van Muyden*, and *Van Dyck* Profeſſors of civil Law in the Univerſity of *Vtrecht*, which runs thus. *Cenſemus (ſuppoſita Factorum Venitate) Rationes et Præſumptiones ex Circumſtantiis Perſonarum, Temporis, aliiſque deductas, quibus Inſtrumentum de quo quæritur a* Roberto Cuningham *productum, falſum vel ſuppoſititium eſſe contenditur, adeo eſſe fortes et luculentas, et tot Præjudiciis ac Argumentis firmatas, ut illas conjunctim ſumptas pro indubitatis Probationibus habendas exiſtimemus. Nec dubitamus quin ut alia quælibet Inſtrumenta, ita et illa quæ ſcripta ſunt in Carta vacua ſive blanca, etiam poſtquam Teſtes Vitam cum Morte commutaverunt, in dubium vocari, et ob tot ac tales, quot et quales, in hac Facti Specie cumulantur Fraudis et Falſi Suſpiciones omni probandi et obligandi Vi ac Poteſtate deſtitui et privari poſſint. Quare ſi in hac Lite eſſemus Judices, ſine ulla Hæſitatione omnino pro Domino* Kilmaronock, *contra* Robertum Cuningham *ejuſque Socios, pronunciaremus; eumque ab hac injuſta ac calumnioſa Petitione abſolveremus.* The Preſumption of Delivery of a Writ out of the Granter's Hand being only *Præſumptio Juris*, may be taken off by a contrary Probation, and it cannot be denied, That *Præſumptiones Hominis* are a *Species* of Proof equally ſtrong as any Preſumption of Law, that admits of contrary Evidence; as the learned *Voetius Menochius* and *Afflictus* obſerve, and the Lord *Stair Inſtit. Lib.* 4. *Tit.* 45. *N.* 18, 23. tells us: And the golden Rule in theſe Caſes is expreſs'd in *L.* 3. *ff. de Teſtibus.* Again, by the Current of our former Deciſions, Bonds and other Rights have been annulled by violent ſtrong Preſumptions: As of Latency and lying long dormant, and the Quality or Condition of the Debtor and Creditor, *February* 6, 1668, *Chiſholm* contra *Rennies*, *February* 27, 1666, Creditors of Lord *Gray* contra Lord *Gray*, *February* 1697, Sir *Robert Grierſon* contra the Earl of *Annandale*, *December* 15, 1681, *Mercer* of *Clavadge* contra the Lady *Aldy*, *December* 17, 1684, *Lindſay* contra *Cuninghamhead*, and in a late Caſe 1688, betwixt the Duke of *Hamiltoun* and *Cuningham* of *Auchinharvie*, the Duke and Dutcheſs were aſſoilzied upon Evidences given, That it was convincingly improbable that the Bond purſued for could be truly reſting, tho' the Creditor was a Perſon of intire Reputation, and the Bond had been publickly own'd, and paſs'd thro' ſeveral Hands by legal Tranſmiſſion. Which evinceth that the Lords have ſtill been in Uſe to ballance the Preſumption of Bonds being out of the Debtor's Hands, with ſatisfying Evidences that they could not be truly reſting. The Lords have alſo found blank Writs in the Hands of Factors and Servants to belong to their Maſters, and Obligations filled up in a Servant's Name to be due to the Maſter, *December* 1682, *Cornwall* of *Bonhard* contra *Burrel*, *February* 8, 1710, *M'laren* and *Din* contra Executors of Major *Chieſly*. As to the Prattick 1675, betwixt the L. of *Luſs* and the Earl of *Nithſdale*, the ſame hath been either altered, or the Plea ſopite by an Agreement. Becauſe 'tis omitted out of the Viſcount of *Stair*'s Collection at the Time, and obſerved by no other Hand, nor any Mention of it upon Record. Again, the Bond was not blank, but filled up with the Creditor's Name, which

Law preſumes was originally ſo, tho' the Ink appeared different: It having been uſual to make Bonds blank in the Creditor's Name, and fill them up *ex Intervallo* at ſigning. Beſides, the Qualification in that Deciſion comes not up to what is pleaded in *Kilmaronock*'s Caſe, from the Bond's being not only in the Hands of a Factor, but a Manager with the greateſt Powers, even to the tranſacting of the Granter's Debts who had conſtant Acceſs to all the Granter's Writs, and gave many of them up to third Parties, and pretends not to be Creditor in the Bond, but a bare Finder. The Letter from Sir *George Maxwel* to *Rae*, doth not ſupport the Bond in Queſtion: For Sir *George* was not Granter of the Bond, but only his Heir, and the Letter imports only, That he underſtood from uncertain Accompts, that there might have been ſuch a Bond, but was in doubt as to the whole Contents. It's *Petitio Principii* for the Defenders to alledge, That a blank Bond being out of the Granter's Hand cannot be quarrelled by his Repreſentatives: For a Bond filled up *ab Initio* may be quarrelled upon pregnant Preſumptions, and much more a blank Bond.

Duplyed for the Defenders. The cumulative Preſumptions urged out of my Lord *Stair*'s Inſtitutions, are chiefly in Matters of Fraud and Truſt, which indeed are to be proved only in that Manner. And ſo do the Deciſions produced by the Purſuer in Support of his Qualifications, land all in Effect into Caſes of Truſt and Fraud or Payment, and are founded upon plain Proof of ſuch Circumſtances, as leave no Room with the Judge to doubt of, termed in Law, *Indicia indubitata et Luce clariora, ubi Circumſtantiæ ita Factum premunt ut moraliter ſit impoſſibile Rem aliter ſe habere.* The Authority of the Deciſion 1675, betwixt the Laird of *Luſs* and the Earl of *Nithſdale*, cannot be diſputed, becauſe not found in my Lord *Stair*'s Collection; for 'tis obſerved by a Judge of great Learning and Exactneſs, whom no Body will preſume to have impoſed upon the World any Thing fictitious. And it can't be imagined, but that among the accurate and far greater Number of Deciſions collected by the Lord *Stair*, ſeverals might have eſcaped his Lordſhip's Obſervation. But which is more, the Decreet it ſelf in that Matter ſtands recorded in the Low Parliament-houſe. Where ever Writs have been called in Queſtion as abſtracted, and not fairly delivered, it was conſtantly found neceſſary in the firſt Place to prove, That ſuch Writs were in the Cuſtody of the Perſons, from whom they're alledged to have been abſtracted: Upon this plain Ground of Law, *non poteſt videri deſiiſſe habere, qui nunquam habuit*, *L.* 208. *ff. de Reg. Juris.* And whatever Suſpicion may remain of *Agnes Montgomery*'s not having this Bond; the Lords will remember, as a learned Lawyer *ad L.* 14. *Cod. de Probat.* obſerves, That *licet Suſpicio alii ſufficiat, Judici tamen non ſufficit, quia Judex ex Sacramento ligatus eſt, ſecundum allegata et probata judicare.* As to the Opinion of the two forein Lawyers procured by the Purſuers, the Defenders don't doubt their being Perſons of Repute in their Profeſſion. But at the ſame Time, it may be obſerved, 1. However the Nature of Preſumptions may be very well known from the *Roman* Law, yet little or nothing of blank Writs (which crept in afterwards for the Benefit of Commerce) is to be known from that Fountain. 2. Had *Kilmaronock* and *Houſtoun* jointly ſtated the Query, and given the Honorary to theſe Lawyers, their Anſwer perhaps would have been in other Terms. 3. The Lawyers were not informed of the Miſſive Letter now produced, which very much alters the Caſe. So that upon the whole, little Weight can be laid upon this Forein emendicate Opinion.

The Lords ſuſtained the Qualifications and Reaſons of Reduction, relevant to extinguiſh the Bond, not only *quoad* the Cedent, but alſo found the Aſſigny to be in no better Caſe than he as to the Competency of the Reaſons of Reduction : In Reſpect the Aſſignation was made after the Bond was quarrelled by Reduction and Improbation.

July 7, 1713. *The Creditors of* James Hamilton *younger of* Orbiſtoun, *againſt* James Hamilton *of* Dalziel.

IN a Proceſs at the Inſtance of the Creditors of young *Orbiſtoun*, againſt *James Hamilton* of *Dalziel* and Others, for proving the Tenor of a Diſpoſition granted by the deceas'd *William Hamilton* of *Orbiſtoun* elder to his only Son : The Lords repelled the Alledgeance proponed for the Defenders, That the Diſpoſition, whereof the Tenor was crav'd to be prov'd, was innovated by Contract entered into at *Cramond*, betwixt old and young *Orbiſtoun*, *hoc Loco*; reſerving to the Defenders to be heard thereon after the Tenor is prov'd, and allowed them to give in a Condeſcendance of the Qualifications, That the Diſpoſition was cancelled and retired by old *Orbiſtoun*, and to prove the ſame before Anſwer.

Albeit it was alledged for the Defenders, That if the Writ, whereof the Tenor is offered to be made up, hath been innovated and altered, a proving the Tenor cannot proceed. Becauſe, then the Purſuers have no Intereſt, and a Party having no Intereſt cannot purſue: Action being *Jus perſequendi quod ſibi debetur*, not competent vagrantly to every Perſon having a Mind to inſiſt, but only to ſuch as can ſhew their Intereſt in what is acclaimed. Nor is there any Difference in this Matter, betwixt a proving of the Tenor, and other Actions: On the contrary, proving of Tenors being extraordinary Remedies, are not to be admitted till every Thing objected againſt the Purſuer's Intereſt be diſcuſs'd. So in Exhibitions *ad deliberandum* (which like this is a preparatory Action for a ſeparate Proceſs) 'tis a good Defence, That the Defunct was denuded, whereby the Purſuers Intereſt ceas'd, and there can be no further Step made till the Import of that Defence be tried. Every acceſſory Proceſs muſt be determined by the ſame Rules, as the Principal Proceſs, if inſiſted in, would: *Finis dat Formam Negotio*, he that hath Right to the End, hath Right to the Means that lead to it; and *è contra*, one that hath no Right to the End, ought not to be admitted to uſe the Means to attain what is the Right of another: Conſequently, what is relevant againſt the principal Concluſion, is relevant againſt the Acceſſory of proving the Tenor. Were a Renunciation of the Diſpoſition under young *Orbiſtoun*'s Hand produced, his Creditors could not proceed in proving the Tenor, till the Renunciation were diſcuſs'd: Now, Innovation hath the ſame Effect in Law, as a Diſcharge or Renunciation; and the Lords are always in Uſe to reſtrain Humour of Parties in putting others to unneceſſeary Charges, by ſuſtaining the common Exception, *Fruſtra probatur*, &c.

In Reſpect it was Anſwered for the Purſuer, That they are not obliged to plead their Intereſt, or diſpute the Import of the pretended Innovation, until their Right inſtructing the ſame be complete and in the Field, which they are bringing in by proving the Tenor. This regularly ſhould meet with no Oppoſition, being of the Nature of a Transferring *in Statu quo*, prejudicial to no Party: For if the Writ whereof the Tenor is to be prov'd was good and effectual, the Party leſed by Accident ſhould have it redintegrated by the Aſſiſtance of Juſtice; and if it was exceptionable, it will be ſo ſtill after proving the Tenor, and all Defences againſt it intire. The Inſtance of an Exhibition *ad Deliberandum*, is forein to the Purpoſe: For none can deliberate about a Succeſſion, where there is nothing to ſucceed to. Whereas a Perſon may juſtly prove the Tenor of a Writ tho' innovated; ſeing innovated Writs are not always extinct, but continue ſtill good Evidents with the Burden of the Innovation, *February* 25, 1675, 1675, *Binnie* contra *Scot*, obſerv'd by *Dirletoun*. Again, a Diſcharge or Renunciation could not ſtop Proceſs of Tenor: Becauſe, the Tenor of Writs may be prov'd for other Effects than for obtaining Implement or Performance. Beſides, a Diſcharge is not the ſame with an Innovation, the firſt being a direct Extinction of a Right, and the other an Extinction implyed only. The Brocard, *Fruſtra probatur, &c.* is miſapply'd, for the Purſuers, without any Humour, decline to diſpute the Point of Innovation, till they be *in pari Caſu* with the Defenders, by having their Right complete in their Hands, which they are proſecuting upon their own Charges, without any Trouble or Expence to the other Party.

July 8, 1713. Andrew Baillie *of* Parbroth, *contra* Robert Nisbet *of* Greenholm, *and* Archibald Nisbet *of* Carſin.

IN a Reduction *ex Capite Inhibitionis*, at the Inſtance of *Andrew Baillie*, againſt *Robert* and *Archibald Nisbets*, the Defenders objected three Nullities againſt the Execution of the Inhibition, *Viz.* 1. It doth not deſign the Party at whoſe Inſtance the Inhibition was uſed, nor the Party againſt whom, otherways than by a general Relation to the Letters, contrary to the Act of Parliament 1672, which, tho' it mention only Executions of Summons, includes alſo Executions of Inhibition, Horning, and the like: Summons and Letters being Terms of promiſcuous Uſe in our Law, as is clear from *Act* 45, *Parl.* 5. *Ja.* 5. and the *Act* 40. *Parl.* 1695. *Act* 33. *Parl.* 1469. *Act* 74. *Parl.* 1540. 2. The Execution doth not bear Delivery of a ſubſcribed Copy to the Party, which is a neceſſary Solemnity by *Act* 139. *Parl.* 12. *Ja.* 6. For when an Execution doth not bear, That the Formality required by Law was uſed, it is preſumed againſt it, That ſuch a Formality was omitted. 3. The Execution doth not bear, That there were any Witneſſes to leaving of the Copy, but only to its affixing.

Anſwered for the Purſuer. 1. The Act 1672, relates only to Summons, the Commencement and Continuation of Proceſs before the Lords of Seſſion to different Diets of Compearance to Purſuers and Defenders, *&c.* Now, there are no ſuch Terms uſed with Reſpect to Inhibition, which is a complete Security by the Execution and Publication, and cannot be regulated by the Statute aforeſaid. 2 Law doth indeed require, That Copies of Summons and Letters delivered to Parties, be ſigned by the Executer, but not that the Execution expreſly bear, That the Copy delivered was ſigned. 3. If the Meſſenger after Narration of his having left and affixed a Copy, and uſed the other particular Solemnities, had ſaid no more but *before theſe Witneſſes*, &c. and the Witneſſes had ſubſcribed the Execution, it had been certainly good. Now, his ſaying, *Witneſs to the affixing*, can never wrong the Execution, which had been good without it: More than it could be quarrelled as null for not bearing, *That they were Witneſſes to the open and publick reading and crying of the Oyeſſes*, which are likewiſe ſaid to be done in the Execution.

The Lords repelled the Nullities, and ſuſtained the Execution.

July 9, 1713. *The Duke of* Montroſe *contra* Archibald M'aulay *of* Ardincaple.

THE Duke of *Montroſe* ſtanding infeſt in the Dukedom and Regality of *Lennox*, purſued a Reduction, Improbation and Declarator againſt his Vaſſals, and particularly againſt *Ardincaple*, who claimed an heretable Right to the Office of Bailliary of the Regality of *Lennox*. The Defender for vouching his Right to that Office of Bailliary, produced certain heretable Rights of the Bailliary of the Earldom, granted by the Duke of *Lennox* to *Logan* of *Balvie*, and diſponed by him to the Defender's Predeceſſors, from whom he derives Right. He produced likewiſe ſeveral Deeds and Documents, proving, That he and his Predeceſſors had poſſeſs'd upwards of Fourty Years as Baillies of the Regality. Upon this Production the Defender pleaded, 1. That he, as having Right to the Bailliary of the Earldom, had Right to be heretable Baillie of the Regality. Becauſe, 1. The heretable Office of Baillie of the Earldom, was the ſame with the heretable Office of Baillie of the Regality; and all ancient Earldoms included Regalities. In ſo far as anciently, the Erection of Lands in a *Comitatus*, was the higheſt Denomination of Dignity and Juriſdiction in *Scotland*, including *omnimodam Poteſtatem*: As appears by ſeveral Charters of the old Earls of *Douglaſs* and others, and Charters even of ſome Lords, as *Galloway*, *Annandale*, &c. wherein the Powers of a Regality are particularly enumerated, ſuch as, judging Malefices, Repledging, the leading and training fencible Men. 2. The Earl of *Lennox* had all the Powers competent to any other Earls of *Scotland*, within the Lands of the *Comitatus & Dominium de Lennox*; and conſequently had the Powers of Regality. Which is not only probable from their near Relation to the Royal Family, but alſo appears from ſeveral Charters of the Family of *Lennox*, bearing particular Privileges competent only to Regalities: As the Charter of *Walter Foſline*, and of *Duncan* Earl of *Lennox*, granted by King *Robert* the Second, and the Charter of *Matthew* Earl of *Lennox*, granted by King *James* the Fourth, in the Year 1511. All which Rights and Privileges in the Charters aforeſaid, came in the Perſon of *John* Earl of *Lennox*, who *in Anno* 1517, diſponed the heretable Bailliary of the Earldom in Favours of *Logan* of *Balvie*. 3. Albeit *Ludovick* Duke of *Lennox* (who ſucceded to Earl *John*) procured the Earldom to be erected in a Dutchy and Regality, with free Chappel and Chancery, Eſcheats and other Privileges competent to any Regality; yet he did immediately thereafter grant a Commiſſion to *Logan* of *Balvie*, when heretable Baillie of the Earldom, to be alſo his Baillie of Regality: Declaring, That the ſaid Commiſſion, in ſo far as concerned the Office of Baillie of the Regality, ſhould continue for Nineteen Years after the Date, *Anno* 1593, and that *Logan*'s accepting thereof, ſhould no ways prejudice his heretable Right of Bailliary of the Earldom. 2. After expiring of this temporary Commiſſion in the *1613*, *M'aulay* of *Ardincaple* the Defender's Predeceſſor purchaſed the heretable Office of Bailliary of the Earldom from *Logan* of *Balvie*: And upon that Title hath continued ſince then to act as heretable Baillie of the Regality. So that whatever Exception his Title might have been liable to *ab Initio*, the ſame is now rendred unquarrellable by Preſcription.

Anſwered for the Purſuer. 1. The Erection of Lands in a *Comitatus* or *Dominium* doth not neceſſarly infer any Juriſdiction, except what is competent to any Baron, (an Earldom being only a higher Denomination of Barony) and therefore can never be extended to comprehend Juriſdiction of Regality, which beſides other Privileges, carries along with it the Power of repledging from, and an abſolute Excluſion of the King's ordinary Judges. If Earldom did virtually include the Juriſdiction of a Regality, why was it that the Earls mentioned by the Defender and others, were ſo anxious to have ſome Branches of the Juriſdiction of a Regality ſpecially inſert in their Charters; and others, long after they were Earls, got their Earldoms erected into Regalities, as did the Earl of *Sutherland* by a Charter from King *David* the Second to him and *Margaret* his Spouſe the King's Siſter? Why did they not retain the old Denomination of Earldom or Lordſhip, and under that exerce all the Powers competent to Regalities? No other Reaſon can be given, but that ſuch

Erections, comprehended no more than the ordinary Juriſdiction, which they and all other Vaſſals holding *in Capite* of the Crown to this Day retain. It's certain, that albeit the Stile of all the Patents of Earls and Lords do contain the general Clauſe of enjoying their Earldoms and Dignities as free and with all the Rights and Privileges competent to any Earl or Lord of the ſame Dignity: Yet many of our ancient Nobility, who have their Lands erected in Earldoms and Lordſhips at this Day, have no Regalities, *V. G.* The Lordſhip of *Scone*, &c. And thoſe who have, the Date of the Erection of their Lands in Regalities with the Powers and Privileges thereof are known. Again the ſpecial Privileges of Regality granted to the Earls of *Lennox* are not contained in any one Charter, but were got from the Crown by Degrees; which is a convincing Evidence, that they belong not to Earls or Lords by having their Lands erected in an Earldom or Lordſhip. What need had *Ludovick* Earl of *Lennox* to procure his Earldom and Lordſhip to be erected in a Dutchy and Regality with free Chappel and Chancery in common Form; if previouſly by Erection of the Earldom he had a Right of Regality? And then his taking Care, immediately upon the Erection, to diſtinguiſh the Province of Baillie of an Earldom from that of Baillie of a Regality, and granting a Commiſſion of the Bailliary of Regality to his heretable Baillie of the Earldom for Nineteen Years only, with the other's accepting ſuch a Commiſſion, ſeems to put it beyond Controverſie, that an Earldom doth not imply a Regality. 2. *Logan* of *Balvie* having entred to Poſſeſſion by the temporary Commiſſion, the Continuance of that Poſſeſſion whether by him or *Ardincaple*, cannot be aſcribed to any other Title. Becauſe, that of Baillie of the Earldom could not veſt him with the Character or Powers of Baillie of Regality. And the Queſtion is not how far the Defender hath extended his Power of Baillie of the Earldom by long Preſcription, but whether the heretable Right of Baillie of the Earldom, could be a Title to the Defender's Predeceſſors to preſcribe a Right as heretable Baillie of the Regality. So that the Defender's pretended Preſcription was without any Title: In ſo far as his Infeſtment in the Bailliary of the Earldom could be none, 'cauſe he poſſeſs'd as Baillie of the Regality; and the temporary Commiſſion could not eſtabliſh an heretable Right, contrary to the expreſs Tenor of it, *Arg. L.* 2. *C. de Præſcript.* 30 *vel* 40 *Ann.* nor could have any more Effect in Law, than tacit Relocation after expiring of a Tack. It doth not alter the Caſe, that the Commiſſion was expired before *Ardincaple* acquired from *Logan* of *Balvie* the heretable Office: For ſtill *Ardincaple* ſucceeded in Place of *Logan*, whoſe Poſſeſſion was by an expreſs Commiſſion, or *per tacitam Relocationem*, and can be in no better Caſe than he was. Beſides, the *Acquiſition* of the heretable Office of Baillie of the Earldom muſt, as a bounding Charter, influence *Ardincaple*'s Poſſeſſion perpetually, to hinder him to preſcribe beyond the Bounds of that Office.

The Lords found, That any Charter Erecting the Eſtate of *Lennox* into an Earldom with as ample Powers as any other Earls, did not give the Earls of *Lennox* a Right of Regality, nor to *Balvie* their heretable Baillie of the Earldom, a Right to be heretable Baillie of the Regality; and that *Balvie*'s heretable Office of the Bailliary of the Earldom, did not comprehend an heretable Office of Bailliary of the Regality. And alſo found, That after the Eſtate of *Lennox* was erected into a Dukedom and Regality, *Balvie*, who was formerly heretable Baillie of the Earldom of *Lennox*, having accepted of a temporary Commiſſion for Nineteen Years from the Duke of *Lennox*, to be Baillie of the Regality of *Lennox*, and having commenc'd his Poſſeſſion by Virtue thereof; he and his Succeſſors could not preſcribe a Right to the heretable Bailliary of the Regality of *Lennox*: And found the Writs and Documents produced for the Defender not ſufficient to exclude the Purſuer's Title.

July 10, 1713. James Douglaſs *of* Hiſleſide, *againſt* William Somervel *of* Kennocks.

MR. *William Somervel* having diſponed the Lands of *Kennocks* and *Blantaggart* to *James Stuart* Son to Mr. *William Stuart* of *Hiſleſide*, who was infeſt in the Year 1670: *Griſſil Stuart* Spouſe to *Samuel Douglaſs* of *Hiſleſide*, in the Year 1683, after having been ſerved Heir in general to *James Stuart* her Brother, did with her Huſband ſubſcribe a Diſcharge and Renunciation in Favours of *William Somervel*, of all Right in their Perſons by Virtue of any Diſpoſition or other Right or Title they could pretend to the Lands of *Kennocks*. After the Deceaſe of *Griſſil Stuart*, *James Douglaſs* now of *Hiſleſide* her Son, ſerved Heir in ſpecial to *James Stuart* his Uncle, as the Perſon laſt veſt and ſeas'd in theſe Lands of *Kennocks*, and commenc'd a proving the Tenor of the ſaid Diſpoſition and Infeſtment, which were abſtracted and amiſſing.

William Somervel objected, That the Purſuer had no Right to prove the Tenor, becauſe, 1. His ſpecial Service is intrinſically null, as proceeding upon an Infeſtment *A Me* not confirm'd by the Superior at the Time of the Service, which Infeſtment was null, or at moſt but a preparatory Step in Order to eſtabliſh a Right when ever a Confirmation ſhould be obtained. So that there was no Subject for a Service, that is no Feu, which could not be conſtituted by a null, or at moſt a conditional Infeſtment: And tho' the ordinary Way of annulling Services be by a great Inqueſt, yet the Lords ſuſtain Reductions of Services before themſelves where the Nullities are obvious. Nor can a Confirmation lately impetrated by the Purſuer, validate the Service expede before there was a Right in Being, to which *James Douglaſs* could be ſerved, ſuppoſe it might make Way for a ſubſequent Service. 2. *Ita eſt*, that before Confirmation, the Diſpoſition in Favours of *James Stuart* (which notwithſtanding the Infeſtment *A Me* not confirm'd continued a perſonal Right) was tranſmitted to *Griſſil Stuart* his Siſter by her general Service, and by her effectually diſcharged and renounced, as if no Seaſin had followed: Which general Service and Renunciation was ſuch a Mid-impediment as hindred the Confirmation to operate *retro*, ſo as to validate the Purſuer's Infeſtment from the Date thereof. For *Griſſil* being generally ſerved, might have reſigned upon the Procuratory in the Diſpoſition, and completed her Right, or might have conveyed her Right to others, who might in the ſame Way have rendred their's effectual. And as the imaginary Infeſtment was no Hindrance to the Tranſmiſſion in Favours of *Griſſil*: So after the Right came in her Perſon, ſhe did ſo extinguiſh it, as there was no more Place for Confirmation. For clearing which Point, it would be noticed, That the Defender doth not plead, That the general Service convey'd the Diſpoſition with the Seaſin *A Me* taken upon it, which truly could not fall under any Service, as being really no Right, but merely a Conſent to eſtabliſh a Right, in Caſe another Party concurred, that did not exiſt till that Concourſe was given; nor yet do they pretend, That the general Service alone did make the Infeſtment *A Me* to ceaſe, or hinder it to become a valid Right by Confirmation: But what the Defender urgeth is, That the whole Right *James Stuart* had being convey'd to his Siſter, the ſame was legally and fairly extinguiſhed by her Renunciation, and ſo hindred the Effect of any ſubſequent Confirmation; or as our Lawyers ſay, was a *medium Impedimentum* to hinder the drawing back of the Confirmation to the Date of the Seaſin. 'Tis not neceſſary in all Caſes, that a Mid-impediment for hindring the conjoining a Confirmation with a precedent Seaſin, be a real Right eſtabliſhed by Infeſtment, *Dirletoun Doubts*, *Tit. Confirmation*, *Craig*, *Feud. Lib.* 2. *Dieg.* 4. *Pag.* 157, *December* 5, 1623, *Paton* contra *Stuart*, which ſeems to be required only when more voluntary

Rights are granted by the ſame Perſon, and the laſt Right firſt completed would be preferred. But after all, it ſeems needleſs to diſpute this Point: Since the Queſtion is not about a Conveyance of the Diſpoſition made by *Griſſil Stuart* which the Receiver neglected to complete before this Confirmation intervened; but about a total Extinction of the Right it ſelf, which takes away all Place for Confirmation, as an Accident cannot be without a Subject.

Anſwered for the Purſuer. 1. He being ſerved Heir in ſpecial by an Inqueſt of 15 ſworn Men, is not obliged to defend the Evidences upon which the Service proceeded: The formal Retour produced by him ſufficiently entitles him to Action, and can't be thus taken away by Exception. Again, it's *Jus Tertii* to any not pretending to be a nearer Heir to the Defunct, to quarrel the Service: Beſides, there is no Reaſon why an apparent Heir may not purſue a Proving the Tenor of theſe very Rights in which he is to be ſerved. Nor was it neceſſary for the Purſuer to have got a Confirmation before his Service; if what is daily Practice, and the Lord *Dirletoun*'s Opinion *Page* 25, be to be regarded. When our Lawyers ſay, That an Infeſtment *A Me* is null till confirmed, they don't underſtand it to be ſimply null, as a Seaſin is for Want of its proper Symbol; but null as to certain Effects, *Viz.* In a Competition with a more complete Right, or null, by not taking preſent Effect, and being as it were in Suſpence till confirmed by the Superior, like *Donatio inter Virum et Uxorem, quæ Morte confirmatur.* So that albeit the Seaſin *A Me*, was null or uncomplete *quoad* the Superior, or a third Party, veſted firſt with a more ſolemn Right: Yet it is good againſt an Heir who may be debarred *perſonali Objectione* from quarrelling. 2. *James Stuart*'s Infeſtment could be carried only by a ſpecial Service, becauſe had it not been more than a perſonal Right, Confirmation could not make it a complete real Right. Its being rendred completely real by Confirmation, implies that before ſuch completing it was of the ſame Nature as after, that is real: Seing Confirmation, (which is but an Approving or Ratihabition) might ſtrengthen the Right, but could not alter the very Eſſence of it. 2. The Infeſtment *A Me* is not carried by a general Service (which conveys perſonal Rights) becauſe it hath ſeveral Effects of a real Right, the beſt Proof that it is one: *Viz.* It infers Recognition, 5 *February* 1669, Lady *Carnegy* contra Lord *Cranburn*, *Stair Inſtit. Tit. Extinction of Infeſtments* §. 11. Which an unregiſtred Seaſin doth not, as *Craig* obſerves; and yet an unregiſtred Seaſin is acknowledged to be a real Right. The Caſualties of Superiority fall *retro* from the Date of the Seaſin *A Me*, when ever Confirmation is obtained, *Stair Inſtit. Tit. Infeſtments of Property*: But no ſuch Caſualties fall a by perſonal Right, tho' confirmed by the Superior. And Infeſtment *A Me* would be a ſufficient Title in a Mails and Duties againſt Tenants. 3. *Eſto* a Seaſin *A Me* did not make a valid Right till Confirmation, yet the Diſpoſition on which it proceeds, is owned to be a valid perſonal Right: Now the ſame Arguments that are made Uſe of to annul the Infeſtment, would alſo annul the Diſpoſition, which is the Warrant of it, and properly that which the Superior confirms. 4. *Griſſil Stuart*'s general Service could be no Mid-impediment: Becauſe even after that Service ſhe her ſelf could have confirmed the Seaſin, and completed her Right that Way; and conſequently, ſo could the Purſuer, when his Mother did no more but ſerve Heir in general. Had *Griſſil Stuart*, after the general Service, reſigned upon the Procuratory in the Diſpoſition granted to her Brother, and taken a Charter of Reſignation and Infeſtment, that would indeed have hindred the Purſuer's Confirmation, to draw back, becauſe two could not be Vaſſals in the ſame Right to the ſame Superior: But ſhe never having become Vaſſal, it was intire to the Purſuer to make Uſe of the Faculty he had of making himſelf Vaſſal, by ſerving Heir in ſpecial and confirming. Her Renunciation could have no Effect, becauſe her general Service could at moſt carry only the Procuratory of Reſignation, which could not be effectually renounced; ſeing the diſpoſitive Part and Precept of Seaſin was not carried by the general Service. Again, when our Lawyers ſay, That an Appriſing is a ſufficient Mid-impediment to hinder a Confirmation to draw back, they are to be underſtood of a complete Appriſing. Becauſe, they mention Appriſings, againſt the Diſponer, and not Appriſings againſt the Obtainer of the Diſpoſition.

The Lords found, That the whole Right in *James Stuart*'s Perſon, by the Diſpoſition made in his Favours, having been conveyed to his Siſter by the general Service; her Diſcharge and Renunciation was a Mid-impediment and effectual Stop to any ſubſequent Confirmation of the Infeſtment *A Me*, which was once in *James*'s Perſon.

Eodem Die. Jean Crawford *Relict of* James Crawford *Son to the Laird of* Ardmillan, *againſt* John Kennedy *of* Balterſan.

JEan Crawford having Right by Progreſs to ſome Tacks ſet by the Biſhop of *Dumblain* to the deceas'd *Kennedy* of *Balterſan* of the Teinds of his Lands, purſued *John Kennedy* now of *Balterſan*, as Heir to the Defunct his Father, for Payment of 16 Years Tack-teind-duties, during which Time it was proved, That he the Defunct was Heretor of, and poſſeſſed the Lands: The Lords found the Defender liable for theſe Teind-duties, albeit it was not proved, That he was in the natural Poſſeſſion, or that he received a Joint-duty for Stock and Teind. In Reſpect it is preſumed, That he intrometted with the whole Rents comprehending both Stock and Teind: Seeing it is not alledged, that any other Perſon uplifted the Teind.

Eodem Die. James Ramſay *and* Daniel Reid *his Aſſigny*, *againſt* David Spalding *of* Aſhintilly.

IN the Action at the Inſtance of *James Ramſay*, againſt *Aſhintilly*, as Atteſter of the Sufficiency of *Knockfoldich*, Cautioner in the Suſpenſion of a Charge of Horning given by the Purſuer to *Joſeph Watſon*: The Lords *ſupra* 19 *July* 1710, found, That the Defender's Atteſtation doth not oblige him for the Sufficiency of the Cautioner ſimply, but only for his Sufficiency at the Time of the Atteſtation.

The Defender now alledged, That *James Ramſay* the Charger having drawn a Bill upon *Watſon* the Suſpender for 300 *Lib.* of the Sum in the Bond upon which he was charged, payable to *Thomas Rattray*, which the Suſpender accepted; This was an anſwering of ſo much of the Sum in the Bond, and putting it upon another Foot and Method of Payment, or an Innovation, equivalent as if the Creditor in the Bond had aſſigned a third Party to ſo much of his Debt, and the Aſſignation had been formally intimated to the Debtor. Yea, a Debtor's accepting of a Bill payable to a third Party, puts him under a ſtronger Tie, than an intimated Aſſignation: Becauſe the former goes from Hand to Hand by blank indorſing, without being affected by Arreſtment or Compenſation for the Indorſer's Debt. So that it being unwarrantable in *Ramſay* to charge for the full Sum in the Bond, after he was denuded as aforeſaid of a Part thereof by the Bill, and the Suſpender not being *in tuto* to pay, he having accepted a Bill in Part, payable to another: The Reaſon of Suſpenſion was juſt, and conſequently the Cautioner ought to go free.

Replyed for the Purſuer. The Suſpender not having paid the Bill, he could plead no Defalcation thereon, but only to be ſecured againſt paying the ſame, in Caſe he ſhould pay the whole Sum in the Bond, which may be eaſily done. Seeing *Rattray* the Creditor therein, acknowledges by a Declaration under his Hand, That he was but a Truſtee for the Behoof of *Ramſay* the Drawer, and obligeth him to make the Bill forthcoming to him or his Order, and hold Compt to him for what he ſhould recover by Virtue thereof.

Duplyed for the Defender. The Suſpender is never *in tuto*, till the Bill be retired to him, ſeing the Creditor therein might have indorſed it to any third Party, who could not be prejudiced by the Indorſer's ſeparate Declaration.

The Lords repelled the Defence founded on the accepted Bill; the Purſuer, upon Payment, finding Caution to warrand the Defender againſt all further Payment by Virtue of that Bill.

July 15, 1713. *The Creditors of* Robert Scot *of* Harden *and* Jean Ker *his Relict competing.*

IN a Competition betwixt the Lady *Harden* and her deceas'd Huſband's Creditors: The Lords found, That the Extent of the Lady's Joynture is not to be the Rule of alimenting the Defunct's Family till the Term after his Death, but the Quality of the Perſon, and Condition of the Family left by him.

Eodem Die. John Watſon *Merchant in* Edinburgh, *and Others, againſt* James Gordon *Senior, Merchant there.*

IN an Action at the Inſtance of *John Watſon* and Others, againſt *James Gordon*, for Payment of a Bill of Exchange, drawn by *Robert Gordon* Merchant in *Burdeaux*, upon, and accepted by the Defender, payable to the Purſuers: The Lords found the Defender not liable to pay Annualrent for the Sum in the Bill, from the Time it fell due; in Reſpect the Bill was never proteſted for not Payment.

July 16, 1713. James Dunbar *Merchant in* Inverneſs, *againſt the Earl of* Cromartie.

THE Earl of *Cromartie* being charged at the Inſtance of *John Dunbar*, upon two Bonds for borrowed Mony, he ſuſpended, and raiſed Improbation of the Bonds, upon the Head of Falſhood, after the Suſpender's conſigning Fourty Pound, the Charger's giving in Articles of Improbation, and abiding by the Verity of the Bonds quarrelled *ſub Periculo Falſi*, but before any Act was extracted: The Lords allowed the Suſpender to paſs from his Improbation, and found upon Payment inſtantly verified by Diſcharges produced, he always deponing *de Calumnia*, That theſe Diſcharges came to his Hand after proponing Falſhood; The Meaning of the Brocard, *Exceptio Falſi eſt omnium ultima*, being, That one who hath proponed the Exception of Falſhood, cannot, after he is concluded by an Act extracted upon it, recur to other Defences, and Payment inſtantly verified, being the moſt favourable Defence. But the Lords ordained the Fourty Pound conſigned by the Suſpender, to be given up to the Charger.

July 17, 1713. James Blackwood *of* London *Merchant*, *againſt* John Hamilton *of* Grange, *and his Tenants*.

IN an Action of Mails and Duties purſued by *James Blackwood*, againſt the Tenants of the Eſtate of *Grange*, *John Hamilton* their Maſter compeared and repeated a Reduction of the Purſuer's Title, which was an Adjudication, upon this Ground; That the ſame proceeds upon a Decreet proving the Tenor of a Bond therein libelled, blank as to Writer's Name and Witneſſes; and it was not prov'd, in the Proceſs of Tenor, That the Bond had Writer's Name and Witneſſes ſubſcribing.

The Lords found the Tenor as prov'd null, and reduc'd the Adjudication following thereon. Nor would they preſume, That the Bond was formal, and that the Solemnities were adhibited. For the Lords conſidered, That the Decreet proving the Tenor could be no more effectual, than if the Bond it ſelf were produced blank in the Writer's Name and Witneſſes: As a Decreet proving the Tenor of a Bond dated ſince the Act of Parliament 1696, libelled blank in the Creditor's Name, could not be ſuſtained to ſupport ſuch a Bond labouring under the intrinſick Nullity of being blank. Albeit Mr. *Blackwood* pretended to be in a more favourable Caſe againſt the Heir of his Debtor, than if he were competing with another Creditor: For it would be relevant for the Debtor himſelf who granted the Bond, to object the preſent Nullity.

Eodem Die. John Weir *Perwig-maker in* Edinburgh *Supplicant*, *againſt* Andrew Deuchar *Procurator before the inferior Courts there*.

UPON adviſing a Complaint offered by *John Weir*, againſt *Andrew Deuchar*, (at whoſe Inſtance Execution was provided to paſs upon the Complainer's Contract of Marriage with *Elizabeth Davidſon*, for Implement in Favours of the Wife) for uſing Inhibition againſt the Complainer, upon a conditional Obligement therein, before the Condition was purified: Albeit it could not be pretended, That the Complainer was failing in his Credit. The Lords finding that there was no preſent juſt Cauſe for raiſing this Inhibition, which was done by *Deuchar* out of mere Humour, without Advice from the Wife; they diſcharged the ſame. For tho' Inhibition may proceed upon a conditional Debt, it muſt paſs *Cauſa cognitâ*.

July 21, 1713. *The Heretors of the Pariſh of* Abdie, *againſt Mr.* John Corſan *Miniſter there*.

MR. *John Corſan* having ten Bolls of Victual yearly, modified in his Decreet of Locality, for defraying the Expence of the Communion Elements, The Heretors of his Pariſh purſued him for Repetition of theſe modified Bolls, as *indebite* paid to him, for all Years wherein the Sacrament was not adminiſtred by him, to the End the ſame might be given to the Poor, or apply'd to other pious Uſes within the Pariſh. Becauſe, the *Act* 54. *Parl.* 3. *Ja.* 6. *Ordaining Perſons* (*i. e.* the Pariſhioners) *of all Pariſh Kirks to furniſh Bread and Wine to the Communion, how oft the ſame ſhall be miniſtred there*, implys, That they are liable to that Charge only when the Sacrament is miniſtred: And thoſe who are of Opinion, That the Heretors are liable yearly, hold, That the Sum modified, when the Sacrament is not adminiſtred, ſhould be given to the Poor, and not to the Miniſter, *Mackenzie Obſerv.* on the ſaid Act, *Forbes*'s *Treatiſe of Church Lands and Tithes*, *Pag.* 428, and a Miniſter obtained

Decreet for Payment of the Sum modified for Communion Elements, upon his Offer to put it in the Poors Box, *November* 29, 1678, *Birnie* againſt the Earl of *Nithſdale*: Which Offer was made, becauſe he knew the Lords would oblige him to it.

The Lords found, That the yearly Modification for the Communion Elements, cannot, when the Sacrament is not adminiſtred, be diverted to the Benefit of the Miniſter, but ought to be apply'd to the Uſe of the Poor. Albeit it was alledged for the Defender, That he had the ſame Right to the Modification for Communion Elements, as to any other Part of his Stipend. And as there is no poſitive Law determining that Manner of Application: So there hath been no Deciſion ſave one proceeding on the Miniſter's Conſent, which ought not to be a Rule againſt thoſe who do not conſent. Beſides, the Miniſter is the moſt competent Judge when it is fit to adminiſter the Sacrament, within the Pariſh under his Cure: And is only cenſurable for Remiſneſs or Negligence therein, by the Eccleſiaſtical Judicatures.

Thereafter *July* 28, 1713, The Defender crav'd by a Bill, 1. That the Application of the Modification, for Communion Elements to the Uſe of the Poor when the Sacrament is not adminiſtred, might be made a Rule to take Effect only in Time coming; And that the Lords would aſſoilzie him from Repetition of Bygones: Seing it would lay a Precedent for innumerable vexatious Pleas, not only againſt Miniſters *in pari Caſu*, but even againſt the Widows and Orphans of ſuch as are dead. 2. That the Lords would find the *Jus exigendi* of theſe Modifications for the Poors Uſe, to be in the Kirk-Seſſion, accountable for the due Adminiſtration thereof to the Juſtices of Peace, or other Judges competent.

The Lords refuſed the Deſire of the Petition.

Eodem Die. James Budge *of* Toſtingal *and his Tutor, againſt Sir* James Sinclair *of* Dunbeath.

IN a Proceſs of removing from the Lands of *Benaliſky*, at the Inſtance of *James Budge* and his Tutor, againſt Sir *James Sinclair*, who had indeed removed, but clandeſtinely, without offering the Poſſeſſion to the Purſuer, and connived at others intruding immediately into the Poſſeſſion: The Lords found it not relevant to aſſoilzie the Defender, That he had removed himſelf and his Sub-tenants from theſe Lands, unleſs he had left the Poſſeſſion rid and void, or offered the ſame to the Purſuer when void. For otherwiſe they thought him liable *tanquam Poſſeſſor*, when another entered in his Vice, and diſappointed the Effect of the Warning. But the Lords in the Reaſoning, made a Diſtinction betwixt Poſſeſſion occupied by an Intruder ſuddenly after the Party removed, and Intruſion after the Poſſeſſion had been long void, or ſo long as the Heretor might have eaſily known that it was ſo.

Eodem Die. *Doctor* James Garden, *againſt Mr.* David Anderſon *Profeſſor of Divinity in the King's College of* Aberdeen.

DOctor *James Garden* being deprived of his Office of Profeſſor of Divinity in the King's College of *Aberdeen*, *January* 25, 1697, by the Commiſſion of Parliament for viſiting Univerſities, Colleges and Schools, becauſe of his refuſing to qualifie himſelf in the Terms of the Act 17 of the Parliament 1690, by taking the Oaths to the Government, and ſubſcribing the Confeſſion of Faith: In Obedience to this Sentence the Doctor quitted the Office, and the ſame was ſupply'd firſt by admitting Mr. *George Anderſon* to be Profeſſor, and after his Death Mr. *David Anderſon.* The Doctor raiſed Reduction of Mr. *David Anderſon*'s Right, upon this among other Grounds, That Her Majeſty's Act of Indemnity in the Year 1703, took off his Incapacity to exerce the Office, and virtually reponed him: Eſpecially conſidering, That there was no Profeſſor eſtabliſhed before that Time when he qualified himſelf by taking the Oaths, and returned to the Exerciſe of his Office.

Anſwered for the Defender. 1. The Act of Indemnity concerns only Crimes and Delinquencies, and doth not comprehend the Purſuer's Caſe, who was not deprived for a Delinquence, but for the Nonperformance of a Condition required to qualifie him to continue in the Exerciſe of his Function. 2. Suppoſe the Doctor's not qualifying in the Terms of Law, could be reckoned a Delinquence, he being ſentenc'd upon that Account, his Caſe falls not under the Indemnity, which excepts all Sentences and Dooms thereof. 3. All the Doctor could plead from the Indemnity, had he the Benefit thereof, is to free him from Proſecution for his not qualifying formerly, and to recapacitate him *pro Futuro*, to be admitted to any new Office upon a legal Call. But the Indemnity could never repone him to that Office of which he was deprived for Diſobedience to a Law, and be a Ground to thruſt out the Defender who was legally admitted thereto: Eſpecially conſidering, That he did neither take the Oaths within the Time limited by Act of Parliament, nor to this Hour hath ſubſcribed the Confeſſion of Faith, and ſubmitted to the Government of the Church; both which are Qualifications as expreſly required in Profeſſors of Divinity by the Act 1690, as their ſwearing Allegiance to the Sovereign.

Replyed for the Purſuer. 1. The Act of Indemnity doth not diſtinguiſh whether Sentence intervened or not: And 'tis the Queen's Will that Her Indemnity be interpreted in the largeſt Senſe. 2. That Sentences fall under the Indemnity, is clear from the Exceptions therein of pecunial Fines and Unlaws already paid and tranſacted, which imply, That thoſe not paid or tranſacted are remitted: And the Purſuer's Office being then vacant, was in the Caſe of a Fine not paid. 3. There is no Place to diſtinguiſh the Effect of the Indemnity as to inabling the Purſuer for a new Commiſſion, and the redintegrating his old one. For the Purſuer could not poſſibly have any other Benefit by the Indemnity, than Reſtitution of his Office: Since the Act of Parliament imports no Inability to injoy a new Office, but expoſeth the Recuſant to the Hazard of being turn'd out of his preſent Office. 4. The Purſuer's Caſe can't be thought excepted out of the Indemnity, under the Clauſe *Forfeitures*, &c. For that Word abſtractly mentioned is underſtood of Forfeitures for Treaſon: Which is farther clear'd from the ſubſequent Words, *All Sentences and Dooms*, that can be apply'd only to Sentences of Forfeiture for treaſonable Crimes.

The Lords ſuſtained the Defence, and aſſoilzied the Defender from the Reduction.

July 22, 1713. James Douglaſs *of* Hiſleſide, *againſt* William Somervel *of* Kennocks.

IN the Action of proving the Tenor at the Inſtance of *Hiſleſide*, the Lords having 10 *July* Inſtant, found, That *Griſſil Stuart*'s general Service and the Renunciation granted by her was ſuch a Mid-impediment as hindred the Superior's Confirmation to operate in Favours of the Purſuer, ſo as to make the Infeſtment *A Me* valid from the Date thereof: The Purſuer repeated a Reduction of the Renunciation upon the Head of Fraud and Circumvention.

Alledged for the Defender. *Actio de Dolo*, or upon Fraud and Circumvention, not being a popular Action competent to any Perſon, but only to the Perſon overreached thereby, or his Repreſentatives; *Hiſleſide* hath no Title to inſiſt in ſuch a Reduction, unleſs he were ſerved Heir to, or did repreſent the Granter of the Deed quarrelled, that he might have the Benefit of the Reduction in Caſe he prevailed.

Replyed for the Purſuer. He hath good Intereſt to remove *Griſſil Stuart*'s Renunciation out of the Way. Becauſe, 1. Had not that been granted, his Confirmation would have drawn back, and made the Infeſtment *A Me* a valid Right of Property. 2. He hath undoubted Title to reduce any Right flowing from *James Stuart* whom he repreſents, and this Renunciation doth flow mediately tho' not immediately from *James Stuart* the Purſuer's Author. 3. An apparent Heir hath Title to reduce all Deeds that ſtop his Service to his Predeceſſor: And this Renunciation is the only Thing could have ſtopp'd his Service before he was ſerved, or hinder his Service to be effectual, now that it is expede. 4. Suppoſe *Hiſleſide* could not *Via Actionis* purſue directly a Reduction of this Renunciation, he hath a Title to object any Nullity by Way of Reply againſt it, now when obtruded by the Defender to elide the Purſuer's Action *qui excipiendo fit reus*.

Duplyed for the Defender. Albeit taking away the Diſcharge would be effectual to revive the Purſuer's Right: Yet that conſequential Benefit is no Title to reduce the Deed of another upon the ſpecial Reaſon of Fraud and Circumvention, without repreſenting the Granter: For none can quarrel a Deed upon the Head of Fraud or Leſion, but he who ſubjects himſelf to perform whatever the Granter would have been liable to in the Event of it's being annulled, which the Purſuer is not, unleſs he repreſent *Griſſil Stuart*; and an Abſolviture in the Defender's Favours in this Proceſs, would not ſecure him from being unquieted by the like Action at the Inſtance of other Heirs. Apparent Heirs are indeed allowed to reduce Deeds on Death-bed for removing any Stops to their Service, as being null in themſelves, and made *Tempore inhabili*: But no ſuch Objection lies againſt the Diſcharge in Queſtion, which *Griſſil Stuart* had no Doubt Power to grant, and no Perſon can quarrel it upon any ſpecial Reaſon as in this Caſe, but an Heir ſerved. And even where Reduction is intented for removing a Deed that hinders the Reducer to eſtabliſh a Right to the Subject, the Lords never allow the Reduction to proceed, till the Purſuer hath made up in his Perſon all the Right to his Predeceſſor that he could. *V. G.* They oblige apparent Heirs to ſerve in general in Order to reduce Infeſtments granted by their Predeceſſors.

The Lords found, That *Hiſleſide* could not found upon the Reaſon of Fraud and Circumvention, unleſs he repreſent *Griſſil Stuart* the Perſon alledged to be circumvened: And therefore found, That he had no Title in his Perſon to quarrel the Diſcharge and Renunciation by *Griſſil Stuart*, he not being ſerved Heir to her.

July 23, 1713. *Mr.* George Honyman *Miniſter of the Goſpel, againſt* Anna Oliphant *and* John Wilſon *Writer in* St. Andrews.

IN the Suſpenſion of a Decreet obtained by Mr. *George Honyman*, *March* 20, 1712, before the Stewart-depute of the Regality of *St. Andrews*, againſt *Anna Oliphant* and her Husband, without a Diſpenſation: The Lords found the Decreet null. Becauſe inferior Courts *regulariter* muſt have a Diſpenſation to ſit in the Vacation-time. And the Act of *Sederunt July* 21, 1696 doth not import a general Diſpenſation to all inferior Courts to ſit till the 20 *March incluſive*, but only that by a Diſpenſation, they may ſit till then, and no longer.

Eodem Die. John Black *Merchant in* Dumfreis, *againſt* Agnes Lindſay *Relict of* John Lawſon *of* Bilbow.

IN a Proceſs at the Inſtance of *John Black*, againſt *Agnes Lindſay*, as vitious Intrometter with the Moveables of *John Lawſon* her deceas'd Husband, for Payment of Fourty Pound *Sterling* owing by him to the Purſuer: The Lords found the Defender, who intrometted by Virtue of ſingular Titles, liable *in Valorem*, her Intromiſſion having been by Virtue of no valid Title; and that ſhe could not affect the Subject *pendente Lite* by Confirmation, in Prejudice of the Purſuer.

Eodem Die. Gordon *and Mr.* Hary Osburn, *againſt* Jean Campbell *and others.*

IN a Reduction *ex Capite Lecti*, of a Diſpoſition whereupon Infeſtment had followed, purſued by *Gordon* and Mr. *Hary Osburn*, deriving Right from *Robert Gordon* in the Kingdom of *Ireland*, as apparent Heir to *James Gordon* of *Newark*, againſt *Jean Campbell* and others: The Lords repelled this dilatory Defence, That the firſt Day of Compearance to which the Defenders were cited was in the Vacation-time. In reſpect Errors in filling up of Days of Compearance, can be amended at the Bar; and the Defenders have the full Number of Days allowed by Law. And where the Day of Compearance happens to be an unlawful Day, the Citation, which bears Continuation of Days, is underſtood to be next to the lawful Day thereafter. But the Lords found no Proceſs, unleſs *Robert Gordon*'s Propinquity to *James Gordon* be inſtructed by a Service as Heir to him, or otherways. Becauſe tho' naked Apparency of a Perſon known and born in the Country, is ſuſtained to found Proceſs: Yet Action is not ſuſtained at the Inſtance of one born out of the Country, unleſs ſome Document be produced, cognoſcing and trying his Propinquity of Blood to the Perſon whoſe apparent Heir he pretends to be, *December* 17, 1627, *Donaldſon* contra *Brown*.

Eodem Die. *Captain* Adam Blair, *againſt* John Blair *of* Glaſclune.

CAptain *Adam Blair* having, as infeſt in the Eſtate of *Glaſclune* upon a Charter of Adjudication, purſued a Reduction and Improbation of *John Blair*'s Rights and Titles thereto: The Lords found it competent to the Defender to exclude the Purſuer *perſonali Objectione*, upon a Renunciation of all Right to the Eſtate, and Diſpoſition by the Purſuer's Author in Favours of the Defender's Predeceſſor, anterior to the Bonds whereupon the Purſuer's Adjudication was led; theſe Bonds being gratuitous, *July* 15, 1675, *Alexander* contra *Lundies*. Albeit the Rights produced by the Defender were only perſonal, not completed by Infeſtment.

Eodem Die. John Edgar *Chirurgion Apothecary in* Haddingtoun, *and* Chriſtian Brown *his Spouſe, againſt* William Sinclair *of the Pariſh of St.* Martins *in* London.

THe decas'd *William Brown* Chirurgion Apothecary in *Haddingtoun*, having, for the Love and Favour he bore to *Chriſtian Brown* his Daughter, and for certain other onerous Cauſes, aſſigned to her and *Fran-*

cis Sinclair then her Husband, and their Heirs and Executors, 700 Merks *Scots* owing to him by *Alexander Miller* of *Gourlybank*: There aroſe, after *Francis Sinclair*'s Deceaſe who died abroad, a Competition for the Sum aforeſaid, betwixt *William Sinclair* who produced a Probate of the Defunct's Will out of the Prerogative Court of *Canterbury*, naming him his Executor and Adminiſtrator, and *John Edgar* preſent Husband to *Chriſtian Brown*.

William Sinclair pleaded, That *Francis Sinclair* the Husband being conjoin'd with *Catharin Brown* his Wife in the Aſſignation to this moveable Sum, he, *tanquam Perſona dignior*, was ſole Fiar, *June* 9, 1667, *Johnſtoun* contra *Cuningham*, *January* 23, 1668, *Juſtice* contra *Stirling*, *January* 29, 1639, *Graham* contra *Park*. And *Chriſtian* has Right only to the Annualrent of the Half of the Sum; becauſe not provided to the Man and his Wife, and the longeſt Liver, but only to her and him, *February* 18, 1637, *Mungal* contra *Steel*.

Anſwered for John Edgar. Tho' uſually Tranſmiſſions to Husband and Wife infer a Preference in Favours of the Husband, yet that ſuffers many Exceptions, not only in Matters of Heretage, but even in the Tranſmiſſion of moveable Sums, where the Deſign of the Granter to make the Wife Fiar, appears from pregnant Preſumptions; as in this Caſe, where the Right flows from the Wife's Father, upon a Narrative of Love and Favour to his Daughter, the Wife is firſt named, and the Husband only in a Manner, follows *pro Intereſſe*. Upon which Ground the Wife hath a juſt Claim to the Fie of the whole; at leaſt ſhe ought to be preferred to the Fie of the Half, as a common conjunct Fiar, the Conveyance not being to them in the uſual Stile of *Conjunct-fie and Liferent*, which uſeth to be interpreted in the Husband's Favours. But the Aſſignation is made to *Chriſtian Brown* and *Francis Sinclair* her Husband ſimply, as when a Subject is conveyed to ſeveral Strangers jointly: In which Caſe, the common Rule of Law takes Place, *ubi duobus conjunctim diſponitur, Concurſu faciunt Partes*. Now this holds more in the Caſe of Moveables, which by their Nature more eaſily receive Diviſion than Lands, and is conſonant to the Deciſion, *February* 2, 1632, *Bartilmo* contra *Haſſington*.

The Lords found, That the Husband hath Right to the Fie of the whole, and the Wife to the Liferent of the whole.

Eodem Die. William Duncan *Merchant in* Edinburgh, *againſt* David Miller *Merchant there*.

IN an Action of Declarator at the Inſtance of *Jean Livingſtoun* and her Husband, againſt the Creditors of *John Robertſon* (who, as Heir to *Gilbert Robertſon* his Father, ſold the Lands of *Whitehouſe* to *Jean Livingſtoun*) for purging the Lands of all Incumbrances ariſing from their Debts and Diligences: There aroſe a Competition betwixt *William Duncan* and *David Miller*: *William Duncan* pretended to be a real Creditor for 6000 Merks, the Remains of the Price of the Lands owing by *Gilbert Robertſon* to *George Aikenhead* his Author *per* Bond.

David Miller claim'd Preference for the Half of the Sum of 1400 Merks Principal, and Annualrents thereof contained in a Bond granted by *Gilbert Robertſon* to *Helen Matthiſon* in *Stirling*, aſſigned by her to *Robert Ranie* and *David Miller* upon this Ground, That *James Miller* Writer in *Edinburgh*, to whom *Helen Matthiſon* had formerly diſponed her Debt with a Power to alter, did, upon a Proceſs for Payment againſt *John Robertſon*, uſe Inhibition for Security thereof; which Inhibition, now that *James Miller*'s Right is reduced, accrews to *David Miller* the ſecond Aſſigny. Becauſe the Power to alter reſerved to *Helen Matthiſon* in her Aſſignation to *James Miller*, made his Right to be of the Nature of a Factory or Truſt for the Cedent: And any Diligence done by Factors or Truſties accrews to the Conſtituents, their Heirs or Aſſignies, *July* 14, 1667, *Scot* contra Sir *Laurence Scot.* And it hath been frequently found, That Diligence uſed by Donatars of Forfeitures for ſecuring the Subject gifted to them, accrewed to the forfeited Perſons and their Heirs reſtored *per Modum Juſtitiæ*, without Neceſſity of Aſſignation or Conveyance by the Donatar.

Anſwered for William Duncan. James Miller's Inhibition can't ſubſiſt in the Perſon of *David*. Becauſe, 1. Tho' Inhibition be in ſome Senſe a real Burden upon the inhibited Perſon's Lands, at leaſt becomes ſuch by a poſterior Adjudication: Yet as to the Inhibiter, it is a meerly perſonal Diligence reaching only Deeds done to his Prejudice, and hath no Effect in Favours of third Parties, not deriving Right from him. 2. Inhibition is effectual to the Inhibiter himſelf, only in ſo far as concerns the Right on which it is founded: Therefore this Inhibition founded on *Helen Matthiſon*'s Diſpoſition, is without any Foundation, now when that Diſpoſition is annull'd and out of Doors. 3. *James Miller*'s Right was not of the Nature of a Factory or Truſt, but was elicited from *Helen Matthiſon* by Fraud and Circumvention, and reduced upon that Head: So that as *James Miller*'s Right was null *ab Initio*, the Inhibition uſed by him was null in Conſequence. 4. Granting that *James Miller* was a Factor or Truſtie, yet the Inhibition being uſed eleven Years after that Truſt, or Factory was revoked by the ſecond Aſſignation in Favours of *Ranie* and *David Miller*, intimated by a Summons of Reduction of *James*'s Right, it was ſimply null, and cannot be Effectual to any Perſon.

The Lords found the Inhibition accreſceth to *David Miller* the ſecond Aſſigny Reducer of the Diſpoſition in Favours of *James*, unleſs it be made appear that the ſaid Diſpoſition was reduced *ex Capite Fraudis*, in which Caſe they remitted to the Ordinary to hear Parties Procurators.

July 24, 1713. *The Univerſity of* Glaſgow, *againſt* James Hamilton *of* Dalziel.

THE Univerſity of *Glaſgow*, having acquired from *Beſſie Herbertſon* an Adjudication led at her Inſtance, againſt *Mungo Niſbet*, of the Lands of *Shiels*, charged *Dalziel* Superior of the Lands (who was in Poſſeſſion by a Declarator of Non-entry) to enter them, and offered him a Charter with a Year's Rent; and upon his Refuſal purſued a *Mails and Duties* againſt the Tenants. In which Proceſs the Superior compearing, alledged, That he was not obliged to receive the Univerſity for a Vaſſal: Becauſe, thro' that Community's not dying, he ſhould be deprived of the Caſualities of Non-entry, Eſcheat, *&c.* ariſing from the Death or Delinquency of a private Vaſſal, which cannot be taken from any Superior, without his own Conſent, by the ſingle Deed of his Vaſſal.

Anſwered for the Univerſity. The Act 37 of *K. J.* 3. fifth Parliament, *Ordains the Over-lord to receive a Creditor or any other Buyer Tenant to him, paying to the Over-lord a Year's Mail, as the Land is ſet for the Time; and failing thereof, That he take the Land to himſelf, and undergang the Debts*: So that Law doth not diſtinguiſh Communities who are Creditors, from ſingular Perſons. Which Diſtinction could not be made, without putting a Stop to all Mortifications, and prohibiting Commerce to Societies. Whereas *Collegia licita* can, as any ſingle Perſon, contract, acquire, buy and ſell, borrow and lend; and conſequently may uſe legal Diligence, as well as others, for ſecuring and making their Debts effectual. 2. If an Univerſity can apprize for Debts owing to them, they can, in Conſequence, oblige the Superior to receive them according to the Rule, *conceſſo* Jure, *omnia concedi videntur, ſine quibus* Jus *illud expediri non poteſt*: Seing if you deny the Means, you take away the End.

Replyed for the Superior. The Brocard *Ubi Lex non diſtinguit, non eſt diſtinguendum,* hath many Exceptions, ariſing from the Nature of the Thing, and other concurring Preſumptions. *In Lege multa quamvis non excipiantur, intelliguntur*; *ſcriptum Legis anguſtum eſt Interpretatio diffuſa, ſeneca* 4. *Controv.* 27. The Words of the Law afford a Preſumption; but where the ſtrict Obſervance thereof would involve Injuſtice, or croſs what appears to have been the Mind of the Lawgiver, 'tis a Circumvention of the Law. The preciſe Words of the cited Statute indefinitely expreſſed, import that each of ſeveral Creditors ſhould pay a Year's Mail to the Overlord for his Entry; but Equity hath otherways explained it: And ſince the Words of the Law are over-ruled by Juſtice againſt the Superior, why not alſo for him? He is expreſly appointed to enter a Creditor upon Payment of a Years Rent, but a Creditor or Buyer ſuch as the former, who doth not Prejudice the Superior more as the other, is tacitly implied. It can't be denied, but Univerſities and Incorporations may purchaſe, but a general Law in the Matter of Vaſſalage, is not underſtood to include them, unleſs expreſſed: In the ſame Manner as a cautionary Obligation, or the like, is not underſtood to fall under a general Diſcharge. Obliging the Superior to ſuch an Entry as this, is a manifeſt Injuſtice done to him, and *æque Rem æſtimanti nimis grave.* Becauſe, 1. It deprives him of his Property, without his Conſent, or Crime, or any Equivalent given for it. 2. It's inconſiſtent with the feudal Contract, whereby the Superior gives off his Land to his Vaſſal, with a certain View of Benefit by the emergent Caſualties ſtipulated, which bring ſometimes more Profit to the Superior, than the whole Property of the Fie would, as the Marriage of a Ward Vaſſal. When King M*alcolm* diſtributed all his Lands among his Men, reſerving nothing to himſelf, but the Royal Dignity, and the Ward and Relief of the Heir of each Baron for his Suſtentation: Would not the Prince have been well ſuſtained, had his Vaſſals next Day diſponed their Lands to Incorporations who neither marry, nor die? The Vaſſal ſhould no more have Liberty to diſappoint the Superior of his Caſualties, than the Superior to defeat his Right of the Fie: And what cannot be done directly, ought not to be allowed to be done indirectly. As the Superior cannot interpoſe another betwixt him and the Vaſſal, to render the Latter's Condition worſe without his Conſent: So neither can the Vaſſal by any Deed of his prejudice the Superior, when the Fie becomes open to him. Nor is there any Difference in this Caſe, betwixt an Adjudication for the Vaſſal's Debts, and a voluntary Diſpoſition by him: Seing an Adjudication carries no more than what was in the Vaſſal's Perſon, and as in it. 3. Is it to be ſuppos'd that the Parliament conſiſting moſtly of Perſons intereſſed in Superiorities, would, at a Time when Vaſſalages were ſo much in Requeſt, that the Affection of changing the Vaſſal was valued to the Superior at a Year's Rent, have made a Law to lop off all the Caſualties of Superiority, without valuing them according to their different Natures, and giving ſome Equivalent to the Superiors, or Security againſt the Attempts and Purchaſes of Burrows? No ſure it was *Caſus incogitatus,* never in the View of the Lawgiver. 4. As Immemorial Forbearance to put this Law in Execution in Favours of Incorporations, doth plainly argue them to be an Exception from the Rule: So the Generality of Laws providing againſt a Ward Vaſſal's alienating his Lands without the Superior's Conſent to his Prejudice, do ſtrongly inforce it. 4. Our Lawyers, as *Craig* and the Lord *Stair* are clear againſt entring of Incorporations. And ſo is the Law of other Places, particularly *England*, where it is not lawful to any to give his Land, without the Superior's Conſent, to a Religious Houſe, 9. *H.* 3. *C.* 36. or to make Feoffment thereof in Mortmain, or to Sub-feu, 18 *Edw.* 1. 5. This is no Reſtriction of Commerce, but what naturally ariſeth from the Paction imply'd in feudal Coutracts, which Incorporations ſhould be aware of, and not Contract with Vaſſals without the Superior's Conſent: And if they do, 'tis at their Peril. Beſides, any ſmall Inconveniency that might happen to Commerce, by excluding Incorporations from purchaſing Lands, being of the Nature of theſe things, *quæ raro et per Accidens eveniunt*, falls not under the Conſideration of Law.

Duplyed for the Univerſity. The Argument drawn from the Origine and Nature of a feudal Contract, whereby neither a Superior can be obtruded upon a Vaſſal, nor a Vaſſal upon a Superior, without mutual Conſent, is of little Weight; for that as feudal Rights being now generally granted for a certain Price, have every where much deborded from their firſt Conſtitution, when Lands were Feued freely for Military Service: So the plain Statute introducing this Rule, diſpenſeth with what is inconſiſtent in the Nature of a feudal Contract. And the Acts of a Sovereign independent Nation, are not *ſtrictæ Interpretationis*, but to have Force according to the full Intendment of the Legiſlator. Now it ſhould be a greater Diſadvantage to the Nation, to abridge Societies of the Benefit of this general Law, than could be compenſated by any Advantage in gratifying Superiors to the others Prejudice. 2. As Superiors muſt undergo the Law whatever be the Inconveniency, and Private muſt always yield to the Publick good: So they have an Equivalent, *viz.* a Year's Rent of the Lands determined by the Parliament; and whatever Pactions be now made, formerly much more was not exacted for a Sale of the Superiority. But next, all yearly Preſtations are ſalved to Superiors: Caſualties of Superiority ariſing *ex Delicto*, which are not preſumed to fall, are little regarded in Law; and thoſe purely caſual, as Ward and Relief, which may chance not to occur in an Age, came little under the View of the Legiſlators, who regard only *quod plerumque fit.* So that upon the whole, ſeing Inconveniencies cannot in all Caſes be ſhunn'd, and the Law doth plainly bar no Creditor, 'tis no Hereſie to adhere to the Letter of the Law.

The Lords found, That *Dalziel* the Superior muſt either enter the Univerſity of *Glaſgow*, or pay the Debt due to the Value of the Lands adjudged, as the ſaid Value ſhall be determined by the Lords upon a Probation thereof. And found, That the Univerſity muſt transfer their Right and Debt to him, upon his paying the ſaid Value of the Lands, with abſolute Warrandice for the Sum they receive: Reſerving always to them their Right againſt the common Debtor, in ſo far as they ſhall not be ſatisfied by *Dalziel*, in Regard the Debt due to the Univerſity is more than the Value of the Lands. And found, That *Dalziel* muſt be comptable for his Intromiſſion with the Rents of the Lands, or Annualrents of the Value thereof in his Option, from the Time the Univerſity did firſt charge him to enter them, and made their Offer of a Year's Rent to him.

Albeit it was alledged for *Dalziel*, That the Expedient of allowing the Superior to be free of ſuch a Vaſſal, by paying the Debt to the Value of the Lands, would afford no Relief to thoſe Superiors who moſt need, and are in a ſpecial Manner under the Care of Law: Superiors that are poor and unable to purchaſe muſt loſe their Right; the Crown will not purchaſe; and the Tutors and Curators of Minor-ſuperiors can't purchaſe with Safety. Now a Law ought to be equal to rich and poor, and every Condition of Perſons. 2. A Vaſſal hath indeed been forfeited for the Superior's Fault: But no Inſtance can be given of a Superior loſing his Right of Superiority for his Vaſſal's

Debt, which is effectually done by obliging him to enter an Incorporation, at leaſt in Ward and Blench-holdings, where there is no yearly Income. In this the Feu Superior is in a better Condition than the Ward, the former having ſomething, and the latter nothing: And yet hitherto the Wardhold holding hath been thought moſt beneficial to the Superior. 3. Was ever any Perſon obliged *per Modum Pœnæ* to purchaſe, or to loſe his own Right, without getting any Equivalent? This is evidently done to *Dalziel*; and if he purchaſe, he muſt do it *tanquam quilibet*, without getting a Year's Rent: So that in all Events, his Superiority is ſunk to him without his own Fault or Fact.

It occurr'd to ſome of the Lords at adviſing, That the Charter might be qualify'd by inſerting in it the Name of ſome interpoſed Perſon, by whom and his Heirs the Caſualities might be determined, according to the Viſcount of *Stair*'s Propoſal, *Inſtit. Lib.* 2. *Tit.* 2. §. 41. But it was not thought fit to go into this Overture. Becauſe, 1. There being no Law for appointing ſuch a Truſtee, it could not be done judicially without Conſent of Parties. 2. It was doubted if the Expedient would anſwer the Deſign. For the interpoſed Perſon and his Succeſſors being to be liable in the firſt Place, and left to ſeek their Relief from the Univerſity: One would hardly be found to undertake ſuch a laſting Inconveniency upon him and his Poſterity. And it might be incommodious and prejudicial to the Community to oblige the interpoſed Perſon's Heirs to ſerve and enter, and grant Procuratories for that End: Who might poſſibly prove backward to do that, tho' upon the Charge of others, whereby they could expect no Profit. Beſides the Fie might come to be forfeited, thro' the Delinquency of the Truſtee: And ſo the Cure prove worſe than the Diſeaſe.

One of the Lords thinking that it would not be ſo hard upon Superiors, to be thus cut off from the Expectation of Caſualties that may or may never belong to them, as to be deprived of thoſe that ſometimes will certainly be due, as the *Duplicando* of the Feu-duty at the Entry of Heirs, or what ariſeth from the Nature of a Feu, upon the Vaſſal's Death: His Lordſhip propoſed that thoſe more certain Caſualties ſhould take Place againſt Incorporation-vaſſals every Fiftieth Year, as the common Period of an ordinary Man's Life, in the Opinion of the Doctors. Since Law determines the Age of the longeſt Liver to be a Hundred Years, and a Vaſſal, tho' he may live that long, may die ſooner.

Eodem Die. *The Creditors of the deceas'd* Robert Roſs *of* Auchloſſin *Competing.*

IN a Ranking of the Creditors of the deceas'd *Robert Roſs* of *Auchloſſin*, and *Francis Roſs* his Son, *Arthur Forbes* Brother to the Laird of *Balflug*, produced the Contract of Marriage betwixt him and *Jean Roſs Robert*'s Daughter, dated *September* 27, 1701, whereby *Robert* and *Francis* ſtood obliged conjunctly to pay to *Arthur Forbes* 2000 Merks of Tocher, and an heretable Bond granted by Father and Son, *January* 2, 1703, to *Arthur Forbes* in Satisfaction thereof completed by Infeftment; and *Nicol Roſs* Brother to the ſaid *Robert Roſs* produced an heretable Bond granted by Father and Son jointly to *Nicol*, and *Margaret Leſlie* his Spouſe for 7500 Merks of Principal, dated *December* 24, 1702 in Place of other Grounds of Debt formerly due to *Nicol* by the Father, and both *Arthur Forbes* and *Nicol Roſs* had timely adjudged. Which Rights they contended to be ſufficient Ground to Rank them as real Creditors to *Robert Roſs* the Father. The other Creditors of *Robert Roſs* produced a Diſpoſition and Infeftment granted by him of his Eſtate, with the

Burden of all his Debts to his Son, before the granting of theſe heretable Bonds in Favours of *Arthur Forbes* and *Nicol Roſs.* And pleaded that *Arthur Forbes* and *Nicol Roſs* having innovated their former Security by taking heretable Bonds in Satisfaction thereof, from the Father and Son after the Father was denuded in his Son's Favours, with the Burden of all his Debts, whereby the Father's Creditors at the Time of the Diſpoſition became real and preferable to all the Son's Creditors, and Debts contracted by the Father, after the Diſpoſition, and conſequently preferable to *Arthur Forbes* and *Nicol Roſs* who are to be conſidered as the Son's Creditors, and ranked after the Father's Creditors, only from the Date of the new Obligations. Seing when Innovation takes Place, the former Security falls, *& etiam Pignora ſolvuntur.*

Anſwered for Arthur Fobes and Nicol Roſs. 1. No Clauſe in the Diſpoſition by *Robert Roſs* to his Son (which was gratuitous without any onerous, juſt or neceſſary Cauſe) can militate againſt them who were lawful Creditors before to the Father. 2. Their heretable Bonds were granted before the Son's Right from the Father was any Way publick, or the Seaſin regiſtred: And a latent Right *inter conjunctos* can be of no Force againſt true Creditors; eſpecially where the Father after granting a general Diſpoſition to his Son continued in Poſſeſſion till his Death, whereby every Perſon was *in optima Fide* to contract with him, at leaſt until the Son's Right appear'd on Record, *July* 2, 1673, *Steil and Jackſon* contra *Maſon*, *February* 12, 1669, *Pot* contra *Pollock*, *November* 28, 1679, *Cathcart* contra *Glaſs*, *December* 4, 1673, *Reid* contra *Reid.* And it can never be underſtood, that the Father's gratuitous Diſpoſition to his own Son can be more effectual to the Father's Creditors, than if it had been directly granted to themſelves: Now he the Father was not in a Condition to prefer one Creditor to another. 3. By our Law, a prior Right, tho' innovated, may be good Evidence of the antecedent onerous Cauſe of a ſubſequent Obligement.

The Lords found, That *Arthur Forbes* and *Nicol Roſs* having *bona Fide* accepted of the heretable Bonds in Place of former Debts due by the Father, before the Father's Infeftment to the Son was on Record, ought to be ranked as Creditors of the Father.

One of the Lords thought, That if the anterior Security was diſcharged, the heretable Bonds granted in Lieu thereof could not be ranked with thoſe Debts of the Father with which the Son's Diſpoſition was burdened. Another was of Opinion, That whether the old Security was diſcharged or not, the new Bond was a clear Innovation. A third Lord differ'd from the laſt, upon this among other Grounds, That if an Heir of Tailzie tied up with a Clauſe irritant in Caſe of his contracting Debt, ſhould pay an old Debt contracted by the Maker of the Tailzie, with Mony borrowed from another Hand, and give to the Lender an heretable Security upon the Eſtate for the ſame: That real Right would be good and effectual, notwithſtanding of the Clauſe Irritant; if the new Creditor could prove that his Mony was ſo apply'd. To which the Caſe of the Lord *Kinnaird* was objected, who having, with Mony borrowed by himſelf, cleared Debts that affected his Eſtate before it was Tailzied, found himſelf under a Neceſſity, after adviſing with the beſt Lawyers, to apply to the Parliament, for impowering him to grant Security, or ſell Land to pay off theſe Creditors whoſe Mony had been apply'd to ſatisfie theſe Debts with which the Tailzie had been burthen'd. But it was anſwered, That in the Lord *Kinnaird*'s Caſe, the new Creditors were not able to prove that their Mony was apply'd to the Payment of the old Debts. Others of the Lords ſuppoſed that a Creditor taking Bond from his Debtor inhibited, in Implement of a Debt due before Inhibition, the new Security could not be reduced *ex Capite Inhibitionis*, if the Creditor could prove that anterior onerous Debt to which that Security was ſurrogated. Another Lord delivered his Opinion thus, The Creditors here being ignorant not only of what had paſs'd betwixt Father and Son, but alſo of their Condition and Inſolvency, and having *Ignorantiâ Facti* given up the old Securities; *Condictio Chirographi indebite traditi* was competent to them by Law: So that there being juſt Ground for calling back the Securities innovated, the pretended Innovation doth evaniſh.

July 28, 1713. Mr. Archibald Dunbar *of* Thundertoun, *againſt Sir* Robert Gordon *of* Gordonſtoun.

AT diſcuſſing the Suſpenſion of a Decreet of the Juſtices of Peace caſting about the High-way, and adjudging ſome Pieces of Sir *Robert Gordon*'s Lands to Mr. *Archibald Dunbar*, for making his Incloſures regular, in the Terms of the *Act* 41. *Parl.* 1. *Ch.* 2. The Lords found, That the ſaid Statute is a perpetual Law, in ſo far as, to incourage Incloſing, it impowers Juſtices of Peace to caſt about the High-ways, and inflicteth Penalties againſt the Cutters or Deſtroyers of Planting, Breakers of Hedges or Incloſures: Albeit it be Temporary, in ſo far as it appoints Heretors and Liferenters to incloſe and plant a certain Quantity of Ground according to their Valuations. For it was thought proper to tie the Heretors for a certain Number of Years to plant, and incloſe, with a View no doubt, That they would find it their Intereſt to continue and go on voluntarly in that Practice. But all Incouragements were deſigned to be perpetual, unleſs ſuch as are limited to a certain Time, as the Exemption from Ceſs, which is confined to Nineteen Years. Where the Act of the Parliament 1685 bears, *Becauſe the Time preſcribed in the ſaid Act* 41. *is now elapſed, it is ſtatuted and ordained, That the whole Heads contained in the ſaid Act, be obſerved for the Space of Nineteen Years next to come*: Theſe Words, tho' not very exactly conceived, can be apply'd only to the Clauſes of the Act that were limited to a Time, *Viz.* The Obligement upon the Heretors during the Ten Years, and the Nineteen Years Freedom then expir'd.

July 29, 1713. George Montgomery *and his Lady Supplicants, againſt* Mr. John Montgomery *of* Wrae *his Father.*

THE Lords appointed a Bill of Horning to paſs againſt Mr. *John Montgomery*, for Implement of the Marriage-articles betwixt his Son and his Lady. Albeit the Contract bore only a Conſent to Regiſtration in the Books of Council and Seſſion, that all Execution might paſs thereon in Form as effeirs; without any expreſs Conſent, That a Decreet might be interponed thereto. For a Decreet of the Lords is interponed by Regiſtration of the Articles, warranting all Execution in general; which can never be underſtood to entitle the Parties only to an Action, ſeing that was competent without any Clauſe of Regiſtration.

July 30, 1713. John Blair *of* Dunskey, *againſt* Robert M'dowal *of* Logan.

IN a Reduction *ex Capite Inhibitionis*, at the Inſtance of *John Blair* againſt *Logan*, the Defender having offered to improve the Execution: The Lords ordained the Purſuer to abide by the ſame ſimply, *ſub Periculo Falſi*, and would not ſuffer him to abide by with this Quality, That he found the Inhibition and Execution among his Father's Writs, in a Proceſs of Ranking of the Creditors of Sir *Godfrey M'culloch*, but allowed him to proteſt, at his abiding by, upon any Quality he thought fit.

Albeit it was alledged for the Purſuer, That the Inhibition was executed and regiſtred in the Year 1685, when he was an Infant a Year old, and never objected againſt in his Father's Lifetime, by the Defender compearing in the Proceſs aforeſaid, where it was produced. And in the Opinion of the Lord *Stair*, *Inſtit. Lib.* 4. *Tit.* 20. §. 19. abiding by *qualificate* is allowed: Which is confirmed by Deciſions, *February* 5, 1635, *Ker* againſt *Forſyth*, obſerved by *Spotſwood*, *Page* 170, *July* 24, 1661, the Laird of *Lamertoun* againſt the Earl of *Levin* and *Kennedy*. Nor was it ever otherwiſe decided, except where the Producer of a Writ lay under ſome Jealouſie of Acceſſion to the Falſhood. This is alſo agreeable to Law and Equity: Becauſe, no Man can by his own Conſent, ſubject himſelf to the Pain of any Crime he is not guilty of, or acceſſory to. Law never makes the uſing of a falſe Writ unwittingly & *ſine Dolo*, to be a Crime: Yea, the Lords are ſo far from finding it Criminal to uſe a falſe Writ, without being conſcious of the Falſhood, that a forged Aſſignation was ſuſtained a ſufficient Title of *bona Fide* Poſſeſſion, againſt Repetition of what was *conſumptum*, *January* 18, 1677, *Dick* contra *Oliphant*. Now, tho' this Execution were falſe, the Purſuer could not poſſibly have been acceſſory thereto: Seing it was regiſtred as ſoon as he was born.

In Reſpect it was anſwered for the Defender. 1. A qualified abiding by was never allowed to an Heir or Aſſigny, unleſs the Cedent or ſome other Party concerned offered to abide by ſimply, *July* 14, 1680, *Gray* againſt *Robertſon*, *January* 3, 1666, *Jack* againſt *Bryan*, which is the Meaning of the Citation out of my Lord *Stair*'s *Inſtitutions*. For *qui Falſum recitaverit tenetur in Crimen Falſi ſubſcribere, Tit. ff. ad L. Cornel. de Falſ.* And where the Uſer of a falſe Writ abides by the ſame after it is quarrelled, *Dolus malus* is preſumed *ex Reipſa*. This is confirmed from the Prattick aforeſaid betwixt *Ker* and *Forſyth*, *February* 5, 1635, as obſerved by *Durie*, and that betwixt *Lamertoun* and the Earl of *Levin*, *July* 24, 1661, as obſerved by Preſident *Gilmoir*.

FINIS.

INDEX.

OF THE

CASES Heard and Determined in this JOURNAL.

A.

ABdie (Heretors of) contra *Corſan*, July 21, 1713.
Abercromby contra *Innes* of *Dunkinty*, July 15, 1707.
Aberdeen (Magiſtrates of) contra *Irving* of *Kincauſſie*, December 9, 1707.
Iidem contra *Gordon* and *Burnet*, December 20, 1711.
Agnew contra *Campbell*, November 19, 1712.
Aikenheads contra *Aikenheads*, June 22, 1711.
Air (Juſtices of Peace of the Shire of) contra Town and Inhabitants of *Irving*, January 24, 1712.
Air (Kirk ſeſſion of) Supplicants, February 12, 1713.
Airth (Laird and Lady) contra *Blackwood* and *Telfer*, June 21, 1707.
Iidem contra *Hamilton* of *Grange*, January 13, 1709.
Iidem contra *Eundem*, February 3, 1710.
Aitkin contra *Guidlet*, January 16, 1706.
Idem contra *Eundem*, December 4, 1707.
Aliſon Supplicant, July 20, 1705.
Idem contra Directors of the *African* Company, March 18, 1707.
Idem contra Children of *Trent* of *Pitcullo*, July 23, 1707.
Idem contra *Chalmers*, February 28, 1708.
Idem contra *Duncan*, July 20, 1710.
Allan contra Creditors of *Cleghorn*, February 19, 1713.
Andersons contra *Gordon*, June 26, 1706.
Anderſon contra *Cock*, December 24, 1709.
Anderſon contra *Forbes*, February 26, 1710.
Annandale (M.) contra Lady *Gilleſsby*, February 15, 1712.
Annandale (Procuratorfiſcal of) contra *Carruthers*, December 7, 1705.
Anſtruther (Sir *Philip*) contra *Gordon*, January 11, 1710.
Arbuthnot contra *Scot*, January 29, 1708.
Archbald contra *Lawſon*, July 29, 1705.
Arnot of *Woodmill* contra Commiſſioners of the *Equivalent*, February, 3, 1708.
Arnot (Sir *David*) contra *Greigs*, June 20, 1712.
Aytoun of that Ilk contra Lady *Aytoun*, July 25, 1705.
Idem contra *Eandem*, November 22, 1705.

B.

Baillie of *Parbroth* contra *Walker*, July 23, 1707.
Baillie of *Lamingtoun* contra *Menzies* of *Culteralters*, July 15, 1709.
Idem contra *Eundem*, December 22, 1710.
Idem contra Sir *William Menzies*, January 25, 1711.
Baillie of *Caſtlecarie* contra *Brown* of *Seabegs*, July 29, 1710.
Baillie contra *Cuningham*, December 20, 1710.
Baillie of *Parbroth* contra *Nisbets*, July 8, 1713.
Baird (Sir *William*) contra *Mortimer* and *Deuchars*, June 28, 1711.
Bairdener contra *Dryſdale*, July 27, 1706.
Balfour contra *Hutton*, February 11, 1708.
Balfour contra *Greig*, February 5, 1713.
Ballantyne contra *Moor*, January 21, 1708.
Ballanden (Creditors of the Lord) competing, March 28, 1707.
Balmerinoch (Lord) contra Earl *Strathmore*, January 9, 1706.
Balvaird contra *Watſon*, January 18, 1709.
Bank (Directors of the) contra Commiſſioners of the *Equivalent*, February 11, 1709.
Barclay of *Towie* contra Creditors of *Rothemay*, December 1, 1708.
Barclay contra *Barclay* of *Touch*, July 14, 1710.
Bartoun contra *Duncan*, June 24, 1709.
Begbie contra *Begbie*, January 23, 1706.
Belhaven (Lord) contra Lord *David Hay*, February 7, 1706.
Bell contra *Campbell*, December 5, 1707.
Bell contra *Dunlop*, June 25, 1708.
Bennet and her Husband contra *Slanders* and others, July 5, 1711.
Bertram contra *Weir* of *Stonebyres*, February 8, 1706.
Binning contra Woollen Manufactory of *Newmills*, and Procurator-fiſcal of *Linlithgow*, June 19, 1706.
Binning contra *Cook* and *Arnot*, January 24, 1711.
Birrel contra *Fergus*, June 18, 1706.
Black contra Creditors of *Steil*, July 19, 1705.
Black contra *Lindſay*, July 23, 1713.
Black and others contra *M'gill* of *Grange*, July 23, 1706.
Blackwood contra *Hamilton* of *Grange*, July 17, 1713.
Blair contra *Oliphant*, June 8, 1705.
Blair contra *Hunter* her Husband, January 6, 1710.
Blair of *Dunskey* contra *M'dowal* of *Logan*, July 30, 1713.
Blair contra *Edgar*, July 29, 1712.
Blair of that Ilk contra *Cuningham*, February 19, 1713.
Blair (Captain) contra *Blair* of *Gleſclune*, July 23, 1713.
Blaw contra *Blaw*, July 12, 1711.
Boigs contra *Watſon*, July 27, 1708.
Bonhard's Creditors competing, ſee *Stuart* contra *Stuart*.
Bonnar contra *Bonnar* and *Maxwel*, June 15, 1709.
Bonnar and *Swinton* contra *Maxwel*, December 14, 1711.
Borthwick of *Fallahill* contra *Arbuthnot*, November 8, 1710.
Boſwel and *Hamilton* contra Cornet *Boſwel*, November 22, 1705.
Iidem contra *Eundem*, February 20, 1708.
Bothwel of *Glencorſe* contra *Trotter* of *Mortounhall*, January 10, 1710.
Bourbon and her Husband contra *Montgomery*, February 16, 1711.
Bowhill (Lord) and *Naſmith* contra *Jackſon*, February 26, 1709.
Boyd of *Drum* contra *Hay*, February 15, 1712.
Boyes contra *Schaw*, June 7, 1707.

Brand (Sir *Alexander*) contra *Torſton*, July 10, 1706.
Idem contra Tenants of *Riccartoun*, February 9, 1711.
Idem contra *Eoſdem*, June 21, 1711.
Brechin (Town of) contra E. *Panmure* and Lord *Grange*, July 24, 1707.
Brewers Supplicants contra Sheriff-deputs of *Edinburgh*, June 18, 1712.
Brodie (Captain) contra *M'lellan* and Others, June 14, 1710.
Brown contra *Hume*, November 14, 1705.
Brown of *Carſluith* contra *Maxwel* of *Cuill*, July 11, 1706.
Brown of *Braid* contra *Brodie*, January 26, 1709
Idem contra *Carſtairs*, July 3, 1711.
Brown younger of *Thornidikes* contra *Brown*, June 24, 1709.
Brown elder of *Thornidikes* contra his Sons, July 20, 1710.
Brown contra *Dickſon*, December 26, 1711.
Browſter contra *Lees*, June 5, 1707.
Bruce Lady *Ridheugh* contra *Forſyth*, March 11, 1707.
Eadem contra *Eundem*, December 31, 1708.
Eadem contra *Eundem*, June 11, 1709.
Bruce contra Sir *James Hall*, July 13, 1708.
Bruce (Captain) contra *Dalrymple* and *Inglis*, December 23, 1709.
Idem contra *Eoſdem*, February 17, 1710.
Bryſſon and *Henderſon* contra Duke of *Athole*, February 7, 1710.
Buchanan (Lady *Leny* and her Husband) contra M. *Montroſe*, January 16, 1706.
Idiem contra *Eundem*, March 20, 1707.
Buchanan of *Sandſide* contra *Eundem*, March 19, 1707.
Buchanan contra *Menzies*, February 15, 1712.
Buchanan contra *French*, June 19, 1713.
Budge contra Sir *James Sinclair*, July 21, 1713.
Bundy contra *Kennedy* of *Culzean*, February 12, 1708.
Idem contra *Eundem*, June 11, 1708.
Buntine contra *Buchanan* of *Drumakill*, July 7, 1710.
Burnet and her Husband *contra* Baron *Maitland* and *Young* of *Auldbar*, February 24, 1709.
Burnet (Executors of) contra *Panton*, December 24, 1709.
Burnet contra *Simpſon* and the founded Maſters of the King's College of *Aberdeen*, December 21, 1711.
Burnet (Sir *Thomas*) contra Heretors of the Shire of *Kincardin*, Feb. 19, 1713.
Idem contra *Eoſdem*, June 18, 1713.
Burton contra *Hamilton* of *Monkland*, July 23, 1707.
Butchers (Country) *contra* Magiſtrates and Skinners of *Edinburgh*, July 8, 1712.
Bute (Earl) contra *Haliburton* of *Pitcur*, July 18, 1712.
Butler and *Gordon* contra *Ragg*, July 31, 1708.
Byers contra *Reid*, July 27, 1708.

C.

CAlder contra *Middleton*, June 21, 1711.
Calderwood contra Sir *Thomas Young*, February 11, 1708.
Caldwell (Ladies of) contra *Dalziel* of *Binns*, February 19, 1706.
Callender (of *Craigforth*) contra L. *Lundin*, February 20, 1707.
Colquhoun (Lady *Monboddo*) contra Laird and Lady *Newmains*, July 3, 1712.
Eadem contra *Eoſdem*, June 23, 1713.
Campbell contra Sir *Alexander Anſtruther*, January 18, 1706.
Campbell of *Calder* contra Creditors of *Park Hay*, July 17, 1706.
Campbell contra *Campbell* of *Burnbank*, February 9, 1709.
Campbell of *Glenderuel* contra *Graham* of *Gorthie*, January 16, 1713.

Cardroſs (Lady) contra *Hamilton*, February 20, 1708.
Eadem contra *Eundem*, February 4, 1709.
Eadem contra *Graham* of *Buchlyvie*, June 7, 1710.
Carmichael contra *Bertram* of *Nisbet*, July 11, 1711.
Carmichael contra *Lockhart*, June 30, 1713.
Caruthers and her Huſband contra *Johnſton* of *Elſhiſhiels*, January 29, 1706.
Iidem contra *Caruthers* of *Dormont*, July 24, 1706.
Caſſils (C.) contra E. *Rutherglen*, February 18, 1713.
Chalmers contra Creditors of *Lyon*, July 25, 1710.
Chalmers contra *Grant* of *Dalrachny*, June 11, 1713.
Chappel and *Chriſtie* contra *Guydet*, June 29, 1705.
Cheap contra *Arnot* of *Woodmill*, July 18, 1712.
Cheap contra *Cleugh*, January 29, 1713.
Chieſlies (Major) Repreſentatives contra *Brand*, January 9, 1708.
Chiſholm contra *Steidman*, November 18, 1707.
Cleghorns contra *Torſton*, December 26, 1707.
Cleland (Creditors of) Supplicants, July 7, 1709.
Clerk contra *Dallas*, July 6, 1711.
Clerk and *Reid* contra Creditors of *Broadlees*, July 17, 1712.
Cochran and *Dykes* contra *Urquhart*, June 12, 1705.
Cochran contra Lord *Bargany*, January 8, 1708.
Cochran contra *Pringle*, July 16, 1709.
Cochran of *Kilmaronock* contra *Houſtoun* of that Ilk and *Cuningham*, July 3, 1713.
Coltran and *Gullen* contra *Matthie*, December 12, 1707.
Colvil contra *Irvin* of *Drum*, January 26, 1709.
Colvil contra Colonel *Ogilvie*, July 15, 1709.
Corbet of *Hardgray* contra *Hamilton* of *Wiſhaw*, March 20, 1707.
Corbet contra *Cochran* of *Kilmaronock*, July 25, 1707.
Corsbie contra *M^c^lair*, July 26, 1712.
Coſe (Creditors of) contra *Pedie* and others, February 24, 1708.
Cowie contra *Cowies*, February 26, 1707.
Eadem contra *Eaſdem*, March 5, 1707.
Eadem contra *Eaſdem*, June 24, and July 22, 1708.
Cowie and *Hardy* contra *Brown* of *Seabegs* and others, July 22, 1707.
Coupland contra *Caruthers*, June 25, 1708.
Craig of *Riccartoun*'s Creditors contra the Lady, July 22, 1708.
Craigs of *Riccartoun* (Creditors of) competing, July 22, 1712.
Craigforth (Lady) and her Huſband contra *Murray* of *Deuchar*, June 13, 1710.
Crawford and others contra *Cuningham*, December 23, 1707.
Crawford contra *Crawford*, December 27, 1711.
Crawford contra *Kennedy* of *Balterſan*, July 10, 1713.
Crichtoun contra *Borthwick* of *Cruickſtoun*, July 18, 1707.
Crombie contra *Robertſon*, November 16, 1709.
Cuming (Sir *Alexander*) contra Sir *Andrew Kennedy*, March 18, 1707.
Idem contra *Eundem*, November 19, 1707.
Idem contra *Eundem*, January 16, 1708.
Idem contra *Vere Kennedy*, December 10, 1708.
Idem contra *Eundem*, February 4, 1709.
Cuningham (Colonel) contra Lady *Semple*, July 5, 1706.
Cuningham of *Enterkin* contra his Curators, July 23, 1707.
Idem contra *Eoſdem*, December 5, 1707.
Cuningham of *Craigends* contra E. of *Eglintoun*, December 27, 1709.
Cuningham contra *Agnew*, July 4, 1711.

D.

DAES of *Coldingknows* contra *Scougal* and *Semple*, January 2, 1711.
Dalglieſh (Lady *Riccartoun*) contra *Gibſon*, July 9, 1709.
Dalhouſie (Earl) contra Lord and Lady *Hawley*, November, 13, 1712.
Idem contra *Eoſdem*, February 13, 1713.
Dalrymple (Sir *David*) contra *Hume* and *Blackwood*, January 19, 1711.
Dalrymple (Sir *Hugh)* Lord Preſident, contra Sir *John Inglis*, January 28, 1708.
Idem contra *Eundem*, February 18, 1708.
Dalrymple and *Skeen* of *Halyards*, contra *Johnſton*, June 23, 1710.
Darling contra *Hay*, January 18, 1709.
Davidſon of *Tullimorgan* contra the Town of *Aberdeen*, December 16, 1708.
Dawſon and *Hill* contra *Murray* of *Spot*'s Creditors, February 13, 1706.
Dewar contra *Wright*, November 14, 1710.
Dewar's (Creditors of) competing, December 22, 1710.
Dick Lady *Penkill* contra *Dunbar* her Husband and his Creditors, December 1, 1709.
Dick contra *Carſtairs* of *Kilconquhar*, February 15, 1711.
Dick and *Cubiſon* contra *Roriſon* and Others, June 19, 1712.
Dickie contra *Cowie* and Others, December 26, 1705.
Dickſon of *Hartrie* contra *Miln* of *Carridden*, July 3, 1705.
Idem contra *Eundem*, December 18, 1707.
Dickſon contra *Hume*, January 19, 1710.
Dickſon and *Heriot* contra *Logan*, December 22, 1710.
Iidem contra *Eandem*, February 16, 1711.
Iidem contra *Eandem*, November 22, 1711.
Dobie contra *Oliphant* and her Husband July 8, 1707.
Don (Sir *Alexander*) contra *Don*, November 28, 1712.
Idem contra *Eoſdem*, February 5, 1713.
Donaldſon contra the Magiſtrates of *Brechin*, July 24, 1706.
Donaldſon contra *Cockburn*, January 18, 1709.
Douglaſs (Duke of) contra the Creditors of *Spot*, July 27, 1708.
Douglaſs of *Dornock* contra *Caruthers*, November 13, 1711.
Douglaſs contra *Chatto*, November 26, 1712.
Douglaſs of *Hiſleſide* contra *Somervell* of *Kennocks*, July 10, 1713.
Idem contra *Eundem* July 22, 1713.
Drummond of *Megginſh* contra L. of *Innernytie*, July 27, 1708.
Drummond contra *Kennedy* and *Reid*, July 9, 1709.
Drummond contra *Campbell* of *Burnbank*, December 13, 1709.
Duff of *Bracco* Supplicant, December 29, 1709.
Dumfermling (Creditors and Donatar of) contra L. of *Innes*, March 14, 1707.
Idem contra *Cowper*, July 5, 1710.
Dumfreis (Town of) contra Heretors upon the Water of *Nith*, June 20, 1705.
Dunbar (Town Treaſurer of) contra *Pringle*, July 17, 1706.
Dunbar contra *Muirhead*, November 30, and December 17, 1709.
Dunbar contra the E. of *Cromarty*, July 16, 1713.
Dunbar of *Thundertoun* contra *Gordon* of *Gordonſtoun*, July 28, 1713.
Duncan contra Lady *Drum*, November 15, 1705.
Duncan contra *Scrimzeor* of *Kirktoun*, February 19, 1706.
Idem contra *Eundem*, July 3, 1707.
Idem contra *Graham* July 22, 1709.
Duncan of *Lundy* contra *Innes* February 28, 1713.
Duncan contra *Miller*, July 23, 1713.
Dundaff (Feuars of) contra *Madrill*, July 22, 1709.
Idem contra *Eoſdem*, December 23, 1709.

Dundas of that Ilk contra *Dundas*, July 25, 1705.
Idem contra *Eundem*, January 2, 1706.
Dundas's (George) Creditors competing. (See *Steuart* contra *Steuart*)
Dundas of *Brieſtmill* contra *Sinclair* of *Carloury*, July 11, 1706.
Dundas (Baillie) contra *Allan*, January, 17, 1711.

E.

EDGAR contra *Sinclair*, July 23, 1713.
Edinburgh (Town of) contra Country Brewers, July 18, 1711.
Iidem contra *Eoſdem*, July 15, 1712.
Iidem contra *Mackie*, July 24, 1711.
Their Tackſmen of the Impoſt upon Ale, contra *Straiton*, December 19, 1712.
The Tackſmen of their Mills contra *Alexander*, December 19, 1710.
Edinglaſſie (Creditors of) contra *Gordon* of *Carnouſtie*, July 15, 1707.
Edins and *Hume* contra *Hunter*, March 20, 1707.
Edmondſtoun and *Olipher* contra *Edmondſtoun*, July 19, 1706.
Elibank (Lord) contra *Adamſon* and her Husband, February 8, 1712.
Idem and his Siſters contra *Mackenzie* of *Frazerdale*, July 23, 1708.
Iidem contra *Eundem*, January 26, 1711.
Eliot contra *Hume* of *Kaims*, July 26, 1705.
Eliot contra Repreſentatives of *Veach*, February 20, 1708.
Eliot contra *Eliots*, June 29, 1711.
Eliſes contra *Watſon* of *Saughtoun*, January 5, 1712.
Eædem contra *Eundem*, February 5, 1712.
Elphinſton (Sir *James*) *contra* the Creditors of *Strichan*, July 23, 1706.
Idem contra *Paton*, December 16, 1710.
Enterkin (Lady) contra L. of *Enterkin*, December 27, 1711.
Erskin (Colonel) *contra* Lady *Bettie Boſwell* and her Husband, March 11, 1707.
Idem contra Sir *George Hamilton*, December 18, 1708.
Idem contra *Eundem*, February 8, 1709.
Idem contra *Eundem*, July 21, 1710.
Idem contra *Eundem*, December 19, 1710.
Idem contra *Eundem*, November 26, 1712.
Idem contra *Eundem*, February 12, 1713.
Idem Supplicant, July 27, 1710.
Erskin of *Alva* contra *Thomſon*, December 12, 1711.
Erskin contra *Eliot*, January 24, 1712.
Ewan contra *Rowan*, June 15, 1711.
Ewart contra *Ewart*, February 8, 1706.
Eyres, *Mure* and *Ballantine* contra *Hunter* and *Campbell*, January 19, 1711.

F.

FAirholm contra *Mackenzie* of *Aſſint*, July 29, 1710.
Farquharſon contra *Frazer* of *Doors* January 25, 1709.
Fea contra *Trail* her Father in Law, February 8, 1710.
Eadem contra *Trail* her Husband, July 9, 1712.
Fead contra *Ewart* June 22, 1705.
Fead contra *Maxwell* of *Dalſwintoun* and Others, February 4, 1709.
Fergus contra *Birrell*, December 12, 1707.
Ferguſon contra *Mure*, December 27, 1711.
Ferguſon contra *Irving* of *Gribtoun*, January 3, 1712.
Fincham contra *Murehead* of *Breadiſholm*, February 15, 1706.
Fleming and *Hamilton* contra *Calder* of *Muirtoun*, January 25, 1706.
Iidem contra *Eundem*, July 18, 1706.
Iidem contra *Eundem*, December 28, 1709.

Forbes (Sir *William*) of *Monimusk*'s Creditors contra Maſters of the Queen's College of *Aberdeen*, July 12, 1710.
Ejuſdem (perſonal) contra his real Creditors, January 4, 1712.
Forbes contra *Grants*, July 20, 1708.
Forbes contra *Forbes*, November 27, 1708.
Forbes and her Husband contra *Forbes* and *Monro*, February, 9, 1709.
Iidem contra *Eoſdem*, July 7, 1709.
Forbes of *Ballogie* contra *Cattanach*, January 21, 1710.
Idem contra *Allardice*, June 25, 1710.
Forbes (Sir *Robert*) contra *Watſon*, February 16, 1711.
Ejuſdem Creditores contra *Blackwoods*, June 12, 1711.
Forbes and *Paterſon* contra Lady *Collodden*, July 8, 1712.
Forbes of *Blacktoun* contra *Abernethy* of *Meyen*, February 12, 1713.
Forfar (Earl) contra *Gilhagie*, January 31, 1712.
Forreſt contra *Craig*, February 15, 1709.
Forreſter contra *Forreſter*, January 13, 1711.
Forſyth contra *Ritchie*, December 15, 1710.
Fraſer contra *Brown* and *Gordon*, March 27, 1707.
Fraſerburgh (Feuars and Merchants of) contra Lord *Saltoun*, June 19, 1707.
Fulton contra *Johnſton*, January 29, 1708.

G.

G*Alloway* (Earl) contra *Hamilton* of *Baldoon* and his Mother, June 30, 1709.
Garden (Doctor) contra *Anderſon*, June 19, 1712.
Idem contra *Eundem*, July 21, 1713.
Gavin contra L. *Skelmurly*, December 28, 1705.
Gib of *Caſtletoun* contra *Robertſon*, June 25, 1713.
Gibſon of *Durie* contra *Trotter* of *Mortounhall* and others, July 18, 1710.
Gibſon contra *Cochran*, Eodem Die.
Gibſon and *Wilſon* contra *Leith*, January 2, 1711.
Gilleſpie contra *Gilleſpie* and *Carſes*, November 21, 1705.
Gladſtones (Creditors of) competing, ſee *Lilly* contra *Crawford*.
Glaſgow (Town of) contra *Sanders*, July 17, 1711.
Glaſgow (Univerſity of) contra *Hamilton* of *Dalziel*, July 24, 1713.
Glaſſels and his Factor contra Magiſtrates of *Forfar*, December 13, 1711.
Glendinning contra *Irving*, January 28, 1708.
Idem contra *Eundem*, January 6, 1710.
Gordon (Dutcheſs of) contra the Duke, March 18, 1707.
Gordon of *Davach* contra *Duff* of *Dipple*, March 28, 1707.
Idem contra *Gordon*, July 17, 1711.
Idem contra *Gordon* of *Techmury*, July 30, 1712.
Gordon of *Auchintoule* contra *Duff* of *Drummure*, June 24, 1707.
Gordon of *Gordonſtoun*'s Tutors Supplicants, July 17, 1707.
Iidem Supplicants, July 11, 1710.
Gordon of *Cults* contra Lady *Gight* and her Husband, July 13, 1708.
Gordon of *Buckie* contra *M‘intoſh* of *Borland*, December 27, 1710.
Gordon of *Gordonſtoun* contra his Curators, February 22, 1712.
Gordon of *Troquhen* contra *M‘gie* of *Balmagie*, November 27, 1711.
Gordon contra *Anderſon*, December 9, 1712.
Gordon contra *Gordon* and others, January 16, 1713.
Gordon contra D. *Gordon*, February 18, 1713.
Gordon and *Osburn* contra *Campbell*, July 23, 1713.
Graham contra *Piper* of *Newgrange*, March 28, 1707.
Graham contra *Corbet*, July 14, 1708.
Graham contra Earl of *Levin* and Major *Colt*, July 14, 1709.

Graham contra Captains *M'Queen* and *Drummond*, February 9, 1711.
Grant (Captain) contra Major *Anderſon*, June 20, 1705.
Grant of *Dalahaple* contra *Eundem*, July 11, 1706.
Grant (Laird of) contra Creditors of *Halgreen*, March 21, 1707.
Idem contra Earl of *Sutherland*, February 17, 1708.
Grant contra *Strachan* of *Thorntoun*, November 18, 1710.
Grant contra Duke of *Gordon*, June 23, 1710.
Grant contra *Grant*, July 9, 1712.
Gray of *Balgowny* contra *Panton* of *Hiltoun*, July 24, 1705.
Gray (Lord) contra Sir *William Hope*, February 14, 1710.
Idem contra *Eundem*, July 5, 1710.
Idem contra *Eundem*, July 21, 1710.
Gray contra *Cairncorſe*, January 16, 1711.
Gray contra *Chieſlie* July 4, 1711.
Gray contra *Cockburn*, December 27, 1711.
Greenock (Lady) contra Sir *John Schaw*, January 5, 1709.
Eadem contra *Eundem*, June 22, 1709.
Eadem contra *Eundem*, July 19, 1711.
Grierſon Supplicant *contra* Magiſtrates of *Dumfries*, February 20, 1713.
Grieve contra *Thomſon*, December 1, 1705.
Guthrie and *Williamſon* contra *Gordon*, February 2, 1711.

H.

H*Aigs* of *Bimmerſide* contra *Halyburton* of *Newmains*, July 5, 1705.
Iidem contra *Eundem*, March 14, 1707.
Halden contra *Rhymer* and *Ramſay*, July 22, 1707.
Haliday and *Temple* contra *Garden* of *Greenhill*, February 20, 1706.
Iidem contra *Cuningham*, February 17, 1708.
Halkerſtoun of *Rathillet* contra *Melvil* of *Mordecarny*, November 24, 1708.
Idem contra *Eundem*, January 19, and February 1, 1709.
Hall (Sir *James*) *contra* Lady *Pitfirren*, March 18, 1707.
Hall contra Dam *Mary Campbell* and her Husband, February 17, 1708.
Halyburton of *Fodderance* contra *Cook* July 26, 1711.
Hamilton contra *Livingſton* of *Kilſyth*, June 16, 1705.
Hamilton of *Grange-Brech* and his Spouſe *contra* Cornet *Boſwell*, July 25, 1705.
Hamilton (Sir *George*) *contra* Laird and Lady *Airth*, June 20, 1710.
Hamilton (Dutcheſs of) contra *Campbell*, February 13, 1706.
Hamilton of *Wiſhaw* contra Creditors of *Cleland*, February 8, 1706.
Idem contra *Boyd*, July 10, 1712.
Idem contra *Moir* of *Cairnhill*, November 21, 1710.
Hamilton and *Mackenzie* contra *Campbell* of *Aberuchil*, February 23, 1709.
Hamilton and *Brown* contra *Turnbul*, December 8, 1709.
Hamilton of *Bangour* contra Lady *Ormiſtoun* and her Children, December 6, 1709, See *Ormiſtoun* (Lord and Lady) contra *Bangour*.
Idem contra *Eoſdem*, July 4, 1712.
Hamilton contra *Gordon*, January 27, 1710.
Hamilton contra *Piper* of *Newgrange*, June 29, 1711.
Hamilton and her Husband *contra* L. *Burleigh* and *Wright*, February 7, 1712.
Hamilton of *Pumpherſtoun* contra Lady *Cardroſs*, November 19, 1712.
Hamilton of *Orbiſtoun*'s Creditors contra *Hamilton* of *Dalziel*, July 7, 1713.
Iidem contra *Eundem*, June 19, 1713.
Harden (Lady) and her Husband *contra* Laird of *Preſtoungrange*, July 10, 1707.
Hardy contra *Allan* and *Chiſholm*, January 4, 1709.

Hay contra *Cuming* of *Birneſs*, June 28, 1706.
Hay (Baillie) contra *Hay* and Others, March 15, 1707.
Hay (Lord *Alexander*) contra Creditors of *Spot*, July 8, 1708.
Idem contra *Eoſdem*, November 28, 1710.
Hay and *Caruthers* contra Doctor *Hay* July 27, 1710.
Idem contra *Eundem*, December 29, 1710.
Hay contra *Crawfurd*, February 20, 1712.
Hay contra Sir *Samuel Forbes*, July 9, 1712.
Heggins contra Sir *Alexander Brand*, June 26, 1705.
Henderſon contra *Graham*, July 21, 1710.
Henderſon contra *Dunbar* of *Thundertoun*, February 21, 1706.
Henderſon contra *Henderſon*, March 27, 1707.
Henderſon and *Innes* contra *Morton* and *Smith*, December 20, 1710.
Henry contra *Glaſſels*, December 22, 1709.
Idem contra *Eundem*, February 22, 1711.
Hepburn contra *Hepburn*, December 8, 1708.
Hepburn of *Humbie* contra Lord *Strathnaver*, July 3, 1712.
Heriot contra *Ker*, June 22, 1711.
Heriot's Hoſpital (Adminiſtrators of) *contra* Brewers in the *Canongate*, February 22, 1707.
Iidem contra *Angus*, July 1, 1709.
Herries contra *Maxwel* of *Orchyardtoun*, January 18, 1712.
Hill and *Muirhead* contra *Muirhead*, January 26, 1709.
Hodge contra *Miller*, November 19, 1707.
Honyman contra *Oliphant* and her Husband, July 23, 1713.
Horn contra Lord *Edward Murray* and his Lady, February 20, 1711
Horsburgh contra *Cranſtouns*, December 4, 1712.
Houſtoun contra Lord *Roſs*, July 15, 1708.
Houſtoun contra Lady *Kinkaid* and her Husband, January 21, 1709.
Houſtoun contra *Muſbet*, February 22, 1712.
Hume (Sir *Robert*) contra Sir *Patrick Hume*, July 16, 1708.
Hume of *Wedderburn* contra *Hume* of *Ninewells*, December 29, 1710.
Hume Relict of *Hume* of *Eccles*, Supplicant, July 17, 1712.
Hume contra *Smith*, December 5, 1712.
Hutchiſon contra *Couts*, December 21, 1711.

I.

Jackſon contra *Carnwath* and other Creditors of *Cockburn*, June 30, 1705.
James contra *Watkins*, December 31, 1708.
Jamiſons contra *Sheriffs*, December 14, 1708.
Inglis contra Lord *Alexander Hay*, July 2, 1709.
Inglis contra *Fuller*, January 18, 1712.
Innerleith (Lady) *contra* Lairds of *Cockburn* and *Lammertoun*, June 21, 1705.
Innernytie (Laird and Lady) *contra* Laird and Lady *Aldie*, February 26, 1709.
Innes contra Earl of *Broadalbine*, March 25, 1707.
Inverury (Lord) contra *Gordon*, July 11, 1705.
Jolly contra *Bethune* of *Tarvit* and Others, March 25, 1707.
Johnſton contra Repreſentatives of *Napier*, July 1, 1708.
Johnſton (Sir *John*) contra *Pedder*, December 30, 1709.
Johnſton contra *Houſtoun*, January 20, 1713.
Irving contra *Crawfurd*, June 22, 1705.
Irving (Doctor) contra *Skeen* of *Halyards*, March 7, 1707.
Irving (of *Kincauſſie*) contra *Deuchars*, March 13, 1707.

Irving contra *Corbets*, January 4, 1709.
Irving of *Drum* contra *Gordon*, December 22, 1710.
Junkiſon contra Lady *Ardvorlick*, February 26, 1709.

K.

Keith of *Ludquhairn* contra *Sinclair* of *Diren*, June 30, 1705.
Kennedy (Sir *Andrew*) contra *Gordon*, June 28, 1705.
Idem contra Sir *Alexander Cuming*, January 3, 1706.
Idem contra *Eundem*, July 21, 1711.
Idem contra *Eundem*, November 9, 1711.
Idem contra *Eundem*, June 26, 1712.
Idem contra *Eundem*, July 30, 1712.
Kennedy contra *Vans* and *Crawfurd*, February 24, 1708.
Kennedy of *Kilhinzie* contra *Agnew* and others, February 17, 1713.
Ker of *Graden* contra *Abernethy*, November 28, 1705.
Idem contra *Eundem*, December 25, 1705.
Ker contra *Dunbar*, February 5, 1706.
Ker of *Moriſtoun* contra *Calderwood*, February 14, 1706.
Ker contra *Howiſon* and *Lookup*, February 11, 1708.
Ker contra *Primroſe*, January 4, 1709.
Ker contra *Gibſon*, July 5, 1709.
Ker of *Chatto* contra Creditors of *Harden*, June 17, 1712.
Idem contra *Eoſdem*, July 29, 1712.
Kidzew contra July 23, 1707.
Kinfawns (Lady and others) contra Laird of *Kinfawns*, July 19, 1711.
King contra *Ker*, January 24, 1711.
King contra *Eſdale*, December 6, 1711.
Kinloch of *Gilmortoun* contra *Forbes* of *Tolquhon*, July 3, 1708.
Knox contra *Hume* of *Kaims*, March 12, 1707.

L.

Lamb Supplicant contra *Cleland* and *Gibſon*, July 27, 1710.
Langtoun (Creditors of) competing, January 20, 1709.
Lauderdale (Earl) contra Lord *Teſter*, June 20 and July 20, 1709.
Idem contra *Eundem*, December 13, 1709.
Idem contra *Eundem*, and *Seaton* of *Barns*, February 2, 1710.
Law contra *White*, December 10, 1709.
Law contra *Turnbul*, November 24, 1710.
Lawrie contra Sir *Alexander Maxwel*, February 22, 1711.
Lawſon contra *Gilmoir*, June 22, 1709.
Lee (Lady) contra Laird of *Lee*, December 24, 1709.
Lees contra *Dunwoodie*, July 18, 1706.
Leſlie of *Kincraigie* contra Creditors of *Riccartoun*, February 10, 1710.
Leſlie contra Creditors of *Leſlie*, June 15, 1710.
Leſlie and *Johnſton* contra *Dick* of *Grange*, December 29, 1710.
Levin (Earl of) contra *Durham* of *Largo*, February 14, 1706.
Idem contra *Scot* of *Gilmorſcleugh* and *Armſtrong*, March 15, 1707.
Idem contra *Moriſon* of *Bognie*, February 10, 1710.
Idem contra *Eundem*, February 10, 1713.
Idem contra *Eundem*, December 21, 1710.
Idem contra *Findlay*, February 22, 1711.
Idem contra Earl of *Glencairn*, December 20, 1711.

Lewars contra *Carmichael* of *Mauldſley*, July 5, 1711.
Liddel contra *Davidſon*, June 19, 1711.
Leith (Kirk-ſeſſion of North) and *Williamſon* contra *Skeen* and *Brown*, January 20, 1708.
Lillie contra *Crawford* of *Montquhany*, July 26, 1705.
Linklatter contra *Boſwal*, June 19, 1711.
Eadem contra *Eundem*, January 28, 1713.
Linn Supplicant, June 30, 1708.
Linning contra *Baillie* of *Walſtoun*, December 24, 1709.
Livingtoun contra *Menzies*, December 13, 1705.
Idem contra *Eandem*, January 22, 1706.
Idem contra *Eandem*, June 14, 1707.
Idem contra *Eandem*, June 17, 1707.
Idem contra *Eandem* and *Livingtoun*, January 23, 1708.
Idem contra Laird of *Preſtoungrange*, November 15, 1709.
Livingtoun and *Tait* contra *Forreſt*, February 17, 1713.
Lockhart contra *Wardrop*, February 28, 1708.
Lockhart of *Carnwath* contra *Baillie* of *Walſtoun*, December 23, 1709.
Logie contra *Ferguſon*, January 4, 1710.
Lundy and her Husband contra Lord *Sinclair*, February 11, 1713.
Lyon (Mrs.) contra Earl *Aboyn*, December 21, 1709.
Eadem contra Lord and Lady *Kinnaird*, June 13, 1711.
Lyon of *Bridgetoun* contra Lady *Kerſe*, January 16, 1712.

M.

M'*Aulay* of *Ardincaple* contra *Bell*, December 12, 1712.
Mackie contra *Paton*, November 30, 1710.
M'dowal contra *Marſhal*, July 14, 1705.
M'dowal of *Logan* contra *Agnew* of *Seuchan*, June 12, 1707.
Idem contra *Eundem*, July 31, 1707.
M'farland contra *Cowie*, July 31, 1705.
M'gibben contra Managers of the Woollen Manufactury at *Newmills*, July 14, 1710.
M'guffog of *Ruſco* contra *Blairs*, January 28, 1709.
M'ildownie contra *Graham*, July 1, 1712.
M'kay contra *Sinclair* of *Stempſter*, February 11, 1708.
M'kenzie (Sir *John*) contra Magiſtrates of *Inverneſs*, December 3, 1709.
M'kenzie of *Frazerdale* contra Lord *Elibank*, December 20, 1709.
M'kenzie of *Allangrange* contra *M'kenzie* of *Kilcowie*, July 25, 1710.
M'kenzie contra Inhabitants of *Burntiſland*, November 21 and Decem. 2, 1712.
M'kenzie of *Preſtounhall* contra *Fletcher* and her Husband, January 11, 1712.
M'laren and *Din* contra Executors of Major *Chieſly*, February 8, 1710.
M'liery contra *Glen*, December 5, 1707.
M'micken contra *Kennedy* of *Glenour*, June 27, 1706.
M'pherſon contra *M'pherſon*, January 28, 1713.
M'reoch contra *Alexander*, January 2, 1712.
Main contra *Maxwel* and Partners, July 27, 1710.
Maitland contra *Brand*, January 22, 1706.
Idem contra *Eundem*, July 22, 1707.
Malcolms contra Queen's Advocate, June 19, 1712.
Malices contra *Ogilvie*, February 3, 1708.
Man contra *Reid*, December 19, 1705.
March (Earl) contra Earl of *Levin*, June 28, 1710.
Marr (Earl) contra Feuars of *Bothkenner*, February 24, 1708.
Marſhal (Creditors of) contra his Children, December 23, 1709.

Iidem contra *Hamilton* of *Pancaitland*, Eodem Die.
Marſhall contra *Marſhalls*, February 17, 1710.
Maſſon contra Earl of *Aberdeen*, November 29, and December 13, 1709.
Matthie (Supplicanty) contra Commiſſary-Clerk of *Edinburgh*, June 23, 1705.
Maver and *Cowback* contra *Ruſſel*, July 7, 1710.
Maxwel (Sir *William*) contra *Irving*, February 1, 1706.
Maxwel of *Tarraughtie*'s Creditors contra *Maxwel*, July 21, 1710.
Meek contra *Dunlop*, June 18, 1707.
Menzies contra *Gordon* of *Pitlurg*, January 26, 1709.
Menzies contra *Graham*, January 25, 1711.
Menzies (Sir *William*) contra *Brown* of *Dolphingtoun*, December 21, 1710.
Menzies and *Clerk* contra L. *Preſtoungrange*, January 17, 1712.
Miller contra Repreſentatives of *Bonnar*, February 19, 1708.
Miln contra *Erskin* February 10, 1710.
Minto (Lord) contra *Gordon*, July 27, 1705.
Idem contra *Marſhall*, February 8, 1712.
Mitchel contra *Baillie* and *Shearer*, November 29, 1710.
Mitchel contra *M'addam*, January 18, 1712.
Moir contra Creditors of *Jack*, June 10, 1709.
Moir contra Sir *Samuel Forbes*, February 16, 1710.
Moir and *Moriſon* contra *Dons*, January 24, 1711.
Moir contra Sir *Alexander Maxwel*, June 18, 1712.
Moliſon Supplicant, March 18, 1707.
Moncrieff of *Mornipea* contra *Maxwel* of *Leckiebank*, February 23, 1710.
Idem contra Heirs and Creditors of *Ballo*, July 25, 1712.
Moncrieff and her Husband contra *Monipenny*, July 14. 1710.
Iidem contra *Eandem*, July 20, 1711.
Iidem contra *Eandem*, February 19, 1712.
Iidem contra *Eandem*, June 20, 1712.
Iidem contra *Eandem*, January 27, 1713.
Iidem contra *Eandem*, June 20, 1713.
Moncrieff of that Ilk contra Creditors of *Campbell*, February 21, 1712.
Monro contra *Monro*, December 16, 1712.
Monteith contra *Douglaſs*, November 8, 1710.
Montgomery contra *Alexander*, July 31, 1708.
Montgomery and *Alves* contra Marqueſs of *Lothian*, January 18, 1712.
Montgomery contra Enſign *Brown*, June 18, 1713.
Montgomery and his Lady contra *Montgomery* of *Wrae*, July 29, 1713.
Montroſe (D) contra *Walkingſhaw* of that Ilk, July 27, 1706.
Idem contra Feuars of *Kilpatrick*, July 13, 1711.
Idem contra *M'aulay* of *Ardincaple*, December 19, 1711.
Idem contra *Eundem*, July 9, 1713.
Idem and Others Supplicants, November 22, 1712.
Montroſe (Town of) contra *Strachan*, January 17, 1710.
Montſtuart (Lord) contra Lady *Mackenzie* and her Husband, January 2, 1708.
Moriſon of *Bognie* contra E. of *Levin*, February 20, 1713.
Mortimer contra *Archibald* and Others, January 5, 1710.
Muirhead and *Leith* contra *Lockhart* of *Carnwath*, February 10, 1708.
Muirhead of *Stevenſon*'s Creditors contra *Hamilton* of *Wiſhaw*, June 12, 1713.
Mullikens Supplicants, June 26, 1706.
Murray contra *Chalmers*, December 11, 1705.
Murrays contra *Murray* of *Deuchar*, June 23, 1705.
Murray of *Conheath* contra *Irving* of *Drumcoltran*, March 18, 1707.

Murray Lady *Pitfirren*, contra *Wood*, July 26, 1709.
Murray contra *Wood*, November 4, 1709.
Murray of *Philiphaugh*, contra *Trotter* of *Mortounhall*, December 9, 1709.
Murray contra *Murray*, June 16, 1710.
Murray contra Sir *Robert Blackwood*, July 25, 1710.
Murray of *Burghtoun* contra *M'guffock* of *Ruſco*, November 23, 1711.
Idem contra Lady *Semple*, July 22, 1712.
Murray contra *Murray*, January 4, 1712.
Murray of *Burghtoun* contra *M'lellan* of *Barclay*, June 19, 1713.
Muſhet of *Callihat* contra *Harvie* of *Blackhouſe*, December 16, 1710.

N.

NAIRN of *Drumkilbo*, contra *M'lellan*, July 11, 1711.
Idem contra *Eundem*, February 22, 1712.
Idem contra *Betſon* of *Kilrie*, Eodem Die.
Nairn contra *Barclays*, November 18, 1712.
Naughton contra *Ritchie*, December 10, 1712.
Newgalloway (Magiſtrates and Procurator-fiſcal of) contra their Vaſſals, July 20, 1710.
Nicol contra *Park* of *Fulfoordlies*, March 12, 1707.
Idem contra *Eundem*, July 20, 1708.
Nicolſon (Creditors of) contra E *Balcarras*, July 23, 1708.
Nicolſon (Lady) contra Laird of *Preſtoungrange*, February 7, 1711.
Idem contra *Eundem*, July 17, 1711.
Nicolſon (Dam *Rachel*) contra Doctor *Oſwald*, July 17, 1712.
Neilſons contra *Culter* and *Wilſon*, July 12, 1711.
Nisbet and *Bell*, contra *Monro*, February 16, 1711.
Nisbet of *Dirletoun*, contra *Johnſton*, July 26, 1711.

O.

OGILVIE contra *Baillie* of *Lamingtoun*, July 21, 1711.
Ogilvie contra E. *Levin*, January 29, 1712.
Oliphant contra *Oliphant*, July 13, 1705.
Ormiſtoun (Lady) and her Husband, contra *Hamilton* of *Bangour*, January 21, 1708.
Iidem contra *Eundem*, January 25, 1709.
Iidem contra *Eundem*, November 11, 1709.
Iidem contra *Eundem*, December 14, 1709.
Iidem contra *Eundem*, December 15, 1710.
Iidem contra *Eundem*, January 17, 1711.
Iidem contra *Eundem*, November 8, 1711.
Iidem contra *Eundem*, July 23, 1712.
Orr contra *Wallace* of *Camſiſcan*, February 14, 1712.
Oſwald (Captain) contra Captain *Gordon*, June 26, 1711.

P.

PAISLEY (Magiſtrates of) contra their Vaſſals, February 13, 1711.
Parkhay (Creditors of) contra *Falconer*, January 23, 1711.
Paterſon and *Anderſon* (Creditors of) contra *Douglaſſes*, November 21, 1705.

Idem contra *Eoſdem*, November 29, 1705.
Paterſon contra Sir *James Ramſay* and others, January 25, 1710.
Paterſon and others, contra Town of *Edinburgh*, July 26, 1711.
Paton contra *Leith* of *Belchirie*, July 8, 1708.
Paton of *Panholls*'s Creditors competing, June 8, 1711.
Pennicook (Doctor) contra *Campbell* and *Edgar* and their Husbands, January 20, 1709.
Perth (Inhabitants of) contra Shoemakers there, January 12, 1711.
Pitcairn contra *Haliday*, December 21, 1710.
Pitmedden (Lord) and his Lady, contra *Monro*, July 4, 1705.
Iidem contra L. *Gordonſtoun*, December 9, 1707.
Iidem contra *Bathgate* and *Wedderburn*, December 3, 1709.
Iidem contra *Douglaſs*, July 2, 1712.
Plummer contra *Houſtoun*, February 13, 1706.
Potter contra *Vre* of *Shirgartoun*, December 5, 1710.
Potts and *Hunter* contra *Mitchelſon* and *Robſon*, July 20, 1705.
Pourie (Laird of) contra *Hunter* of *Burnſide*, December 24, 1708.
Preſton (Captain) and others, contra Lady *Semple*, June 21, 1706.
Preſton (Colonel) contra Colonel *Erskin*, November 24, 1710.
Pringle contra *Manderſon*, June 24, 1708.
Pringles contra *Irving* of *Gribtoun*, July 13, 1711.
Purdie contra *Roſs*, March 5, 1707.
Pyper Supplicant, January 5, 1711.

Q.

QVAKER, January 29, 1713.

R.

RAE and *Corſan* contra *Maxwell* of *Munſhes*, July 19, 1711.
Ragg contra *Brown*, July 28, 1708.
Ramſay and *Reid* contra *Spalding* of *Aſhintully*, July 19, 1710.
Ramſay contra *Gibſon* of *Durie*, February 1, 1706.
Ramſay contra *Nairn* of *Danſinnen*, January 2, 1708.
Ramſay and *Reid* contra *Spalding* of *Aſhintully*, July 10, 1713.
Rankeillor (Lady) contra Lady *Aitoun*, July 8, and 23, 1709.
Rankine (alias *Little*) of *Libbertoun* contra *Johnſton* and *Henderſon*, February 1, 1709.
Reid contra *Maxwell* and *Lanerick*, July 7, 1708.
Reid and *Ker* contra Town of *Edinburgh* and their Tackſmen, December 27, 1711.
Reoch contra *Young*, January 2, 1712.
Richardſon contra E. of *Eglintoun*, July 17, 1705.
Robertſons contra Commiſſary *Baillie*, June 13, 1705.
Iidem contra *Eundem*, June 26, 1705.
Robertſon contra Dam *Anna Houſtoun* and her Husband, March 13, 1707.
Robertſon contra *Robertſon* of *Strowan*, February 22, 1712.
Rollmainers contra Lady *Blantyre* and others, July 22, 1708.
Roſs (Lord) contra *Gray* of *Newtoun*, January 16, 1706.
Idem contra *Houſtoun*, February 14, 1710.
Roſs of *Aldie* contra *Roſs* of *Eye*, July 25, 1710.

Idem contra *Eundem*, November 14, 1710.
Idem contra *Eundem*, January 23, 1711.
Roſs of *Lethintie*'s Creditors contra *Gelly* and *Hall*, July 20, 1711.
Roſs Supplicant contra *Rentoun*, February 26, 1712.
Roſs of *Auchloſſin*'s Creditors competing, July 24, 1713.
Row contra *Row*, January 1, 1706.
Roxburgh (Earl of) *contra* Heretors of *Lillieſleaf*, February 27, 1706.
Idem contra Town of *Dunbar*, June 5, 1713.
Rule contra Repreſentatives of *Reid*, July 24, 1707.
Rule contra *Purdie*, June 30, 1708.
Rules contra Magiſtrates of *Stirling*, July 23, 1708.
Iidem contra Creditors of *Riccartoun*, February 20, 1712.
Rule contra *Purdie*, December 8, 1710.
Ruſſel of *Broadſhaw* contra *Miller*, January 9, 1711.

S.

SAltoun (Lord) contra *Elphinſtoun*, July 7, 1708.
Sandilands contra *Purdie*, November 9, 1709.
Sands and others contra *Scot*, January 6, 1708.
Savage and *Dun* contra *Craig*, January 25, 1710.
Schaw contra Sir *John Schaw* of *Greenock*, January 24, 1706.
Sclanders contra *Hill*, July 20, 1710.
Scot contra *Laign*, March 19, 1707.
Scot of *Raeburn* contra *Scot* of *Haycheſter*, June 23, 1713.
Scot of *Harden* contra Lady *Harden*, January 27, 1708.
Scot of *Harden*'s Creditors *contra* his Relict, July 15, 1713.
Scot contra *Seton*, February 5, 1708.
Idem contra *Eundem*, November 12, 1708.
Scot contra *Baillie*, November 7, 1711.
Scot Lady *Halkſhaw* contra Dutcheſs of *Buccleugh*, February 12, 1712.
Eadem contra *Eandem*, July 1, 1712.
Eadem contra *Eandem*, January 28, 1713.
Seafield (Earl) *contra* Creditors of *Boyn*, February 23, 1709.
Selkrig contra *French*, June 30, 1708.
Semple (Lady) *contra* Lady *Comiſtoun*, July 13, 1705.
Eadem contra Lord *Semple* and his Tenants, November 30, 1711.
Sharp (Sir *William*) *contra* Arch-Biſhop of *Glaſgow*, June 26, 1706.
Sharp of *Hoddam* contra Earl *Nithſdale*, February 2, 1710.
Idem contra *Maxwell* of *Cowhill*, July 17, 1711.
Shields contra Town of St. *Andrews*, February 8, 1709.
Short contra *Hopkin*, February 13, 1711.
Idem contra *Eundem*, July 3, 1711.
Sinclair of *Roſlin* and his Tutors Supplicants, July 18, 1710.
Sinclair contra *Sinclair*, November 27, 1705.
Sinclair of *Stevenſon* contra Creditors of Lord *Ballenden*. See *Ballenden*.
Sinclair contra *Purveſſes*, June 26, 1707.
Sinclair contra *Maxwell of Tinwall*, January 6, 1708.
Sinclair of *Quendall* contra *Murray*, June 24, 1712.
Smith contra *Matthie*, December 31, 1708.
Smith contra *Vint*, December 27, 1709.
Smith and *Wallace* contra *Smith* of *Browſterland*, December 14, 1710.

Smiths contra *Semple* of *Fullwood*, December 14, 1711.
Smith contra *Stirling*, December 5, 1712.
Sochan contra *Boſwall*, November 30, 1709.
Somervell contra *Dundas* and *Anderſon*, July 14, 1705.
Somervell contra *Smith* of *Camno*, July 2, 1706.
Souper contra *Pyper* and *Miln*, July 2, 1708.
Spence contra *Duncan*, January 15, 1706.
Spot (Creditors of) competing, November 30, 1711.
Spotſwood contra *Brown*, July 3, 1712.
Stark and *Tom* contra *Jolly*, January 22, 1713.
Stirling contra *M^c^reoch* and *Alexander*, June 19, 1705.
Stirling (Town of) contra *Murrays* of *Polmais*, February 7, 1706.
Stirling contra *Gordon*, December 2, 1712.
Strachan contra Magiſtrates of *Aberdeen*, February 14, 1708.
Idem contra *Eoſdem*, June 21, 1710.
Idem contra *Eoſdem*, February 2, 1711.
Straitoun contra Earl of *Lauderdale*, July 23, 1708.
Straitoun contra *Robertſon*, January 19, 1710.
Strichan (Creditors of) competing. See *Elphinſtoun*.
Stuart of *Torrence* contra *Stuart* of *Pardovan*, June 26, 1705.
Idem contra other Creditors of *George Dundas*, February 20, 1706.
Stuart contra *Baillie* and *Robertſon*, June 27, 1705.
Stuart of *Blackhall* contra Adjudgers of *Corſhill*, July 15, 1707.
Idem contra *Stuart* of *Carſewell*, July 28, 1709.
Stuart Supplicant, July 13, 1708.
Stuarts (Creditors of) contra *Stuarts*, July 16, 1709.
Stuart contra Children of *Cuming* of *Pittoully*, July 6, 1711,
Stuart contra *Meinzies*, February 21, 1712.
Stuart contra Earl of *Bute*, February 7, 1712.
Stuart contra *Hill*, January 24, 1712.
Stuart and *Weir* contra *Douglaſs* of *Cavers*, December 10, 1712.
Stuart and Others *contra* Captain *Collier*, February 13, 1713.
Stuart contra *Halyburton*, July 1, 1713.
Sutherland (Earl of) *contra* Earl of *Crawfurd*, January 23, 24, 25, 1706.
Suttie contra *Roſs* June 28, 1705.
Swynton (Sir *John*) contra Lady *Craigmiller*, June 28, 1706.
Swyntoun and Executors of *Bonnar* contra *Tom*, January 26, 1709.
Sym and *Scot* contra *Donaldſon*, November 27, 1708.
Sympſon contra *Hamilton*, July 1, 1707.
Sympſon and *White* contra *Rollo* of *Powhouſe*, January 26, 1710.

T.

TAylors of *Canongate* contra Taylors of *Edinburgh*, June 16, 1708.
Iidem contra *Eoſdem*, November 27, 1709.
Temple contra *Cuningham*, July 2, 1708.
Terſie contra *Burnet* and *Forbes*, February 22, 1711.
Thomſon and *Hay* contra Earl of *Linlithgow* and his Curators, July 16. 1708.
Tod contra *Cruikſhanks*, November 18, 1712.
Trotter (Doctor) contra *Telfer*, December 24, 1708.
Turnbul contra *Anderſon*, July 19, 1706.
Turnbul contra Creditors of *Elder*, November 25, 1709.

Turnbul contra *Kinnier*, February 22, 1712.
Turner contra *Roſs* of *Tilliſnaught*, July 5, 1707.
Tweeddale (M.) contra *Orrock* of that Ilk, February 13, 1708.

V.

VALLANGE of *Poſſils* contra *M'dowal* of *Freugh*, July 14, 1709.
Veach contra C. and E. of *Traquair*, November 17, 1708.
Vere Kennedy Supplicant contra *Stuart*, July 27, 1710.
Vint contra Lord and Lady *Hawley*, November 8, 1712.

W.

WADDEL contra *Douglaſs* of *Bads*, December 10, 1709.
Waddels contra *Wadderſtoun*, July 16, 1707.
Waddel contra *Waddel* and *Gilhagie*, November 21, 1707.
Wallace of *Ingliſtoun* and *Baillie* contra *Lauders* and their Husbands, February 20, 1707.
Wallace of *Ingliſtoun* contra Creditors of *Spot*, February 10, 1710.
Walwood's Creditors competing, June 15, 1705.
Walwood contra *Scougal* and *Semple* of *Fullwood*, July 3, 1711.
Wat contra *Forreſt*, January 15, 1706.
Watſon contra Repreſentatives of *Forreſter*, June 22, 1706.
Watſon of *Muirhouſe* contra *Smith*, February 9, 1709.
Idem contra *Mackenzie* of *Applecroſs*, January 19, 1711.
Watſon of *Saughtoun* contra *Brown*, June 7, 1710.
Idem contra *Eundem*, January 16, 1711.
Watſon contra Lord *Preſtounhall*, February 21, 1711.
Watſon and others contra *Arbuckle*, November 16, 1711.
Watſon and Executors of *Wilſon* contra *Gordon*, July 15, 1713.
Wauchop of *Nidderie*'s Tutors Supplicants, July 3, 1711.
Wauchop of *Cakemuir* contra *Hamilton* of *Fallahall*, December 1, 1711.
Wedderburn of *Blackneſs* contra Baillie *Man*, July 23, 1707.
Wedderburn contra Creditors of *Crawford*, December 31, 1709.
Weems and *White* contra *Murray*, July 24, 1706.
Weir Supplicant contra *Deuchar*, July 17, 1713.
White (Baillie) contra Tenants of *Birkhill*, February 15, 1710.
Idem contra *Eoſdem*, June 9, 1710.
Idem contra *Eoſdem*, July 4, 1710.
Idem contra *Reid*, January 10, 1712.
Idem contra *Eundem*, February 19, 1713.
White of *Bannochy* contra *Knox*, December 27, 1711.
Wightman contra Creditors of *Bonhard*, June 7, 1709.
Wigtoun (Juſtices of Peace of) contra *Martin* of *Mool*, November 9, 1710.
Wilkie's Children contra Creditors of *Wilkie*, June 10, 1709.
Williamſon contra *Thomſon*, July 16, 1708.
Wilſon contra Lord *Saline*, January 24, 1706.
Idem contra *Shorts*, January 4, 1712.
Wilſon of *Sands* contra *Mackenzie*, June 27, 1711.
Idem contra *Eundem*, July 15, 1712.

Wintoun's (Earl of) Caſe, February 9, 1711.
Idem contra *Hay* of *Drummelzier*, June 28, 1712.
Wood Supplicant contra *Fullertoun*, November 28, 1710.
Woodcroft and his Factor contra E. *Strathnaver*, January 15, 1712.
Wright and *Kinloch* contra *Lindſay*, January 2, 1708.
Iidem contra *Wright*, June 24, 1712.

Y.

YOUNG of *Roſebank* contra *Bothwels* of *Glencorſe*, December 11, 1705.
Young and *Man* Supplicants, January 16, 1706.
Young contra *Craicks*, February 15, 1706.
Young contra *Young*, July 10, 1706.
Young contra *Nisbet* of *Dean*, December 13, 1710.

Z.

ZEAMAN contra *Grieves*, July 18, 1707.

Advertiſement.

THE Reader of the *Dedication* and *Preface* of Mr. *Forbes*'s *Journal of the Seſſion*, is deſired to correct with his Pen the following material Eſcapes of the Preſs, and to bear with any literal Errors.

Dedication, Page 2. Line 4. *read* Proceedings.

Preface, Page 3. Line 13. *for* the the, *read* the; Line 14. *for* Jeraous, *read* Jealous; L. 27. *f.* the in, *r.* in the. P. 4. L. 33. *f.* out, *r.* out of. P. 6. L. 1. *f.* Sons, *r.* eldeſt Sons. P. 11. L. 18. *f.* take, *r.* takes. P. 16. L. 7. *f.* 1537, *r.* 1637. P. 18. L. 2. *dele* of. P. 22. L. 32. *r. terras reliquit.* P. 26. L. 40. *f.* 1695, *r.* 1595. P. 34. L. 31. *f.* ſerveat, *r.* ſerve at. P. 35. L. 18. *f.* afte, *r.* after. P. 42. L. 7. *f.* 1678. *r.* 1688; L. 19. *f.* Nephew, *r.* Couſin; L. 13. *f. June* 677, *r. June* 1677. P. 46. L. 42. *f.* may, *r.* many. P. 50. L. 17. *r. Minto* Baronet. p. 93. l. ult. for Coddingtoun r. Eddingtoun.

INDEX

OF THE

General Titles of *ACTS* of *SEDERUNT* contained in this JOURNAL:

February 14, 1706, *Anent the Signet.*

June 21, 1707, *Concerning the Manner of laying on Arreſtments, and intimating Aſſignations to the Commiſſioners of the Equivalent.*

February 11, 1708, *Declaring* Staff *and* Baſton *the only Symbols to be uſed in Reſignations of Lands in the Superior's Hands.*

November 11, 1708, *Regulating the Side Bar, and concerning extracting and giving Stops by the Ordinary.*

December 25, 1708, *Anent the Lords due Attendance.*

Eodem Die, *Anent Factors upon, and Tackſmen of ſequeſtred Eſtates.*

January 1, 1709, *Anent Proteſtations, Suſpenſions and Advocations,* &c.

July 1, 1709, *Ordaining the principal Clerks of Seſſion to put out Boxes for receiving Bills, Anſwers, and Informations.*

July 8, 1709, *Anent ſubſcribing Interlocutors in the Outer-houſe, and Bills reclaiming againſt them.*

July 9, 1709, *Prohibiting Advocates to uſe undecent and diſreſpectful Expreſſions.*

Eodem Die, *Anent Bills againſt Interlocutors in Preſence.*

December 27, 1709. *Anent Cautioners in Suſpenſions, and atteſting of Cautioners.*

Eodem Die, *Anent the Outer-houſe Rolls.*

June 20, 1710, *Againſt Profaneneſs.*

November 23, 1710, *Anent Factors on Bankrupt Eſtates.*

December 19, 1710, *Anent ſubſcribing Informations, Petitions, and Anſwers.*

June 5, 1711, *Anent the Order of the Service of the Lords upon the Bills in the Outer-houſe, for preparing concluded Cauſes, and on the Oaths and Witneſſes.*

November 20, 1711, *For the more ready and eaſie Adminiſtration of Juſtice before the Lords of Council and Seſſion.*

November 22, 1711, *For the more ſpeedy diſcuſſing of Compts and Reckonings.*

November 23, 1711, *Anent Bankrupts, the Ranking of their Creditors, and Sale of their Eſtates.*

February 4, 1713, *Directing the Manner of ſigneting Summonſes and other Writs paſſing the Signet.*

Index Materiarum,

OR,

An Alphabetical Abridgement of the Lords Deciſions, and Acts of *Sederunt*, from the Firſt Day of *June*, 1705, to the laſt of *July*, 1713.

A.

Accompts. *See* Preſcription.

AN unſubſcribed Scroll of an Accompt of Charge and Diſcharge, wherein a Sum due by Bond was exactly ſtated paid, and Credit given to the Debtor for it; ſuſtained probative of the Payment againſt the Repreſentatives of the Creditor; the Debtor proving always, That the Accompt is the Creditor's holograph Writ, and was found lying by him at his Death, *February* 19, 1708, *Miller* againſt the Repreſentatives of *Bonnar*.

An Aſſigny having obliged himſelf by his Back-bond, to imploy what ſhould be recovered in Satisfaction of the Expences in proſecuting the Affair *primo Loco*, and then for Payment of the Cedent's Creditors as therein ranked, and obliged himſelf to denude in Favours of any Perſon named by the major Part of theſe Creditors; and having obtained a Decreet in the Cedent's Name, againſt the Debtor in the Subject aſſigned, who raiſed Suſpenſion and Reduction, during the Dependence whereof, both Cedent and Aſſigny died: The Heir and Executor of the Creditor preferred in the ſecond Place by the Aſſigny's Back-bond, was found to have a good Title to inſiſt and carry on the Proceſs; upon finding Caution to pay what ſhould appear to be due to the Aſſigny's Repreſentatives, *December* 9, 1707, Lord and Lady *Pitmedden* contra *Gordon* of *Gordonſtoun*.

Accreſcendi Jus. See *Jus accreſcendi.*

Acts. *See* Reduction.

Adjudications. *See* Heirs.

ACcumulating of Sums in an Adjudication, at a Term preceeding the Date on't, not ſuſtained as a Nullity or Ground of Reſtriction, where Annualrents were only decerned from the Date, *June* 21, 1705, Lady *Innerleith* againſt the Lairds of *Cockburn* and *Lamertoun*, or where the Decreet mentioned not from what Time the accumulated Sum ſhould bear Annualrent, *March* 25, 1707, *Innes* againſt the Earl of *Broadalbine*.

An heretable Bond found adjudgeable, as well as arreſtable, before the Term of Payment, *June* 26, 1705, *Stuart* contra *Stuart*.

An Adjudger preferred to an Arreſter, the Citation in the Adjudication being prior to the Arreſtment, and the Decreet of Adjudication prior to the Decreet of Furthcoming, *Ibidem*.

Adjudgers of an heretable Bond not cloth'd with Infeftment, brought in *pari Paſſu*, *Ibidem*.

One of three Cautioners having failed, and another having paid the Debt upon a Diſcharge and Aſſignation, and for two thirds thereof adjudg'd the other ſolvent Cautioner's Eſtate: The Adjudication was reſtricted to the half, and Accumulations taken off; and the

the Adjudger ordained to aſſign his Right upon Payment, *July* 26, 1708, *Lillie* contra *Crawfurd*.

Adjudication for many Years bygone Annuities of an Infeftment of Annualrent effeiring to a certain Sum granted to two Perſons, found only to ſubſiſt as a Security for the Sums truly due, without the Benefit of an expired Legal: In Reſpect it was led for the whole bygone Annualrents, and the Adjudger had Right but to the Half by Conveyance from one of the Annualrenters, *November* 26, 1712, Colonel *Erſkine* againſt Sir *George Hamilton*.

The Hetetor of an Eſtate tailzied to Heirs-male, having granted a Bond to his Creditor, who, upon a Decreet *Cognitionis Cauſa*, againſt the immediate apparent Heir-male, renouncing to be Heir, led an Adjudication of the Eſtate; and the Factor of the ſaid apparent Heir having purchaſed and retired the Adjudication by the Rents of the *Hæreditas jacens*, and taken a Diſpoſition thereof blank in the Aſſigny's Name; and the next apparent Heir having, after the former's Death, allowed to his ſaid Factor in his Accompts what was paid for the Adjudication, and filled up his own Name in the Blank, and died without entring Heir to the Granter of the Bond on which the Adjudication was led: A remoter Heir-male ſerved in ſpecial to the Granter in the Eſtate adjudged, was found to have good Intereſt to extinguiſh the Adjudication by Payment, notwithſtanding that the laſt apparent Heir-male, who had been more as three Years in Poſſeſſion of the Eſtate, had made a Bond or Diſpoſition of Tailzie thereof in Favours of his Heir of Line *nominatim*; and the Factor's purchaſing and retiring the Adjudication in Manner aforeſaid, and the laſt apparent Heir's allowing what he paid for it to exoner him of his Intromiſſions, was found relevant to extinguiſh the Adjudication by Payment, 13 *February*, 1713, Earl of *Dalhouſie* againſt the Lord and Lady *Hawley*.

Adjudication upon the Bond of an apparent Heir, not ſtopped at the Inſtance of a Creditor of the Defunct, offering inſtantly to debate and exclude the apparent Heir's Intereſt in the Eſtate; but allowed to go out, reſerving the Intereſt of the Predeceſſor's Creditor *contra Executionem*, *March* 19, 1707, *Buchanan* of *Sandſide* againſt the Marqueſs of *Montroſe*.

Adjudication proceeding upon Decreets of Conſtitution againſt an apparent Heir, as lawfully charged to enter to his Predeceſſor; for Payment of principal Sums, Annualrents and Penalties contained in his Predeceſſor's heretable Bonds, without uſing previous Requiſition in the Terms of theſe Bonds; reſtricted to a Security for Principal and Annualrents: Albeit Requiſition was made after the Decreet of Conſtitution, and the Days thereof expired before executing of the Summons of Adjudication, which narrated the Requiſition, *July* 3, 1707, *Duncan* contra *Scrimzeour* of *Kirktoun*. Nor was the ſaid Adjudication ſuſtained as a Security for a fifth Part more, or the termly Failzies, *July* 19, 1707, *inter eoſdem*.

Adjudication upon the Act of Parliament 1672, whereof the Libel narrated only the Ground of the Debt due to the Purſuer, and required, in Reſpect of not Payment, the Debtor's whole Lands to be adjudged in the Terms of the Statute, without craving the Debtor to produce a clear Progreſs to land correſponding to the Debt, and a fifth Part more, which is an Alternative in the Statute; not found null *ex eo Capite*, but reſtricted as a Security only for principal Sum and Annualrents, *November* 17, 1708, *Veach* againſt the Counteſs and Earl of *Traquair*.

Adjudication pronounced by an inferior Judge upon the Renunciation of an apparent Heir, and a Decreet *Cognitionis Cauſa*, ſuſtained, 4 *January*, 1709, *Ker* contra *Primroſe*.

Accumulating Annualrents in a Decreet of Adjudication at a Term preceeding the Date thereof, without mentioning when Annualrent of the accumulate Sum ſhould commence, found not to be a Nullity or Ground of Reſtriction: In Reſpect Annualrent runs in ſuch a Caſe only from the Date of the Decreet, *June* 10, 1709, Children of old *Wilkie* againſt the Creditors of young *Wilkie*.

A Summons of Conſtitution in Order to adjudge and come *in pari Paſſu* with a former Adjudger, being called in the Outer-houſe, and no Compearance marked for the Defender: He compearing at the calling by Courſe of the Regulation Roll, was not allowed to ſee the Proceſs in common Form, but only in the Clerk's Hands, 18 *November*, 1709, *Grant* contra *Strachan* of *Thorntoun*, and 8 *December*, 1709, *Hamilton* and *Brown* contra *Turnbull*.

An Adjudication before the Lords, not brought in *pari Paſſu* with other Adjudications: In Reſpect it was not within Year and Day of the firſt effectual Adjudication upon a *Cognitionis Cauſa* againſt the apparent Heir renouncing, obtained before the Sheriffs; albeit it was within Year and Day of the firſt Adjudication before the Lords. And ſuch Adjudications before the Sheriffs not having been in Uſe formerly to be allowed, require no

Abbre-

Abbreviat to be ſign'd by a Lord, but only by the Judge Pronouncer, 23 *December*, 1709, Creditors of *Marſhall* contra *Hamilton* of *Pancaitland*.

An expired Adjudication upon a Decreet *Cognitionis Cauſa* againſt one as charged to enter Heir and Renouncing, reſtricted to a Security for the principal Sum and Annualrents. Becauſe the Execution of the Letters of General Charge did only bear, *That the Meſſenger paſt at the Command of the within written Letters of General Charge to enter Heir, at the Inſtance of the within deſigned, and in Name and Authority within expreſt, ſummoned, warned and charged them to compear before the Lords, and delivered an Authentick Copy of the ſaid within Letters of General Charge to them perſonally apprehended,* &c. *And this he did after the Form and Tenor of the within Letters, and according thereto in all Points.* Albeit the Apparent Heir compearing in the Decreet *Cognitionis Cauſa* did not quarrel the Execution, but tacitly ſeem'd to paſs from all Objection, by producing a Renunciation, 21 *June* 1710, *Strachan* contra Magiſtrates of *Aberdeen*.

Adjudication proceeding upon an Aſſignation to a Bond of 200 Pound *Scots*, reſtricted to 100 Pound with Annualrent from the Date of the Decreet, and brought in *pari Paſſu* with another Adjudication without Year and Day thereof. In Reſpect the Aſſignation was ſubſcribed only by Two Notaries and Three Witneſſes for the Cedent who could not write, contrary to the Act 80 of the Parliament 1579, that requires Four Witneſſes in ſuch a Caſe, 20 *July* 1710 *Sclanders* contra *Hill*.

A Charter of Adjudication of the Teinds of certain Lands, with Infeftment thereon, not a ſufficient Title to oblige the Heretor of the Lands to make Payment of the Teinds, without producing the Adjudication it ſelf, and inſtructing a Right to them in the Perſon of him they were Adjudg'd from: Albeit no other Right appeared to compete, 29 *November* 1710 *Mitchel* contra *Baillie* and *Shearer*.

One having diſponed his Lands and got a Backbond at the ſame Time, obliging the Receiver of the Diſpoſition to denude in his Favours, when paid of certain Sums: An Adjudication of theſe Lands from the Diſponer with all Right, Title, Intereſt, Reverſion, *&c.* that he had or could pretend thereto, was found to convey the Right of the Backbond, and all other Right the Debtor had of the Subject Adjudged, and preferred to a poſterior ſpecial Adjudication of the Backbond, 21 *December* 1710, Sir *William Menzies* contra *Brown* of *Dauphintoun*.

Partial Payment of the Penalty in a Bond made to a Liferenter of the principal Sum, not ſuſtained as a Nullity or Ground to reſtrict an Adjudication for the ſaid principal Sum and whole Penalty, at the Fiar's Inſtance, 20 *July* 1711, Creditors of *Roſs* of *Lethinty* againſt *Gellie* and *Hall*.

Adjudication of all Lands belonging to a Debtor within a certain Burgh where he lived, ſuſtain'd to prefer the Adjudger to another who without Year and Day Adjudged theſe Tenements more ſpecially by their Bounding and Extent, 11 *July* 1709, *Nairn* of *Drumkilbo* againſt *M'lelland*.

Adjudication allowed to a Creditor *in Diem*, againſt his Debtor who was *vergens ad Inopiam*, before the Term of Payment: Unleſs within a certain Time the Debtor find ſufficient Caution, 12 *July* 1711, *Blaw* againſt *Blaw*.

The filling up of a greater Sum in the recorded Allowance of an Adjudication, than the Sum truly due contained in the Decreet it ſelf, ſuſtained as a Ground to take off the Expiration of the Legal of that Adjudication, but not to bring in another Adjudication without Year and Day thereof *pari Paſſu* with it, 22 *February* 1712, *Nairn* of *Drumkilbo* againſt *M'lelland*.

When a Bankrupt's Eſtate is ſequeſtred, and a Factor put upon it; all Creditors are allowed to give in their Inſtructions of Debt to the Clerk of the Proceſs, at any Time within 40 Days after the Sequeſtration: With this Declaration to be taken in in the Proceſs, and ſigned by the Creditor, that he gives in his Bonds or other Documents of Debt, (mentioning their Dates and the Sums reſting) to the End the Factor may raiſe and obtain Adjudication thereon to his Behoof. The Factor, being certiorated of this Ingiving and Declaration, ſhould raiſe and execute Summons and obtain Decreet of Adjudication in his own Name to the Behoof foreſaid; libelling always upon the foreſaid Declaration: Which Adjudication ſhall be carried on by the Factor at the Expence of the Eſtate, to be allowed him at Compting, and at the Event of the Ranking and Sale, to be proportioned among the Creditors for whoſe Behoof the Adjudication is led, according to their ſeveral Shares and Intereſts in the Price; and failing thereof to be repeted from them by the preferable Creditors to whom the Rents intrometted with by the Factor ſhall be found to belong. The Factor ſhall alſo at the Deſire of Creditors who failed to give in their Inſtructions of Debt within the 40 Days, or at leaſt before raiſing of the

Summons for Adjudging as ſaid is, Adjudge a ſecond Time in his own Name for their Behoof in Manner above-mentioned, but upon the Creditor's own Expences. And all Creditors may Adjudge from Time to Time in their own Names or in the Factor's Name, as they think fit, till the Ranking be concluded. Theſe Creditors for whom Adjudication is ſo led in the Factor's Name ſhall have the ſame Benefit thereof as if they had Adjudged by themſelves upon their reſpective Grounds of Debt, or were retroceſſed by the Factor; And every Creditor may for his own Security extract that Particle of the Decreet concerning his own Debt, upon Payment of the ordinary Dues, without Neceſſity to extract the whole, 23 *November* 1711, Act of *Sederunt* § 2.

Admirality. *See* Decreets.

ONE preferred as higheſt Offerer for Wines adjudged as Prize and rouped by Order of the Admiral, having ſigned the Articles and Conditions of Sale, whereof this was one, That the Perſon preferred ſhould give Bond and ſufficient Caution to pay the Price offered to the Clerk of Admirality within a preciſe Time, under a Penalty: The Admiral was ſuſtained competent to judge in a Proceſs at the Inſtance of his Procurator-Fiſcal againſt the Purchaſer, for Payment of the Penalty incurred through his not performing the Articles of Roup, 26 *June* 1705, *Higgins* contra *Brand*.

A Purſuit intented before the Admiral at the Inſtance of the Conſervator againſt a Factor abroad, for Mony expended in Negotiating his Affairs in *Holland*, Advocated *in Jure*, as not being Maritime, 28 *June* 1705, *Kennedy* contra *Gordon*.

The Admiral incompetent to judge in an Action for Exhibition of Bonds granted to a Factor in *Scotland*, for the Price of Goods ſent to him from abroad to be ſold here; as not being a Maritime or Sea-faring Cauſe, 28 *March* 1707, *Graham* contra *Piper*.

Adultery. See *Condictio ob turpem Cauſam*.

AN Aſſignation by an Adultereſs to her Adulterous Son, not found null *ex eo Capite*, at the Inſtance of the Cedent's Executor *qua* neareſt of Kin, 7 *March* 1707, Doctor *Irving* contra *Skeen* of *Hallyards*.

Advocations. *See* Proteſtations.

THE Proceeding to obtain a Decreet before an inferiour Court, after Subſcribing of a Signature by the Clerk upon the Margin of an Advocation, bearing the ſame to have been produced and admitted, found to infer Contempt of the Lords Authority: Without obliging the Raiſer of the Advocation to prove otherways than by the ſaid ſubſcribed Signature, that the Proceſs Advocated was commenced, and depending before the inferiour Court, 26 *June* 1706, *Mullikens* Supplicants againſt *Sharp* of *Hoddam* and *Coupland*.

If the Party againſt whom Advocation is raiſed, do at diſcuſſing, conſent, the principal Cauſe ſhall be diſcuſs'd ſummarly without an Act, 20 *November* 1711, *Act of Sederunt* § 4.

Advocates. *See* Writs.

ADvocates uſing undecent or diſreſpectful Expreſſions towards the Judges or Parties in Papers drawn by them to be put in the Boxes, are to be debarred from the Exerciſe of their Office during the Time of the Seſſion after the Offence, or further puniſhed according to the Degree thereof, *Act of Sederunt* 9 *July* 1709.

If at the firſt Calling of a Cauſe, the Purſuer's Advocate be not ready, the Ordinary ſhall delete it, to be inrolled in the ordinary Form; or, at the Deſire of the Defender compearing, grant Proteſtation for not Inſiſting, not to be recalled but upon preſent Payment of Ten Shillings *Sterling* or more as his Lordſhip ſhall modifie, to be given to the other Party. If the Defender's Advocate be not ready, an Act or Decreet or other Interlocutor ſhall paſs as the Purſuer craves, and the Ordinary ſees juſt; not to be ſtopped or recalled but upon Payment as aforeſaid. If the Purſuer be not ready at the Calling of any Cauſe in the Inner-houſe, the Lords ſhall, as the Defender deſires and they ſee juſt, either ſcore out the ſame to be inrolled *de novo* in common Form, or proceed to the Cauſe as accords: Againſt the Determination in which Proceeding, the Purſuer ſhall not be afterwards heard, without paying Twenty Shillings *Sterling* to the other Party. If the Defender be not ready, an Act or Decreet or other Interlocutor ſhall be pronounced as above, and not be recalled, but upon inſtant Payment of the like Sum of Twenty Shillings to the adverſe Party. Twenty four Hours before any Cauſe is called, either Party ſhall have lodged in the Clerk's Hands all Writs they are Maſters of, not formerly given out to the oppoſite Party or produced in Proceſs, and the particular Clauſe or Clauſes thereof whereupon they intend to found, marked; And alſo all Writs whereof the Ingivers of Bills or Anſwers to the whole Lords, or of Repreſentations and Anſwers to an Ordinary, are Maſters, and found any Alledgeance on, ſhall be produced with the ſaid Bills Repreſentations and Anſwers, and the particular Clauſes founded on marked as above: Otherways the Alledgeance ſhall not be received, without paying in the Caſe of a concluded Cauſe the Sum mentioned in the 19 Article of the Regulations 1695, and in all other Caſes Fifteen Shillings *Sterling*. And further the Paſſages in all Writs to be founded on not marked, ſhall not be regarded except upon inſtant Payment of a Mulct, to be modified by the Lords and given to the oppoſite Party, *Act of Sederunt* 20 *November* 1711, § 5, 6.

An Advocate compearing without a Mandate for the Defender in a Cauſe who is out of the Kingdom, allowed to ſee the Proceſs in common Form, 10 *July* 1712, *Hamilton* of *Wiſhaw* contra *Boid*.

African-Company. *See* Arreſtments, Competition.

A Particular Share of the capital Stock of the *African* Mony due out of the Equivalent found moveable and legally affected and carried by Confirmation of the Proprietar's Executor Creditor, 25 *July* 1710, *Murray* againſt Sir *Robert Blackwood*.

Ale and Beer. *See* Edinburgh.

IMpoſt of Two Penies upon the Pint of Ale and Beer imported within the Town of *Edinburgh* and it's Privileges, not liable to the Three Months Preſcription introduc'd by the 12 Act of the Parliament 1669, and the *Engliſh* Statute 1 *W.* and *M. Cap.* 24 and 26. Becauſe theſe Laws concern only Purſuits for Fines and Penalties incurred by concealing and imbezilling the Queen's Exciſe; And the Town of *Edinburgh*'s Impoſt is a civil Debt, 19 *December* 1708, *Tackſmen of the Town of* Edinburgh's *Impoſt on Ale* contra *Straitoun*.

A Charter under the great Seal in Favours of a Burgh ratified in Parliament, a ſufficient Title to exact a petty Cuſtom or Cawſey-mail upon Loads and Burdens of Ale and Beer imported from any Place without the Town's Privilege, and to transfer the Duty upon Loads to Sledges, which were not uſed at the Date of the Charter, but now much us'd for bringing in Ale to the Town. And the Town's Exacting a leſs Duty for 40 Years not relevant to reſtrict their Title to that leſſer Duty by Preſcription, 18 *July* 1711, *Magiſtrates of* Edinburgh *againſt the Country Brewers*.

And the Town allowed to impoſe a greater Duty upon the Sledge than was formerly payable for the Load, proportionably to the greater Quantity of Ale or Beer imported by the Sledge, than the Load; but not exceeding a Duty payable for the Cart-load of Ale or Beer eſtabliſhed by Preſcription, 15 *July* 1712 *inter eoſdem*.

Engliſh Ale and Beer liable ſince the Union to a Duty of a Peny *Sterling* impoſed before upon all foreign Ale and Beer imported to *Edinburgh*, 27 *December* 1711, Reid *and* Ker *againſt the Town of* Edinburgh *and the Tackſmen of their Impoſt upon foreign Liquors*.

Aliments.

SUmmons of Aliment ſhould have two Diets when it requires a Term to prove, *July* 13, 1705, *Oliphant* contra *Oliphant*, 21 *February*, 1712, *Stuart* contra *Menzies*.

A Woman liable for an Aliment to her Step-ſon ſerved Heir *cum Beneficio Inventarii*, whoſe Eſtate was overburden'd with his Step-mother's Liferent, the Proviſion of her Children, and other perſonal Debts; albeit he was quarrelling her Liferent in a Reduction, was major, and an Advocate: In Reſpect his Imployment did not afford him Subſiſtence, *July* 25, 1705, *Aitoun* of that Ilk againſt *Colvil*.

Annualrent of a Child's Portion compenſated with her Aliment, the Time that ſhe liv'd in her Father's Family, *January* 16, 1706, *Aitkin* of *Middlegrange* contra *Guidlets* of *Abbotſhaugh*.

A Perſon found liable to his eldeſt Son's Relict, for the Expence of her lying in Childbed of a poſthumous Child; and for the Maintenance of her Children ſince her Huſband's Death: But not for any Modification of Aliment to them in Time coming; in Reſpect he offered to take them home to his own Family, *February* 15, 1706, *Fincham* againſt the Laird of *Breadiſholm*.

Aliment being given to a Wife by a Decreet Arbitral, with the Burden of educating her Daughter, and with a Quality, that if the Daughter did not live with her Mother, through any other Cauſe than that of the Mother's refuſing to entertain her, the Mother ſhould be free of all Charge of her Entertainment, without any Defalcation of the Aliment: The Lords refuſed to modifie and reſtrict the Mother's Aliment, upon her becoming free of the Burden of her Daughter's Education, through her being diſpoſed of in Marriage, *March* 18, 1707, Dutcheſs of *Gordon* againſt the Duke her Huſband.

A Perſon who took his Siſter's Son from his Mother, when the Father was abroad on a Voyage, and intertained him at his Houſe ſeveral Years without any previous Paction; found to have Right to claim Payment for his Aliment from the Father, who at his Return did not require the Alimenter to ſend home his Son, *November* 18, 1707, *Chiſholm* contra *Stiedman*.

Aliment due to a Relict from her Huſband's Death to the ſubſequent Term, when her liferent Proviſion commenced: Albeit ſhe had a ſeparate Bond from her Huſband for a great Sum payable to her by his Heirs, 25 *January*, 1709, Lord Juſtice Clerk and his Lady againſt *Hamilton* of *Bangour*.

Aliment refuſed to an indigent fatherleſs Infant out of the Eſtate of her Uncle, to whom ſhe was preſumptive Heir of Line; albeit he was paſt 60 Years of Age unmarried, and under the Care of a Tutor dative, as a Perſon fatuous and *incompos Mentis*, and ſo upon the Matter a Liferenter only, through his Incapacity to exerce any Act of Property: In Reſpect there is no Law nor Precedent for modifying Aliment in ſuch a Caſe, 15 *June*, 1709, *Bonnar* contra *Bonnar* and *Maxwell*.

Aliment refuſed to a Wife *veſtita Viro*, out of a Jointure provided to her by a former Huſband, in ſo far as prejudicial to her preſent Huſband's Creditors, 25 *November*, 1709, *Turnbul* againſt the Creditors of *Elder*.

A yearly Annuity being provided to a Wife by Conſent of her Husband, with this Quality, That it ſhould be only applicable for her Aliment, and that ſhe ſhould be capable to uplift and diſcharge without his Conſent; and after his Deceaſe ſhe having married another Husband, from whom ſhe diverted becauſe of Maltreatment: The Lords found that the Annuity being alimentary, did exclude that Huſband's Diſpoſal thereof by his *Jus Mariti*, and could not be withdrawn by him or his Creditors, but behov'd to be imployed for alimenting her and him, and their Family; and that the Terms Annuity due before their Marriage, ſhould be imployed to ſatiſfy the Wife's alimentary Debts anterior to the Marriage; and the bygone Term's Annuity ſince the Marriage, for paying alimentary Debts of the Family ſince the Marriage. And found that, in Time coming, the Annuity muſt be applied for Maintenance of the Family; the Huſband always having the Adminiſtration, and Application thereof, upon finding Caution to apply the ſame accordingly; and particularly to pay his Wife out of the firſt End of the ſaid Annuity yearly a certain Sum for her Clothing; providing the Debts contracted for making the liferent Annuity effectual, be paid in the firſt Place off the whole Head of the precedent Annuities, 1 *December*, 1709, *Dick* Lady *Penkill* contra *Dunbar* her Huſbaud and his Creditors.

A Perſon liable by Way of Damage to aliment his Son's Wife ſeparately from her Huſband who had deſerted her through the Inſtigation of his Father's Letter, threatning to diſown him if he own'd her, 8 *February*, 1710, *Fea* contra *Trail* her Father in Law. And the Huſband obliged to aliment her according to his Fortune in *Scotland*, albeit he offered to aliment her in *Ireland* where he dwelt: In Reſpect he would not let her know in what particular Place of *Ireland* he reſided, and furniſh her Mony to defray the Expence of her Journey to come to him, 9 *July*. 1712, *Eadem* againſt *Trail* her Huſband.

A Perſon being reduc'd to extreme Want and Miſery by providing his eldeſt Son to the Groſs of his Eſtate, and thereafter diſponing the Remainder to his ſecond Son, to get good Matches to them; an Aliment was modified to be paid to the Father by theſe Children *pro rata* off what they got from him, 20 *July*, 1710, *Brown* of *Thornidikes* againſt his eldeſt and ſecond Sons.

Proceſs of Aliment at the Inſtance of a Woman againſt one as held and reputed her Huſband, who denied her to be his Wife, ſtopp'd before the Lords, till the Parties Marriage were tried and proved before the Commiſſaries of *Edinburgh*, *January* 25, 1711, *Cameron* contra *Innes*.

An alimentary Proviſion belonging to a Wife, having, after her Separation from her Huſband, been divided equally of Conſent betwixt them by the Lords, the half payable to the Huſband was found not alimentary in his Perſon during the Separation, 21 *December*, 1711, *Hutchiſon* contra *Couts*.

Aliment not due by a Liferenter to her Huſband's apparent Heir-male poſſeſſing the Eſtate, not as Heir to him, but as a Creditor by ſingular Titles, 16 *January*, 1712, *Lyon* of *Brigtoun* againſt Lady *Carſe*.

A Relict provided to a liferent Annuity of Victual to be uplifted out of her Huſband's Lands betwixt *Yule* and *Candlemas*, beginning the firſt Term's Payment betwixt the *Yule* and *Candlemas* after his Deceaſe, allowed a Sum for her Aliment from her Huſband's Death, till the Commencement of her Jointure, 20 *June*, 1712, *Moncrieff* and her Huſband againſt *Monipenny*.

The Extent of a Relict's Jointure, not to be the Rule of alimenting the Defunct's Family till the Term after his Death, but the Quality of the Perſon and Condition of the Family left by him, 15 *July*, 1713, Creditors of *Scot* of *Harden* againſt his Lady, which Aliment affects not the dead's Part only, but comes off the whole Head of the Executry, 20 *June*, 1713, *Moncrieff* and her Huſband againſt *Monipenny*.

Ann.

ANN due to the neareſt of Kin of a ſtipendiary Miniſter of a Burgh Royal, whoſe Stipend was not payable out of the Tithes, but by Contribution of the Burgh, conform to an Act of the Town-Council, 8 *February*, 1709, *Shields* againſt the Magiſtrates of St. *Andrews*.

Annualrent. *See* Sale.

ANnualrent due for Inland Bills, *June* 8, 1705, *Blair* contra *Oliphant*.

A Stranger Executor purſued by the neareſt of Kin of the Defunct who were minors, for their Share of the Inventory given up by the Defunct himſelf, found liable to them from the Date of the Confirmation for Annualrent of Sums therein ſet down, as bearing Annulrent; but not for Annualrent of other Sums, which were not expreſs'd to bear Annualrent, *June* 26, 1705, *Robertſon* againſt Commiſſary *Baillie*.

A Lady having got a Bond of 40000 Merks bearing Annualrent from a Perſon, to take Effect in the Event of his Succeſſion to her Huſband's Eſtate; and having after her Huſband's Deceaſe tranſacted the 40000 Merks with the Granter for a Bond of 30000 Merks when he was ſettled in the Eſtate, of which ſhe uplifted a Part, and the Huſband's Executor having been afterwards preferred to hers in a Proceſs for Payment againſt the Debtor, as to what was reſting, and got Action reſerved for what had been uplifted by her: The ſaid Executor of the Huſband was found not to have Right to claim from the Lady's Executor, Annualrent for the Sum uplifted from the Date of the foreſaid Decreet of Preference, *July* 10, 1707, Lady *Harden* and her Huſband againſt the Laird of *Preſtongrange*.

The Granter of a Bond for the Price of a Liferent affecting Lands purchaſed by him, found liable for Annualrent thereof from his Entry to the Poſſeſſion of the Lands: Albeit the Bond bore the principal Sum to be payable only at the firſt Term of *Whitſunday* or *Martinmas* after the Purchaſer's Right ſhould be ratified by ſome Perſons having Intereſt to quarrel the Sale, with Annualrent after the ſaid Term, and made no Mention of Annualrent before, *July* 23, 1707, Baillie of *Parbroth* contra *Walker* of *Harlawſhiels*. But it was ſuſtained relevant to aſſoilzie the Debtor in the Bond from Annualrents preceeding the Term of Payment, that at the Granting thereof it was *actum & tractatum*, that Annualrent ſhould only be due after the ſaid Term, to be proved by the Oaths of the Writer and inſtrumentary Witneſſes, *Ibidem*.

One having aſſigned his Creditor to a greater Sum owing to himſelf by Bond bearing Annualrent, upon the Creditor's obliging himſelf by Back-bond to retroceſs the Cedent upon his paying the Debt, in Security whereof the Aſſignation was granted; or to order the Debtor in the Sum aſſigned to pay him the *Superplus*, in Caſe the Aſſigny got Payment by the Aſſignation; the Aſſigny, who uplifted the whole Sum aſſigned, was found liable to the Cedent for the Ballance, and Annualrent thereof from the Time of his uplifting the Mony, 22 *December*, 1710, *Irving* of *Drum* contra *Gordon*.

A Legacy payable to one in caſe he ſhould demand it within ſo many Years after the Teſta-

tor's Death, and, upon his failing to require it in due Time, payable to another with Annualrent during the not Payment, having accrewed to the Subſtitute, through the Inſtitute's Neglect to call for it within the limited Time: He was found to have Right to Annualrent for the ſame from the Teſtator's Death, 12 *July*, 1711, *Neilſons* contra *Culter* and *Wilſon*.

Aunus deliberandi. *See* Inventorii Beneficium.

Appeals. *See* Proteſts for Remied of Law.

Appriſings.

THE Heir of an Appriſer infeſt with Conſent of the Repreſentative of one to whom the Appriſer had diſponed his Right within the Legal, having *de novo* conveyed the Appriſing to another in Reſpect no Reſignation had followed upon the firſt Diſpoſition: The laſt Diſpoſition was ſuſtained and found to ſubſiſt; notwithſtanding of an anterior written Declaration by the Receiver of the firſt Diſpoſition, acknowledging the ſame to have been granted to him only in Truſt for the Behoof of Perſons who had the Right of Reverſion; and alſo notwithſtanding of his anterior Diſpoſition to them, in the Warrandice whereof the Declaration is excepted, to the which Diſpoſition the laſt Diſpoſition was preferred: In Reſpect the former Diſpoſition and Declaration were latent, and no publick Infeſtment taken thereon before completing the laſt Diſpoſition by Infeſtment, 21 *July*, 1710, Colonel *Erskin* againſt Sir *George Hamilton*.

Execution not bearing that a Copy was affixed upon the Market Croſs, albeit a Copy was left there, ſuſtained as a Ground to keep the Legal of an Appriſing from expiring, and to reſtrict it as a Security only for the principal Sum and Annualrents owing to the Appriſer, 20 *February*, 1711, *Baillie* contra *Cuningham*.

Arbitration. *See* Oath.

A Decreet Arbitral written in the Blank on the Back of a Submiſſion, found to be no Warrant for ſummary Diligence: In Reſpect the Blank was not ſubſcribed by the Parties, and the Submiſſion bore not a Conſent to Regiſtration of the Decreet Arbitral to follow thereupon; but only the Arbiters did in their Decreet, conſent to the Regiſtration thereof. But the Lords ſeem'd to be of Opinion, That the Want of the Parties Subſcription to the Blank the Decreet was filled up in, was not a Nullity in the Decreet, *March* 12, 1707, *Knox* contra *Hume* of *Kaims*.

A Submiſſion bearing to be ſubſcribed with the Blank on the Back thereof by the Parties and Arbiters in Token of their Acceptance; found to import, That the Blank on the Back of the Submiſſion was ſubſcribed by the Arbiters at ſubſcribing the Submiſſion, and not after filling up the Decreet Arbitral thereon: which was ſuſtained as a ſufficient Reaſon to reduce the Decreet, *January* 1 1706, *Row* contra *Row*

A Decreet Arbitral unwarrantable, for being ſign'd by the choſen *Præſes* of the Arbiters, and not by a Plurality, 8 *July* 1708, *Paton* contra *Leith* of *Belchirie*.

Contending Parties having ſubmitted all their Differences, and one *per Expreſſum*, with full Power to the Arbiters to determine as they ſhould think fit; and theſe Arbiters having determined the ſpecial Difference, and referred another Particular to the Determination of a third Party: The Lords ſuſtained the Decreet except as to the Penalty. In Reſpect the Party who had the Intereſt to claim the delegated Particular, judicially paſt from the ſame, 26 *February*, 1709, Laird and Lady *Innernytie* againſt Sir *Laurence Mercer* of *Aldie*.

A Decreet Arbitral null for Want of the Writer's Name and Deſignation, 3 *July* 1711 *Short* contra *Habkin*.

Arreſtments. *See* Juriſdiction.

AN Annuity in the Diſpoſition of an Eſtate reſerved by Way of Aliment to the Deponer, and payable *per* Advance, found to be of the Nature of a reſerved Liferent, affectable by Arreſtment, *June* 16, 1705, *Hamilton* contra *Livingſtoun* of *Kilſyth*.

A Debt payable to one by a Decreet Arbitral arreſtable by a Creditor to him before the Decreet; altho' it was therein declared alimentary, and not affectable by Creditors. *June* 22, 1705, *Irving* contra *Crawfurd.*

Two Arreſtments in one *Day*, not expreſſing the particular Hour, brought in *pari Paſſu*; although one of the Arreſters offered to prove, That his Copy of Arreſtment was given ſome Hours before the others: Becauſe Witneſſes may be apt to miſtake or forget the Hour, *June* 28 1705, *Sutie* contra *Roſs.*

Arreſtment upon a regiſtred Contract, allowed to be looſed upon Caution; the Obligement therein being general and illiquid, *July* 31 1705, *M^cfarland* contra *Cowie.*

An heretable Bond whereupon Infeſtment had followed, but not regiſtred in the Terms of the Act of Parliament 1617, arreſtable, and the Arreſter was preferred to a poſterior Adjudger of the Bond: Albeit the Sixty Days allowed for Regiſtration were not run at the Time of the Arreſtment, which might have been evacuated by Regiſtration thereafter, *February* 20 1706, *Stuart* of *Torrence* againſt the other Creditors of *Dundas.*

Arreſtment by Virtue of an admiral Precept, upon a Dependence before the Admiralty, for Payment of Bills of Exchange, ſuſtained, *July* 19, 1706, *Turnbul* contra *Anderſon.*

Arreſtment raiſed and uſed upon a Summons before it was executed not ſuſtained, *July* 23, 1706, Competition betwixt Sir *James Elphinſtoun* and the other Creditors of *Strichan.*

Horning and Arreſtment upon a Bond by Virtue of a general Aſſignation from the Creditor therein, not intimated in the Cedent's Lifetime, without a previous Confirmation, found null aud unwarrantable: and the Arreſtment not ſuſtained to have the Effect of Arreſtment upon a depending Action, albeit the Arreſter ſhould now confirm the Debt, *February* 25, 1707, *Jolly* contra *Bethune*, and others.

A particular Share of the capital Stock of the *African* Company found arreſtable at the Inſtance of the Proprietar's Creditor, in order to oblige the Directors to transfer the ſame in the ordinary Way in Favours of the Arreſter, *March* 18, 1707, *Aliſon* againſt the Directors of the *African* Company.

The Fees of a Commiſſioner to the Parliament, not arreſtable; as being alimentary, *March* 18, 1707, *Moliſon* Supplicant.

Arreſtment effectually looſ'd, tho' the Letters of Looſing were not intimated to the Arreſter, *July*, 18, 1707, *Crichton* contra *Borthuick* of *Cruickſtoun.*

The Purſuer of a Furthcoming, wherein his Debtor was called *pro intereſſe*, having referred to the Defender's Oath, what he was owing to the Purſuer's Debtor, and he having deponed: That Oath was not found to hinder the Purſuer's Debtor to ſeek Payment of what more the Deponent truly ow'd him, than was acknowledged by the Oath, *July* 23, 1707, *Kidzew* contra *Hardie.*

Arreſtment in the Hands of a Factor, not ſuſtained to found a Proceſs of Furthcoming of Debt due by the Conſtituent to the Arreſter's Debtor, *January* 18, 1709, *Donaldſon* contra *Cockburn.*

A Decreet of Furthcoming not reduced upon this Reaſon, That Nothing was produced at obtaining thereof, for inſtructing the Debt due to the Arreſter, but only a Horning and Execution of Arreſtment proceeding on a Decreet, and not the *Decreet* it ſelf: the ſame not having been called for by the principal *Debtor*, or the Party in whoſe Hands the Arreſtment had been laid on, and being now produced. But Arreſtment upon a Bond regiſtred in an inferior Court Books, containing a Precept in the End thereof, ordaining all neceſſary Execution to paſs thereon in due and competent Form, after the Charge thereby warranted to be given is duly given and expired, found to have been unwarrantable, *June* 10, 1709, *Moir* againſt the Creditors of *Jack.*

Arreſtment upon a Sheriff's Precept interpoſed ſummarly to a Baillie's *Decreet*, without citing the Party decerned, found null and unwarrantable, *January* 21, 1710, *Forbes* of *Ballogie* contra *Catanach.*

Arreſtment upon a *Dependence* preferred to a poſterior Arreſtment upon a regiſtred Bond: In Regard the Ground of the firſt Arreſtment was conſtituted by a *Decreet* before the Competition, *June* 14, 1710, Captain *Brodie* contra *M^clelland*, and others.

Arreſtment being laid on by Virtue of a Sheriff's Precept, in the Hands of a Perſon within his Juriſdiction, and that Perſon having thereafter changed his Habitation; the inferior Judge of the Place where he preſently reſided, was found competent to judge in an Action of Furthcoming upon the foreſaid Arreſtment, *June* 23, 1710, *Dalrymple* and *Skene* of *Halyards* contra *Johnſtoun.*

Arreſtment of a Defunct's Effects at the Inſtance of one as Creditor to a Perſon ſome Months after decerned Executor dative *qua* neareſt of Kin to the *Defunct*, not ſupported by the ſubſequent Confirmation; and the ſubject confirmed not affected by the Arreſtment.

ment : So that one deriving Right from that Executor by Aſſignation to the Subject, after it was eſtabliſhed in the Cedent's Perſon by Confirmation, was preferred to the Arreſter, *January* 25, 1711, *Menzies* contra *Graham*.

In a Proceſs of Forthcoming for the Price of Ale furniſhed to the Defender by the Purſuer's Debtor, Payment found relevant to be proved by the ſaid Debtor's Oath, in Prejudice of rhe Arreſter, *February* 20, 1711, *Horn* againſt Lord *Edward Murray* and his Lady.

Not ſufficient for the Defender in a Furthcoming to depone, That he was not Debtor at the Time of the Arreſtment for Rents belonging to the Purſuer's Debtor intrometted with by the Deponent, having made Payment thereof to the ſaid Debtor or his Order at ſeveral Times before : But he was ordained to depone ſpecially, what Payments were made by him to the Debtor, and by his Order to the beſt of his Memory, 15 *January* 1712, *Woodcroft* and his Factor *contra* Earl of *Strathnaver*.

A depending Proceſs of Reduction not the proper Ground of Arreſtment, *February* 26, 1712, *Roſs* Supplicant againſt *Renton*.

Arreſtment upon a Dependance for a Debt heretable by Obligement to infeſt, which thereafter became liquid by a Decreet, ſuſtained as preferable to a poſterior Diſpoſition of the Subject arreſted, granted by the Debtor in Favours of a conjunct Perſon, *June* 17, 1712, *Ker* of *Chatto* againſt the Creditors of *Harden*.

Aſſignations. *See* Bonds, Executry, Competition.

A Perſon's Subſcribing as Principal a Bond for a Sum due by himſelf, containing *in Gremio* another's Aſſignation, in further Security, to a Subject due to that other by the principal Debtor, ſuſtained Equivalent to a formal Intimation to him of the Aſſignation, 28 *March* 1707, *Competition of the Creditors of the Lord* Ballenden *and the Counteſs of* Dalhouſie *his Relict*.

A Debt being aſſigned after a Bill of Suſpenſion thereof had been paſt againſt the Cedent; it was found that paſſing of the Bill without Intimation did not render the Subject litigious, ſo as to give the Debtor the Benefit of the Cedent's Oath, 23 *July* 1707, *Burton* contra *Hamilton* of *Monkland*.

Nor yet was a Summons executed only and not called within Year and Day ſuſtained to found the Exception of *Res litigioſa* againſt an Aſſigny, 21 *January* 1709, *Houſton* contra *Lady Kincaid and her Huſband*.

Aſſignation to a Tack-duty in Security of a Debt, whereof the Annualrent was leſs than the Subject aſſigned, found not to make the Aſſigny entring to poſſeſs by Virtue thereof, liable to intromet beyond his Annualrent, or comptable for more, 22 *July* 1709, *Duncan* contra *Graham*.

An Aſſignation to Debts due to the Cedent, in Security and for the more ſure Payment of what he owed to the Aſſigny; not obliged to do Diligence for recovering theſe Debts aſſigned in Security: Nor are they tho' preſcribed (through the Aſſigny's not ſuing for the ſame when he might have done it) imputable in Payment of the Debt due by the Cedent to him, 27 *December* 1709, *Smith* contra *Vint*.

An Aſſigny by one Writ to the Stock and Profits of a Share in a Manufactory, having transferred the Stock to others for onerous Cauſes, reſerving the Profits to himſelf, after he had competed upon his Aſſignation for theſe Profits in a Proceſs with his Cedent's Creditors, who quarrelled his Right as null for not being delivered to him by the Cedent, and offered to prove it by his Oath; And the Tranſlation being intimated after he the Granter had deponed acknowledging the not Delivery of the Aſſignation to him : The Stock transferr'd was found to have been rendred litigious by the ſaid Proceſs, wherein the Profits only were under Debate; and the Oath of the Granter of the Tranſlation ſuſtained to militate and prove againſt the Receivers, to annul their Right in Conſequence of their Author's being null for not Delivery, 19 *January* 1711, Sir *David Dalrymple* againſt Sir *George Hume* and *Blackwood*.

A general Aſſignation *omnium Bonorum* a ſufficient Right to retain Moveables in the Aſſigny's Cuſtody, without Neceſſity of Confirmation, in a Competition with an Executor decerned who had a Licence to purſue; but had not confirmed, 22 *November* 1711, *Dickſon* contra *Logan*.

A poſterior Aſſignation preferred to one granted and intimated before, whereof the Inſtrument of Intimation wanted ſubſcribing Witneſſes: Albeit the firſt Aſſigny produced a new Inſtrument of Intimation of the ſame Date with the former, duly ſigned by the ſame Notary and the Witneſſes deſigned in the firſt Inſtrument. In Reſpect the formal Inſtrument was not produced till after the firſt was regiſtred, and an Interlocutor of the Lords pronounced thereon, 28 *February* 1713, *Duncan* of *Lundy* contra *Innes.*

Atteſters.

ATteſters of Cautioners in Suſpenſions muſt ingage not only for their Sufficiency at the Time of the Atteſtation, but as Cautioners for the Cautioners, and be liable ſubſidiarly in their Order as fully as the Cautioners themſelves, 27 *December* 1709, *Act of Sederunt.*

A Perſon who before the ſaid Act of *Sederunt,* atteſted the Sufficiency of a Cautioner in a Suſpenſion, and obliged him and his for the ſame, not found liable for the Sufficiency of the Cautioner ſimply, but only for his Solvency at the Time of the Atteſtation, 19 *July* 1710, *Ramſay* contra *Spalding* of *Aſhintully.*

B.

Backbonds. *See* Adjudications.

A Precept being intruſted to one upon his giving Backbond to apply the Mony to a certain Uſe, the Backbond was found ſo to affect the Mony, as it could not be arreſted by the Creditors of the Obtainer of the Precept, 19 *July* 1705, *Black* againſt Creditors of *Patrick Steil.*

One having aſſigned a 500 Pound *Sterling* Bond to another, upon his granting a Backbond of the ſame Date acknowledging the Aſſignation to be in Truſt, except as to 160 Pound then advanced to the Cedent, and obliging himſelf to hold Compt to him for the Superplus: The Backbond was found to reſtrict and qualifie the Aſſignation, in Prejudice of a third Party who upon the Faith thereof had lent Mony to the Aſſigny, and arreſted the 500 Pound for his Payment, 8 *November* 1710, *Monteith and his Factor* contra *Captain Douglaſs and his Factor.*

Bankrupts. *See* Competition, conjunct Perſons, Fraud, Adjudication.

A Diſpoſition to a Creditor not allowed to be quarrelled upon the Act of Parliament 1621, as made in Prejudice of the anterior Diligence of Horning us'd by another Creditor; who had denounced the common Debtor at the Market-croſs of *Edinburgh* and regiſtred him at the Horn: In Reſpect the Denunciation was not duly executed at the Croſs of the Head Burgh of the Shire where the Debtor liv'd; nor any other Diligence uſed after the Horning for ſeveral Years to affect either the Debtor's Heretage, or Moveables, 28 *March* 1707, *Gordon* of *Davach* contra *Duff* of *Diple.*

A Charge of Horning for Payment of Debt without Denunciation or Regiſtration, a ſufficient Ground to reduce a poſterior voluntary Aſſignation granted in Favours of another Creditor, by the common Debtor when he was retired to the Abbey for perſonal Protection, 23 *February* 1709, *Hamilton* and *M^c^kenzie* contra Sir *James Campbell* of *Aberuchil.*

A Perſon inſolvent having, after he was charged with Horning at the Inſtance of one of his Creditors, granted a voluntary Aſſignation to another in Security of a Debt contracted before the Charge; the Uſer of the Horning by the Charge was not allowed to reduce the Aſſignation upon the Act of Parliament 1621. In Reſpect he had been *in Mora* in completing his Diligence by Denunciation for a Matter of Five Months thereafter, 9 *July* 1709, *Drummond* contra *Kennedy* and *Reid.*

A Maſter obtaining a Diſpoſition from his Tenant, for Payment of a precedent Year's Rent that fell not under the Hypotheck, after the Tenant was denounced at the Horn by another Creditor; And having obtained Payment *bona Fide* by Virtue of the Diſpoſition; he cannot be liable to repete what he received, more than if he had poinded. Albeit that Creditor who did anterior Diligence would have been preferred in a Competition, *eodem Die,* Lady *Riccartoun* contra *Gibſon.*

Found that a Perſon having received a voluntary Aſſignation from his Debtor in Security of bygone Debt, and by Virtue thereof recovered the Sum aſſigned, might, notwithſtanding after the Debtor's Deceaſe legally confirm the ſaid Sum, as Executor Creditor to him, and by the Confirmation ſupport the Aſſignation quarrelled upon the Act of Parliament 1621 at the Inſtance of a Co-creditor inſiſting for Repetition, 22 *December* 1709, *Henry* contra *Glaſſels* and *Coning*.

Inſolvency of one under Diligence by Horning and Caption, joined with any of the Alternatives of Impriſonment or Retiring, or Flying or Abſconding, or forcibly defending in Order to make him notour Bankrupt in the Terms of the Act of Parliament 1696, to be reckoned at the Time of the Concurrence of the above Qualifications of Bankrupt in the Terms of the ſaid Act: And not at the Time of purſuing a Declarator of Bankrupt. To prove which Inſolvency, only principal Sums, Annualrents thereof reſting, Penalties incurred and Accumulations eſtabliſhed the foreſaid Time of the Concurrence of the above Qualifications of Bankrupt, are brought *in Computo*, 4 *January* 1712, *Forbes* of *Monimuſk's* perſonal againſt his real Creditors.

In a Reduction upon the firſt Part of the Act of Parliament 1621 of a gratuitous Deed in Favours of a conjunct Perſon, this Defence was ſuſtained, That the Granter had, at the Time of the granting thereof, a ſufficient ſeparate unincumbred Eſtate for Payment of all his Debts. And Diligence by ſimple Horning and Denunciation at the Inſtance of another Creditor, found not habile to reduce upon the ſecond Clauſe of the ſaid Statute (hindring voluntary Gratifications to one Creditor in Prejudice of another's more timely Diligence) a ſubſequent Diſpoſition made by the Rebel in Satisfaction of the gratuitous Bond: No real Diligence having been uſed for many Years, 11 *January* 1712, *Mckenzie* of *Preſtounhall* contra *Fletcher* and her Huſband.

One ſerved Heir in general and Executor confirmed to a Defunct, having granted a Diſpoſition *omnium Bonorum* to a conjunct Perſon; the Diſpoſition was found reducible upon the Act of Parliament 1621, at the Inſtance of the Defunct's Creditors who had executed a Summons of Conſtitution of their Debts againſt the Heir before the Diſpoſition, and obtained Decreet thereafter: Unleſs the Receiver of the Diſpoſition could inſtruct a ſeparate unincumbred Eſtate in the Diſponer's Perſon at the Time ſufficient to pay all the Defunct's Creditors, 17 *June* 1712, *Ker* of *Chatto* againſt the Creditors of *Harden*.

In Computo of which Eſtate the Lords would not reckon any Heretage belonging to the Defunct which the Diſponer ſtood not infeſt in as Heir to him, and was tailzied with Clauſes irritant, ſo as he could not diſpoſe thereof, 29 *July* 1712, *inter Eoſdem*.

An Aſſignation by a Father to his Son in his Contract of Marriage, reducible at the Inſtance of the Cedent's Creditor upon the Act of Parliament 1621, as a gratuitous Deed *inter conjunctos*: Unleſs the Son could inſtruct that his Father had then a ſufficient ſeparate unincumbred Eſtate for paying all his Debts. Seeing the Aſſignation (tho' in a Contract of Marriage) was no ways conceived in Favours of the Wife or Children of the Marriage, but ſimply to the conjunct Perſon his Heirs and Aſſignies, 3 *July* 1712, *Hepburn* of *Humby* contra Lord *Strathnaver*.

A fraudulent Bankrupt exempted by the Indemnity from the Penalty of the Act of Parliament 1696, 1 *July* 1713, *Stuart* contra *Haliburton*.

Baron-Baillies.

ARreſtment of an *Engliſhman* according to the Border Law ſuſtained, 20 *July* 1705, *Pots* and *Hunter* contra *Michelſon* and *Robſon*.

A Baron having by a Decreet of his own Baillie diſpoſſeſſed another of certain Lands, that the other had peaceably poſſeſſed more as ſeven Years: The Lords upon a Complaint thereof reponed the Party ſummarly to the Poſſeſſion, upon finding Caution before Extract for the Intromiſſions, 27 *December* 1711, Lady *Enterkin* Supplicant *contra* L. *Enterkin*.

Behaviour as Heir. *See* Paſſive Titles.

Beneficium Ordinis. *See* Heirs.

NOt neceſſary to diſcuſs a preſent Heir of Line before the Heir Male and of Tailzie, if the former Heir of Line renounced, and an Adjudication was led upon the Renunciation: Unleſs ſome Eſtate belonging to the Defunct was omitted out of the Adjudication, 23 *July* 1708, Captain *Straitoun* contra Earl of *Lauderdale*.

A Cautioner in an Indenture found not to have *Beneficium Ordinis* in a Purſuit for the Penalty, incurred by the Apprentice's deſerting his Maſter's Service; and that he might be inſiſted againſt without diſcuſſing the Principal, 11 *February* 1708, *Balfour* contra *Hutton*.

An apparent Heir Male paſſing by his immediate Predeceſſor, who had been three Years in Poſſeſſion of the Eſtate without Infeftment, and ſerving Heir to a remoter laſt infeft; not to be purſued upon the Act of Parliament 1695, to pay the immediate Predeceſſor's Debt, till after the Heir of Line be firſt diſcuſs'd, 13 *November* 1712, *Vint* contra *Earl of Dalhouſie*.

Bills or Petitions.

BIlls reclaiming againſt any Ordinary's Interlocutor, muſt not contain any new Alledgeance not inſerted in the Minutes and inſiſted upon before him, or contained in a Repreſentation refuſed by him; tho Alledgeances made before him may be urged upon new Arguments. Theſe Bills muſt be preſented within eight *Sederunt* Days after ſubſcribing the Interlocutor, and bear expreſly that ſuch Alledgeances were inſerted in the Minutes and pleaded before the Ordinary, or contained in a Repreſentation refuſed by him; And alſo that the Lords Anſwer craved upon an Amand was refuſed, *Act of Sederunt*, 8 *July* 1709.

Clerks are not to receive reclaiming Bills againſt Interlocutors *in Præſentia*, unleſs offered within ſix Days of the pronouncing; nor more than three Bills from the ſame Party againſt one Interlocutor, *Act of Sederunt*, *eodem Die*.

The Ordinary upon the Bills may paſs Suſpenſions in Part, and refuſe them as to the Remainder. Reaſons of Advocation or Suſpenſion offered at paſſing to be proved by the Oath of the adverſe Party (who cannot be had to depone) are to be refuſed, unleſs the Suſpender or Raiſer of the Advocation ſwear *de Calumnia* if preſent, and be vouched by ſome Document under his Hand, if abſent, to be kept by the Clerk of the Bills, unleſs delivered to the Party upon Receipt, at or before diſcuſſing the Reaſons in the Bill, the Vouchers or the Receipt thereof is to be tranſmitted *gratis* to the Clerk of the Proceſs; To the End that if the Reaſons prove calumnious, or the Vouchers be diſproved, the Suſpender or Raiſer of the Advocation may be decerned in Expences. A Roll of the Deliverances upon Bills of Suſpenſion or Advocation bearing the Date and Tenor of the Deliverance, muſt be affixed the Day they are given, and continued for a Week by the Clerk of the Bills in ſome patent Place of the Bill-chamber. Such Deliverances are in Time of Seſſion to be intimated the next Seſſion Day in the Outer-houſe, at the ordinary Time and Place of Intimation: Otherwiſe the Clerks of the Bills are finable by the Ordinary in a Crown or more *toties quoties*, for the Uſe of the Poor or the Party grieved, as his Lordſhip ſhall think fit; to be payed by the principal Clerks or Perſon officiating for the Time, or Collector of their Dues, or any of them, *Act of Sederunt* 20 *November* 1711, §. 1, 2, 3.

No Bills to be adviſed on *Tueſday* or *Wedneſday* in the Forenoon after Eleven a Clock, except the laſt five *Sederunt* Days of the Seſſion, *Ibid.* §. 10.

Clerks are not to receive more as Two reclaiming Bills againſt any Interlocutor in Preſence, nor to receive the ſecond, but upon the Ingiver's conſigning 20 Shillings *Sterling*, to be delivered to the other Party in Caſe of Refuſal, and to be given back to the Petitioner in Caſe the Bill be not refuſed. The Lords will not hear or receive any third reclaiming Bill, unleſs upon new Matter of Fact, and ſufficient Evidence given to verifie that it is recently come to the Party's Knowledge, *Ibid.* §. 15.

Bills of Exchange. *See* Precepts, Letter of Credit, Payment, Diſcharges, promiſſory Notes.

ANnualrent due for Inland Bills, 8 *June* 1705, *Blair* contra *Oliphant*.

A Factor acted warrantably in remitting another Man's Mony to him by Bill from one and reputed reſponſible at the Time; tho the Bill was never honoured, and the Factor had no expreſs Orders to remit by Bill, 22 *June* 1705, *Fead* contra *Ewart*.

Taking Acceptance of a Bill, after a Proteſt for not Acceptance in the Terms of it, payable ſome Days after the Term of Payment in the Bill, not a wrong Step in the Negotiation, 14 *November* 1705, *Brown* contra *Hume* of *Coldinghamlaw*.

Advice from the Creditor in a Bill to him it was payable to under Truſt, ordering the Application of a Part of the Mony toward the Satisfaction of a Debt due to a third Perſon, not being intimated to him: The Property of that Mony found, notwithſtanding the Advice, to remain with him who ſent it, arreſtable by his Creditors, 16 *January* 1706, Lord *Roſs* contra *Gray* of *Newton*.

Relevant for the Debtor in a Bill to prove by the Creditor's Oath, that the Bill, he being the firſt Poſſeſſor thereof, was granted for the Vendition of a Part of a Ship: And that being acknowledged, to prove that he the Debtor in the Bill was debarred from Poſſeſſion of the Subject ſold by preferable Rights of Bottomry affecting the Ship, 13 *February* 1706, *Plummer* contra *Houſtoun*.

The Poſſeſſor of an Inland Bill of Exchange drawn for Value due to him by a third Party, proteſted for not Acceptance, not cut off from his Recourſe againſt the Drawer, for not intimating to her that the Bill was refuſed: Becauſe ſhe could ſhew no Prejudice, from the deſigned Accepter's being in any worſe Condition than the Time of the Draught, who was ſtill abundantly reſponſible, 28 *June* 1706, Sir *John Swintoun* contra Lady *Craigmiller*.

Value preſumed to have been given by the Poſſeſſor of a Bill, tho it bore not Value received; unleſs it were proved by his Writ or Oath that he payed no Value, 19 *March* 1707, *Scot* contra *Laign*.

The Accepter of a Bill for a Part of the Price of a Quantity of Meal, to be delivered by the Drawer, for whoſe Performance the Creditor in the Bill ſtood obliged as Cautioner in the Contract, found not obliged to pay the Bill, the Meal not being delivered: Altho the Bill was payable before the Term for Delivery of the Meal, 7 *June* 1707, *Boyes* contra *Schaw*.

But relevant to elide the Accepter's Defence, that by his Order a third Perſon had received the Bargain of Meal in the Terms of the Contract, the Order being proved by the Accepter's Oath: Without Regard to his Alledgeance, that the Drawer of the Bill had, after Delivery of the Meal, intrometted with a Part of the Price, 26 *July* 1707, *Inter eoſdem*.

Indorſement of Bills of Exchange, not for Value given at the Time, but in Security of bygone Debt leſs than the Sum in the Bill, and what Expences ſhould happen to be diſburſed in recovering Payment, excluded by an anterior ſeparate general Diſcharge granted to the Accepter, 15 *January* 1708, *Crawford* contra *Piper*.

The Indorſer of a Bill purſued by Action of Recourſe, allowed to prove by Oath of the Poſſeſſor's Cedent, That he, the Cedent, got from one who had accepted the Bill as Cautioner for another, an Indorſation without any onerous Cauſe filled up in his Favours in a Blank on the Back thereof, ſubſcribed and delivered by the Defender to the Cautioner Accepter upon Payment of the Contents, that he might fill up the Blank either in the Terms of a Diſcharge, or of an Aſſignation for his Relief againſt the principal Accepter: Albeit the Purſuer was an Aſſigny for an onerous Cauſe. Becauſe he knew the Sum contained in the Bill was rendred litigious by Proceſs betwixt his Cedent and the Defender, before the Aſſignation, 29 *January* 1708, *Fulton* contra *Johnſton*.

A Merchant's Note whereby he obliged himſelf to pay a Sum to other two Merchants, or Order, at ſuch a Place or at another Place with the current Exchange, found to be only a ſimple Ticket, and not of the Nature of a Bill of Exchange; in Reſpect there was not a Drawer and Accepter, and therefore null for Want of Writer and Witneſſes Names and Deſignations, *Eodem Die*, *Arbuthnot* contra *Scot*.

The like Note whereby one promiſed to pay to a Perſon or Order a certain Sum Value received, being indorſed to a third Party, was for the ſame Reaſon found compenſable with the Indorſer's Debt, 12 *February* 1708, *Bundie* contra *Kennedy*.

Value preſumed to have been given by the Poſſeſſor of an Order to deliver to him, Bearer thereof, a certain Sum, and take his Receipt, 26 *January* 1709, *Swintoun* and Executors of *Bonmar* contra Repreſentatives of *Tom*.

A Perſon having been in Uſe to borrow Mony out of the Bank, by drawing Bills upon his Debtors in the ordinary Stile of Bank Bills, payable to his own domeſtick Servant only for Form's Sake, that by his Indorſing them to the Treaſurer of the Bank the Drawer might receive the Value; and one of theſe Draughts proving ineffectual thro' the not Acceptance of him it was drawn upon, ſo as it could not be tranſacted in the Bank, where no unaccepted Bills are negotiated; and being found unindorſed in the Cuſtody of the Servant at his Death, who had not mentioned it in a Diſpoſition made by him of all his Effects, where the Particulars ſpecified were of far leſs Value: It was found to have been drawn for the Maſter's own Behoof, without Neceſſity to his Executors to provein the Terms of the Act of Parliament 1696, that the Poſſeſſor was but a Truſtee, 8 *February* 1710, *M'claren* and *Dinn* contra Executors of Major *Chieſly*.

The Poſſeſſor of a Bill proteſted for not Acceptance, not allowed Recourſe againſt the Drawer. Becauſe he did not timeouſly acquaint him that the Bill was proteſted, and the deſigned Accepter broke in the *interim* with the Drawer's Effects, 10, 21, and 28 *February* 1710, *Miln* contra *Erskin*.

Proteſting a Bill for not Payment againſt the Accepters, and intimating the Proteſt to the Drawer in due Time, relevant to infer Recourſe againſt him: Albeit the Poſſeſſor raiſed no Action for that End till two or three Years after the Bill was proteſted; And alſo took Aſſignations in Security of the Sum therein from the Accepters, 7 *February* 1711, The Lady *Nicolſon* contra *Moriſon* of *Preſtoungrange*.

The Act 25 Seſſ. 6 Par. K. *W.* diſcharging Writs blank in the Receiver's Name extended to Bills of Exchange: In Reſpect the Indorſations of Bills only are therein expreſly excepted, 9 *February* 1711, *Brand* contra Tenants of *Riccartoun*.

A Bill's being blank in the Receiver's Name the Time of Accepting, probable only by his Oath or Writ, 21 *June* 1711, *inter Eoſdem*.

One of two Perſons a Bill was directed to paying it upon Diſtreſs, intituled to recourſe againſt the Drawer for Repayment: Albeit the Payer's Name had been adjected *ex poſt Facto* to the Direction by the Accepter, without the Drawer's Knowledge, 27 *June* 1711, *Wilſon* of *Sands* contra *M'kenzie*.

One having paid a Bill drawn upon him without bearing Value in his own Hand, Action of Recourſe for Reimburſement allowed to his Heir againſt the Drawer: Albeit he the Drawer a Merchant offered to prove by his own Compt-book, and to give his Oath in Supplement, that the Bill was drawn for the Price of Goods taken off from him by the Perſon drawn upon. In Reſpect the ſaid Compt-book had not been regularly kept, 4 *July* 1711, *Cuningham* contra *Agnew*.

That the Drawer of an Inland Bill was certiorated of his Bill's being duly proteſted by the Poſſeſſor, who did not purſue Recourſe till two or three Years after proteſting, muſt be prov'd otherways than by the Poſſeſſor's Oath, 17 *July* 1711, Lady *Nicolſon* contra *Moriſon* of *Preſtoungrange*.

The *Engliſh* Statute of 3 and 4 A. c. 9. giving the like Remedy upon promiſſory Notes as is now uſed upon Bills of Exchange, for the Space of three Years, tho' made perpetual by the 7 A. c. 25, an Act of the *Britiſh* Parliament ſince the Union, doth not extend to promiſſory Notes in *Scotland*, 6 *December* 1711, *King* contra *Eſdale*.

Separate Receipts of partial Payment of Bills of Exchange, do not militate againſt Poſſeſſors to whom theſe Bills were afterwards indorſed, 12 *December* 1711, Sir *John Erſkin* contra *Thomſon*.

A Bill payable to a Third Party for the Behoof of a Perſon drawn upon, being in Order to negotiating put in the deſigned Accepter's Hand, who to gain the more Credit to it adjected another Perſon's Name to the Direction, without the Drawer's Knowledge or Conſent, and prevail'd with him to accept of the Bill conjunctly and ſeverally with himſelf, upon his granting an heretable Bond to relieve the Accepter of all Hazard through Acceptance; and the firſt Accepter having ſold the Bill for Value received, and thereafter turn'd Bankrupt: The Co-accepter, who, upon Diſtreſs, paid the Bill, was allowed Recourſe againſt the Drawer only for the half of the Sum; both being reputed as *Correi promittendi*, ſince the firſt Accepter had failed; and the diſtreſs'd Co-accepter was ordained to aſſign the Half to the Bankrupt's Bond of Relief to the Drawer, *July* 15, 1712, *Wilſon* contra *Mackenzie*.

A Creditor getting a Bill upon his Debtor not bearing Value received, it's preſumed, That the Bill was delivered in Satisfaction of the former Debt, and not for preſent Value immediately received by the Drawer: Unleſs the Poſſeſſor prove by the Drawer's Oath, That the Bill was granted for another Cauſe, *July* 18, 1712, *Cheap* contra *Arnot* of *Woodmiln*.

The Poſſeſſor of a Bill to whom it was indorſed for Value, preferred to the Indorſer's Creditor, who had arreſted the Mony in the Accepter's Hand before Indorſation; it not being alledged that the Indorſation was gratuitous, or that the Indorſee knew of the Arreſtment, when the Bill was indorſed to him, *December* 5, 1712, *Hume* contra *Smith*.

A Perſon who ſuffered a Bill drawn upon him to be proteſted againſt him for not Acceptance, liable to the Poſſeſſor *in quantum* he had of the Drawer's Effects at proteſting of the Bill: Which was found to put him *in mala Fide* to pay thereafter to the Drawer, *December* 9, 1712, *Gordon* contra *Anderſon*.

Two in Copartnery having commiſſioned a Factor abroad, to ſend them Goods in Company, and adviſed him by their Letters, that they would honour his Bills for the Price, and one of the Copartners having accepted in the ordinary Manner the Factor's Bills drawn as *per* Advice, and the other accepted them for his own Part: It was found, That the latter, who produced no Letters of Advice, ought to have ſimply accepted the Bill, and therefore was liable to the Poſſeſſor for the whole Sum, 10 *December*, 1712, *Naughtoun* contra *Ritchie*.

The Indorſement of a Bill for Satisfaction or Security of a prior Debt, and not for preſent Value received, reduceable upon the Act of Parliament 1696 anent Bankrupts, *January* 16, 1713, *Campbell* of *Glenderuel* contra *Graham* of *Gorthie*.

Annualrent not due for the Sum in an accepted Bill from the Term of Payment, in Reſpect the Bill was never proteſted for not Payment, *July* 15, 1713, *Watſon* and Executors of *Wilſon* contra *Gordon*.

Blank Bonds.

A Blank Bond ſuſtained, becauſe ſubſcribed before the Act 25 Parliament 1696, tho, it was not delivered till after the ſaid Statute, *March* 15, 1707, Earl of *Levin* contra *Scot* of *Gilmerſcleugh* and *Armſtrong*.

A Gift from the King under the Privy Seal to one during his Life-time, and after his Deceaſe to his Son, being aſſigned by the Donatar to a Third Party: It was found, That Preſcription thereof was interrupted by the Cedent or Aſſigny's Poſſeſſion; and that the Gift became not extinct by the Death of the Donatar's eldeſt Son, or by his own Death, without filling up the Blank, but ſubſiſted in the Perſon of his ſurviving Son, *June* 19, 1712, *Malcolm* againſt the Queen's Advocate.

A Bond for 17800 Merks bearing Annualrent, blank in the Creditor's Name, dated in the Year 1670, aſſigned about 39 Years after its Date for an onerous Cauſe, by one ſaid to have found it among his Mother in Law's Papers in the 1689 when ſhe died; reduced and declared extinct and void, at the Inſtance of the Granter's Heir for theſe Reaſons and Qualifications following, urged and proved againſt it. 1. The Bond continued blank, and never heard of by any repreſenting the Debtor for a Matter of 39 Years. 2. The Subſcriber and his firſt Heir were abundantly ſolvent; and the Perſon among whoſe Papers the Bond was alledged to have been found, lived and died in a poor Condition, without any poſſible Means of acquiring ſuch a Sum, and never made the leaſt Mention of it, tho' ſhe died of a great Age and lingring Sickneſs. 3. The alledged Finder of the Bond concealed it for about 18 Years after his Mother in Law's Deceaſe, till it was forced into Light by Proceſs: Albeit he could not but be conſcious of the Neceſſity of doing Diligence in the *Interim*, had he a Mind to ſecure the Mony, the then Debtor's Eſtate becoming mightily incumbred; after whoſe Deceaſe he was called and compearing as Factor for the Eſtate, in all the Proceſſes wherein it was wholly diſcuſs'd and ſold. Nor did he produce or found upon ſuch Bond in a Purſuit againſt him at the preſent Heir's Inſtance, wherein he was decerned for a great Sum that he and his Cautioner paid. 4. He had many Occaſions of getting the Bond into his Hand from among the Writs of the Debtor's laſt Heir, an eaſy interdicted Perſon, whoſe Factor, Truſtee and Manager he was for many Years; and after his Death poſſeſſed the Houſe where the Charter Cheſt ſtood, which ſuffered manifeſt Alterations and Handling in that Time. 5. He uſed Writs belonging to the Family to the Prejudice thereof. Nay further, had threatned, that this tho' the firſt ſhould not be the laſt Blank Bond, he would attack them with. Which Qualifications above-mentioned were not only ſuſtained relevant to extinguiſh the Bond *quoad* the Cedent; but alſo the Aſſigny was found to be in no better Caſe than he, as to the Competency of the Reaſons of Reduction, the Aſſignation being after the Bond was quarrelled by Reduction and Improbation, *July* 3, 1713, *Cochran* of *Kilmaronock* contra *Houſton* of that Ilk, and *Cuninghame*.

Bona-fides, *See* Forfeiture, Wadſets, Bankrupts, Poſſeſſion.

AN Heretor found not to have poſſeſs'd his Teinds *bona Fide*, by Virtue of a Decreet of the Commiſſion, valuing them to a Duty leſs than the Proportion of Stipend impoſed on his Lands by a former Decreet of Modification and Locality. Which Decreet of Valuation had been reduced for being pronounced without calling the Miniſter of the Pariſh admitted ſome Days before, the Cure being vacant at the Commencement of the Proceſs, *July* 7, 1708, *Reid* contra *Maxwell* and *Lanerik*.

A Tenant's Payment of his Rent *bona Fide* to the deceas'd Heretor's Second Son held and reputed apparent Heir, in Reſpect that his eldeſt Brother was long abſent out of *Scotland*, and thought to be dead; ſuſtained ſufficient to exoner him at the Inſtance of one pretending Right to the ſaid Rent by Aſſignation from the eldeſt Brother, *February* 22, 1711, *Terſie* contra *Burnet* and *Forbes*.

An Adjudication (without Infeſtment or Charge to the Superior) and a Decreet of Mails and Duties againſt a Perſon after he was Year and Day at the Horn, but before his liferent Eſcheat was gifted, for a Debt anterior to the Rebellion, ſuſtained as a ſufficient Title of *bona Fide* Poſſeſſion to the Adjudger, till he was interpelled by a Decreet of general Declarator of the liferent Eſcheat, *November* 26, 1712, *Douglaſs* contra *Chatto*.

A *Scotſman* who died a Souldier in *Flanders*, having left a Sum of Mony in the Hands of his Colonel a Peer of *Scotland*, which a Creditor of the Defunct uplifted from the Colonel by Virtue of an Adminiſtration in the prerogative Court of *Canterbury*: It was found relevant to aſſoilzie that Creditor from repeting the Mony to Executors *qua* Creditors confirmed before the Commiſſaries of *Edinburgh*, That he got *bona Fide* Payment before any Proceſs or Confirmation in *Scotland*, *June* 12, 1713, Creditors of *Muirhead* of *Stevenſon* againſt *Hamilton* of *Wiſhaw*.

Bonds. *See* Cancelling of Writs, Writs, Holograph, Children, Clauſes.

A Brother having granted a Bond to his Siſter, bearing for Love and Favour, and that ſhe might be provided in a competent Portion; and obliging him and his to pay to her, her Heirs, Executors or Aſſignies at the firſt Term after their Father's Deceaſe, a certain Sum as for Portion natural ſhe could ſucceed to by the Death of Father or Mother; with this Proviſion, That if ſhe died without Heirs procreated of her own Body, living the Time of her Deceaſe, the Mony ſhould return to the Granter of the Bond and his Heirs; and ſhe having aſſigned the bond for an equivalent onerous Cauſe to one who who charg'd for Payment after the Father's Deceaſe: It was found that ſhe was Fiar, and that her Aſſigny had Power to uplift without finding Caution; albeit the Cedent got ſome Legacy from her Parents, and had no Children, nor Hopes of any, *June* 12, 1707, *M'Dougal* of *Logan* againſt *Agnew* of *Scheuchan*.

One of Twelve equal Sharers in a Ship and Cargo to, and from *Guinea*, having granted Bond to another of theſe Copartners, narrating that for that others having diſponed his 12th Share to the Granter, he obliged himſelf to pay him a certain Sum and Annualrent from the Term therein mentioned; with expreſs Proviſion, That the Ship arrive ſafe in *Scotland* or *England*, and no otherwiſe; and having alſo granted another Bond of the ſame Date to the ſame Perſon for a leſſer Sum, in Contemplation of his having inſured to the Granter the foreſaid Share bought by him; and the Price of the Ship and Cargo (which came ſafe to *Guinea*, and from thence to *America*, where it was ſold by the Supercargo) being returned to *London*: The Condition in the firſt mentioned Bond was found not purified; albeit the Granter had received his own 12th Part of the Produce; but he was found liable to pay the other Bond for the leſs Sum, which was the *Præmium* of Inſurance, *July* 25, 1707, *Corbet* againſt *Cochran* of *Kilmaronock*.

A Bond excluding Executors not rendred moveable by an Aſſignation to the Creditor's Wife, not mentioning her Executors, with a Proviſion, That the Aſſigny ſhould be obliged to pay the Sum to their only Child at ſuch an Age; but eſtabliſhed in the Child's Perſon, without Neceſſity of ſerving Heir to the Mother; in Reſpect the Aſſignation bore to be for the Child's Behoof, *February* 10, 1708, *Muirhead* and *Lieth* againſt *Lockhart* of *Cornwath*.

A Bond of Corroboration granted by One of Two *Correi debendi* in the Bond corroborated, ſuſtained to make the Debtor liable only for the Half of the Sum: In Reſpect the Creditor did not produce the original Bond, that he who did corroborate might operate his Relief of the other Half againſt the Co-principal therein bound, *July* 22, 1708, Creditors of *Nicolſon* againſt the Earl of *Balcarras*.

An heretable Bond for a certain Sum being granted by an Heireſs and her Huſband for his Intereſt conjunctly and ſeverally, with a Precept of Seaſin in her Lands allenarly; and thereafter upon the Creditor's advancing to the Huſband another Sum, he with Conſent of his ſaid Spouſe having granted them Security in his proper Eſtate for both the Sums accumulated by Contract, narrating the ſame to have been advanced to the Huſband and his

Lady; and the Lady having afterwards diſponed her Eſtate to her ſecond Huſband, who procured an Aſſignation from the Creditors to the heretable Bond affecting the ſame: The Lords found, That the heretable Bond was principally and originally the Lady's Debt, and did affect her Eſtate and Repreſentatives; and that the Repreſentatives of her firſt Huſband were not liable to pay the ſame to one deriving Right from the ſecond Huſband, who repreſented the Lady principally bound, and extinguiſhed the Debt by his Payment, *January* 13, 1709, Laird and Lady *Airth* againſt *Hamilton* of *Grange*.

It was found relevant for one to reduce a Bond granted by his Father bearing borrowed Mony, and a Bond of Corroboration thereof granted by himſelf, that he offered to prove by the Creditor's Backbond in the Hands of a Third Party, that the original Bond was for no onerous Caſe, and not to be paid if the Granter behaved himſelf dutifully to the Receiver, nor to militate againſt his Heirs, if not purſued in his Life-time; and he never miſbehaved, nor was ſued: Albeit the Son not knowing of the Back-bond, had after his Father's *Deceaſe* corroborated the Debt, which Bond of Corroboration would fall in Conſequence with the original Bond; and he the Son, at the diſcuſſing of the Reaſon of Reduction after ſatisfying the Production, was allowed a Term for recovering the Back-bond out of the *Depoſitar's* Hands, *June* 22, 1710, *Grant* againſt the Duke of *Gordon*.

A Bond of Preſentation whereby ſeveral Perſons ſtood obliged conjunctly and ſeverally to preſent themſelves Priſoners at a certain Time and Place, not implemented by one of them compearing and offering himſelf Priſoner for himſelf and in Name of the other Co-obligants, who had no lawful Excuſe for not appearing, *July* 4, 1710, *White* againſt *Henderſon* and others.

An Obligement to preſent a Priſoner for civil *Debt*, ſuch a *Day* at a certain Place, without Suſpenſion, paſt Bill, or Siſt of Execution, not implemented by preſenting him without any judicial Siſt of Execution: In Regard he defended himſelf from Incarceration, by producing an Atteſtation that he was liſted as a Souldier in Her Majeſty's Army, *July* 21, 1710, *Henderſon* againſt *Graham*.

A Perſon having granted Bond to his younger Children as a Competency for their better Living, wherein he obliged himſelf, his Heirs and Executors to pay particular Sums to each of them at the firſt Term after his Deceaſe, with Annualrent from the Terms of Payment; provided that the ſame ſhould be in full Satisfaction of all Portion natural, or what elſe they could claim by his *Death*, and that the Portion of any of them happening to die without Heirs of their own Body, ſhould be divided equally among the Survivers; and one of theſe Children having died before the Father, and another after him, who conveyed the Remains of his Portion to the Heir, out of a grateful Senſe of good Offices and Services received from him: The Lords found, That the ſurviving Children had Right to the Portion of him that died before the Father, in Reſpect of the Subſtitution in the Bond of Proviſion; but that he who died after, could diſpoſe of his Portion for Cauſes reaſonable, tho' not onerous, notwithſtanding of the Subſtitution, *December* 14, 1710, *Smith* and *Wallace* againſt *Smith* of *Browſterland*.

Border-Law. *See* Baron-Baillies.

Burgage Lands.

A Baſe liferent Infeſtment of Annualrent in Burgage Lands, given by a Baillie of a Burgh as Baillie in that Part, and the Clerk as a common Notary, upon a Precept of Seaſin in an heretable Bond, to be holden blench of the Granter, ſuſtained notwithſtanding the Act 27 Parl. 1 *J. 6.* which diſchargeth only private Infeſtments to the Prejudice of the Caſualities of the *Burgh*, *July* 5, 1711, *Bennet* and her Huſband againſt *Slanders* and others.

Burghs. *See* Judges.

Raiſing Horning upon an Act of the General Convention of the Royal Burghs, appointing one to pay a certain Sum to another, found warrantable, *July* 27, 1710, *Vere Kennedy* Supplicant.

Butchers.

THE Act of Parliament 1703 diſcharging Butchers to bruick or poſſeſs by themſelves or others for their Behoof directly or indirectly, more than an Acre of Land not tilled and ſown yearly with Corns, under the Penalty of 100 *Lib. toties quoties*, beſides the Forfeiture of the Beaſts paſtured thereon, and the Contravener's Burgher Privilege; found to concern only Tackſmen Graſiers, and not to hinder Butchers from uſing their own Property for paſturing of Cattel, *February* 3, 1708, *Malices* contra *Ogilvie*.

Country Butchers reſorting to the Market of *Edinburgh* with their Fleſhes together with their Skins, are free to ſell their Skins or Hides to the beſt Avail; and not tied to ſell at the Price ſet on them by the Skinners or Magiſtrates: But if they get not their own Price may carry back the ſame, without the Danger of having their Perſons, Skins or Hides ſecured on that Account by the Skinners or Magiſtrates, *July* 8, 1712, *The Country Butchers* contra *Magiſtrates of* Edinburgh.

C.

Cancelling of Writs. *See* Scoring, Marginal Note, Gifts, and Writs.

TEaring away the Marginal Sideſcription from the joining of the firſt and ſecond Sheets of a Tailzie, found not to annul the Tailzie: Albeit the Obligement to reſign Procuratory of Reſignation and Lands were contained in the firſt Sheet. Becauſe Sideſcribing is not an indiſpenſible Solemnity in private voluntary Rights, as it is in Decreets, Inhibitions and other Diligences. And further the Maker of the Tailzie conſidered it as valid, notwithſtanding the Sideſcription was tear'd; by ſome Days thereafter ſigning a Revocation thereof, except as to a particular Effect, for which he declared it to ſubſiſt, 23 *January* 1708, *Livingtoun* contra *Menzies* and *Livingtoun*.

One of three Co-principal Debtors in a Bond, having paid the Debt and got a Diſcharge to himſelf and all concerned; and having taken away from the Bond his own Name, and the Name of another of the Co-principals: The Bond was not ſuſtained to operate any Relief to the Payer, againſt the third Co-principal, whoſe Name was left uncancelled, 10 *December* 1709, *Waddel* contra *Douglas* of *Badds*.

Cautionry. *See Correi debendi*, Clauſes, *Beneficium Ordinis*, Bond of Preſentation, *Condictio ob turpem Cauſam*, Factors.

A Bond of Caution for the Fidelity of a Caſh-keeper, put in his Hands to be delivered to the Conſtituents, ſuſtained without Regard to the Granter's offering to prove by Witneſſes, that the ſame was found among the Caſh-keeper's own Papers after his Death: He the Granter having owned himſelf liable as Cautioner by his miſſive Letter, and by the Exception in a general Diſcharge to the Caſh-keeper's Relict and Children as to all Action might be intented upon the Bond of Cautionry, 25 *January* 1706, *Fleming* of *Ferm* contra *Calder* of *Muirtoun*.

A diſtreſſed Cautioner has Right to Annualrent of Annualrents paid by him for the principal Debtor from the Time he paid them, 27 *June* 1706, *M'micken* contra *Kennedy* of *Glenour*.

Cautioners for a Collector of the Cuſtoms bound conjunctly and ſeverally with him, that he ſhould make juſt Compt, Reckoning and Payment of his Intromiſſions to the Tackſmen, and do exact Diligence for bringing in thereof monthly, quarterly or oftner as required: Found liable for what the Collector came ſhort of in his Accompts; tho the Tackſmen had not uſed any Diligence againſt him for Payment all the three laſt Quarters of his Management, 20 *February* 1707, *Wallace* of *Ingliſtoun* and *Baillie* contra *Lauders* and their Huſbands.

The Immunity provided by the Act of Parliament 1695 to Cautioners for Sums of Mony, againſt whom no legal Diligence is uſed within ſeven Years of the Date of their Obligement, not carried by a Clauſe of mutual Relief in a Bond granted by ſeveral Co-principals bound conjunctly and ſeverally, which is implied tho not expreſſed: But only by a Clauſe obliging one of the *Correi* to relieve the reſt of the whole Debt, 21 *January* 1708, *Ballantine* contra *Moor*.

The Debtor in a Bond having become the Creditor's Cautioner for a Year's Tack-duty of the Exciſe, for Security whereof, he the Cautioner, upon Diſtreſs, granted a Diſpoſition of his Lands to the Setters of the Tack, who were paid by their Intromiſſion with the Rents; And the principal Debtor having, after the cautionary Ingagement, before the Term of Payment of the Tack-duty, aſſigned to another the Debt due to him by the Cautioner, who granted a Bond of Corroboration for it to the Aſſigny, after he the Cautioner was inhibited at the Inſtance of another Creditor who ſtood inſeft in his Lands: The Cautioner was found to have Right of Retention of the Sums due by him to the principal Debtor, till he were reliev'd of his Cautionry; And therefore in a Mails and Duties of the Cautioner's Lands, his inhibiting Creditor was preferred to the Receiver of the Bond of Corroboration, 14 *February* 1708, *Strachan* contra Magiſtrates of *Aberdeen.*

A Cautioner corroborating by Bond, a Liferent Annuity in Favours of a Wife, and paying the ſame duly for ſome Years, not free by the 5 Act of the Parliament 1695 of ſubſequent Annuities that fell due after elapſing of the *Septennium*: The ſaid Statute being to be underſtood of Cautioners in Bonds of borrowed Mony, 18 *January* 1709, *Balvaird* contra *Watſon.*

A ſuſpended Decreet being turned into a Libel, and a Day aſſigned to the Suſpender to depone upon the Verity of the Debt; and upon his failing to depone, the Letters being found orderly proceeded: The Cautioner in the Suſpenſion was notwithſtanding found liable to pay the Debt, 30 *November* 1709, *Dunbar* contra *Muirhead.* But not the Expences modified in the Decreet of Suſpenſion: In Reſpect he had oblig'd himſelf in the Bond of Cautionry to pay only the Sum charged for, in Caſe that, at diſcuſſing the Suſpenſion, were found due by the Suſpender, 17 *December* 1709, *inter Eoſdem.*

Cautioners in Suſpenſions muſt now oblige themſelves not only for the Sums in the Charge, but for what ſhall be decerned by the Lords at diſcuſſing; and will be liable for that whether the Decreet be turned into a Libel or not, 27 *December* 1709, *Act of Sederunt.*

A Perſon who obliged himſelf by a Letter to procure Security to the Creditor in a Bond granted by others, or to pay the Debt himſelf; not a Cautioner in the Terms of the Act of Parliament 1695, who could have the Benefit of the ſeven Years Preſcription, 16 *February* 1710, *More* againſt Sir *Samuel Forbes.*

A Bond granted by a Principal and two Cautioners, being aſſigned only in ſo far as might be extended againſt the principal Debtor and one of the Cautioners; and the Aſſigny having diſtreſs'd that Cautioner, and granted to him upon Payment a Diſcharge of the Debt: Action of Relief of the half thereof was found competent to the diſtreſs'd Cautioner againſt his Co-cautioner; notwithſtanding the Reſtriction of the Aſſignation, which ſecured him only from direct Action at the Aſſigny's Inſtance, and could not evacuate the implied legal Obligation of Relief betwixt Cautioners, *February* 12, 1712, *Scot* Lady *Hackſhaw* contra *Dutcheſs of Buccleugh.* And the Cautioner aſſigned againſt found to have no relevant Defence againſt paying more than the half of the Debt to the Aſſigny upon Diſtreſs, *July* 1, 1712, *inter Eaſdem.*

The Years of Minority not deduced to preſerve a cautionary Obligation, after ſeven Years, whereupon no Diligence had been done in that Time in the Terms of the Act 1695, *December* 10, 1712, *Stuart* and *Weir* contra *Douglaſs.*

Three Principals and a Cautioner having granted Bond for a Sum conjunctly and ſeverally, and the Principals obliged themſelves therein to relieve one another *pro rata*, and to relieve the Cautioner in general, without mentioning either *pro rata*, or conjunctly and ſeverally: Theſe Co-principals were found liable *in ſolidum* to relieve the Cautioner, who paid the Debt upon Diſtreſs, and took Aſſignation from the Creditor for his Relief, *June* 19, 1713, *Buchanan* contra *French.*

Certification. *See* Improbation.

IN a Reduction and Improbation of a Decreet of Conſtitution againſt one as charged in general to enter Heir, and an Adjudication following thereon, Certification was refuſed to be granted againſt a Decreet of Appriſing recovered from a third Party and produced *ad Modum Probationis* in the Decreet of Conſtitution: In Reſpect the Appriſing was the Right of a third Party, in which the Adjudger hath no Intereſt. Nor was Certification granted againſt the general Charge and Executions thereof after 20 Years, *February* 20, 1713, *Moriſon* of *Bognie* contra Earl of *Levin.*

Ceſs.

Ceſs.

FOurty Years Uſe of Payment by Magiſtrates of the whole *Quota* of Ceſs due for their Vaſſals Lands as well as the Town's Property, without demanding any Relief from theſe Vaſſals; not ſuſtained as a ſufficient Ground of Immunity to the Vaſſals from paying Ceſs in Time coming, *July* 20, 1710, *The Magiſtrates of* Paiſley *againſt their Vaſſals:* Nor yet from being liable for their Proportion thereof for ſome Years bygone. The Ceſs to be impoſed and proportioned by the Commiſſioners of Supply of the Shire upon the whole Lands in Property and Superiority liable in Ceſs, according to the real Rent thereof, to be proved before theſe Commiſſioners, *February* 13, 1711, *inter Eoſdem.*

A Feu-duty reſerved by the Sovereign in a Charter of Lands of his Property, not liable to Ceſs after Diſſolution thereof from the Crown in Favours of a Subject, *July* 13, 1711, Duke of *Montroſe* contra Feuars of *Kilpatrick.*

Chamberlains of the Crown Rents.

CHamberlain of the Crown-rents not exonered from anſwering and being liable for Reſts due by the Vaſſals or Tenants, by inſtructing Diligence done for the ſame: The Treaſury and Exchequer being never in Uſe to take Reſts off the Hands of the Queen's Chamberlains, Sheriffs, Stewarts, or Baillies who are bound to fit their *Æques* yearly in Exchequer, and get Letters of Relief againſt the Debtors, *July* 27, 1708, D. of *Douglaſs* contra Creditors of *Spot.*

Charter of Appriſing.

A Charter of Appriſing bearing for onerous Cauſes and Warrandice from the Granter's Fact and Deed, not conſidered as granted only in Obedience; and the Granter's Heir not allowed to quarrel the ſame for not Production of the original Rights, in Reſpect of the Obligement of Warrandice, *January* 6, 1710, *Glendinning* of *Partoun* contra *Irving* of *Drumcoltran.*

Children.

CHildren Creditors by Bonds of Proviſion to their Father who made no Contract of Marriage with their Mother, being in a Competition with a Child of a poſterior Marriage, provided by Contract before the Date of the Bonds: The Lords admitted them all *pari Paſſu* according to the Proportions of their reſpective Proviſions, *February* 17, 1710, *Marſhal* contra *Marſhals* and *Farquharſon.*

An exorbitant Proviſion in Favours of Children of a ſecond Marriage, reduced at the Inſtance of the Children of the firſt. In ſo far as prejudicial to the Sum provided to them; there being a ſufficient Competency remaining to the Children of the ſecond Marriage, *June* 22, 1711, *Aitkenhead* contra *Aitkenheads.*

Onerous Creditors preferred to the Debtor's Children, who had Proviſions by Bond or Contract of Marriage anterior to the contracting of the Creditor's Debt: In Reſpect their Father was Fiar of the Sums in the Bonds of Proviſion and Contract, *December* 23, 1709, Creditors of *Marſhall* againſt his Children.

Citation. *See* Execution, Summons.

A Diligence granted to cite one edictally who induſtriouſly abſconded, *June* 12, 1705, *Cochran* contra *Urquhart.*

A Perſon held as confeſt upon a perſonal Citation; tho there was only a Warrant for an edictal Citation: Becauſe a perſonal includes an edictal Citation, as being a better Certioration, *Ibidem.*

Citation by leaving a Copy with the Party's Servant where he lodged in the Morning, when himſelf was aſleep in Bed, as the Servant declared, found null as contrary to the Form preſcribed by the 75 Act 6 Par. *J.* 5. Which requires that Perſons not apprehended perſonally be cited at their principal Dwelling-houſe, *July* 13, 1708, *Bruce* contra Sir *James Hall.*

Citation for the ſecond Diet ſuſtained, albeit the Day of Compearance was 19 Months after the Citation; it being within a Year of the firſt Diet of Compearance, *July* 15, 1709, *Baillie* of *Lamingtoun* contra *Menzies* of *Culterallers*.

Citation of one not perſonally apprehended, by leaving a Copy at another's Dwelling-houſe, which the Execution bore to be his ſpecial Reſidence at the Time, ſuſtained: The Perſon at whoſe Inſtance he was cited, proving that he had reſided there 40 Days before the Citation, *December* 22, 1710, *inter Eoſdem.*

A Baron-Baillie's Decreet againſt his Maſter's Vaſſal, fining him for not attending his Superior at the Circuit-court, annulled, for that it proceeded upon a Libel executed by the Baron-officer *extra Territorium:* Albeit the Party cited was obliged by his Charter to appear, tho not dwelling within the Barony, at all the Baron's Courts, *December* 29, 1710, *Hume* of *Wedderburn* contra *Hume* of *Ninewells.*

A Man having fled and abſconded after his Creditors had cited him, upon a Summons executed at his Dwelling-houſe; they were allowed before calling of the Summons a Warrant to cite the Refugee edictally at the Market-croſſes of the Head Burghs of the Shires where he dwelt and haunted, in Order to hold him confeſs'd upon the Libel if he failed to appear when it ſhould happen to be called, *November* 22, 1712, *Duke of* Montroſe *and others Supplicants againſt* Rob. Roy.

Citation to compear upon a Day in the Vacation Time, ſuſtained, where the Party had the full Number of Days allowed by Law for his Appearance: In Reſpect the Citation bearing with Continuation of Days, is underſtood to be to the next lawful Day thereafter, *July* 23, 1713, *Gordon* and *Oſburn* contra *Campbell* and others.

Clauſes. *See* Eviction, Diſpoſition, Bonds, Marriage, Legacies, Faculty reſerv'd, Heirs, Tailzies, Irritancies, Cautionry.

A Contract of Marriage bearing, *Albeit the Huſband and his Heirs Male to be gotten in the Marriage are not infeſt, nor appointed to be infeſt in Fie in certain Lands out of which the Wife was to liferent an Annuity, nor provided to the Teinds thereof; yet after her Deceaſe, he for his Lifetime, and after his Deceaſe the Heirs Male of the Marriage, ſhould have Right to bruick the Annuity during their Grandfather and Grandmother's Lifetime, and after the Deceaſe of both ſhould have Right to the ſaid whole Lands and Teinds which were formerly tailzied to Heirs Male; And the Huſband's Father being obliged to make ſufficient Infeſtments, Tacks, or other Rights, to him and his ſaid Heirs Male, without Prejudice to the Wife's Liferent: The ſaid anomolous Clauſe was found not to import a Fie in Favours of the Heir Male of the Marriage, but only a Liferent or Maintenance, till he ſhould ſucceed conform to the old Tailzie of the Eſtate by Service and Retour,* July 25, 1705, Dundaſs *of that Ilk* contra Dundaſs.

A Clauſe in a Contract of Marriage, in caſe there ſhall not be Heirs Male procreated betwixt the Parties contracting to ſucceed to an Eſtate, found not to import any Obligement to provide that Eſtate in Favours of Heirs Male of the Marriage, *January* 2, 1706, *inter Eoſdem.*

A Clauſe in a Contract of Marriage allotting Portions to Daughters, becauſe the Eſtate was tailzied to Heirs Male, ſubſequent to a prior Clauſe reſtricting the Proviſion in Favours of the Heirs Male to the ſaid Eſtate lying within a certain Diſtrict, not extended to any Part thereof without that Bounds, *January* 22, 1706, *Livingtoun* contra *Menzies.*

A Father having obliged himſelf and his Heirs ſecluding Executors to pay a certain Proviſion to his Daughter or Daughters of ſuch a Marriage, in caſe there ſhould be no Male Children to enjoy his Eſtate; And the Marriage having diſſolv'd by his Wife's Deceaſe without Sons: The Sum was found payable at the Diſſolution of the Marriage, to the only Daughter thereof, who was not bound to wait till her Father's Death, *February* 8, 1706, *Ewart* contra *Ewart.*

The diſpoſitive Clauſe by an Heireſs in her Contract of Marriage in Favours of her Huſband in Liferent, and the Heirs of the Marriage in Fie, which failing to his Heirs or Aſſignies, reſerving her Liferent; found to make the Huſband Fiar: The Obligement to infeſt and Procuratory of Reſignation being to him and her in conjunct Fie and Liferent, and to the Heirs of the Marriage in Fie, which failing to his own Heirs or Aſſignies;

And the Aſſignation to the Writs, with the Obligement of Warrandice conceived in Favours of him, his Heirs or Aſſignies, *November* 21, 1705, Creditors of *Paterſon* and *Anderſon* againſt *Douglaſſes*.

A Huſband in his Contract of Marriage being obliged to provide the Conqueſt to himſelf and his Wife, and the longeſt Liver of them in conjunct Fie, and the Bairns to be procreated betwixt them; which failing, the one Half to himſelf, his Heirs, Executors and Aſſignies, and the other Half to the Wife's Heirs, Executors and Aſſignies: The Huſband's Heir (there being no Children of the Marriage) was found obliged to procure himſelf infeft in the Conqueſt, and to diſpone the equal Half thereof with Warrandice from Fact and Deed, to the Wife's Aſſigny; albeit the Huſband was Fiar, *March* 5, 1707, *Purdie* contra *Roſs*.

An Heireſs in her Contract of Marriage (perfected long after the Marriage, when a Son thereof was exiſting) having diſponed her Lands to her Huſband in Liferent, and to the Heirs procreated, or to be procreated betwixt them; which failing, to him his Heirs, or Aſſignies in Fie heretably and irredeemably, reſerving her own Liferent; and the ſaid Contract containing an Obligement to infeſt either by Reſignation or Confirmation, as beſt ſhould pleaſe her and him, and their foreſaids, with a Precept for giving heretable Seaſin to him or his Attourney without any Mention of Liferent or Heirs; and giving in the Aſſignation to the Writs, full Power to him and his aforeſaid (according to the Deſtination of Liferent and Fie above-written, with Reſervation of her ſaid Liferent) to intromet with, uplift, *&c.* and mentioning the Writs and Rights of the Lands to be delivered to him, to be kept and uſed for the Uſe and Behoof above-mentioned; and the Wife having for her further Security taken from the Huſband a ſeparate Bond of the ſame Date with the Contract, obliging himſelf, failing Heirs of the Marriage, to denude in Favours of her, her Heirs or Aſſignies: The Huſband was found to be a naked Liferenter, and the Land not affectable by Adjudications for his Debt, *March* 27, 1707, *Frazer* contra *Brown* and *Gordon* her Son.

A Clauſe in a Bond granted by five Perſons obliging them as Co-principals and full Debtors, ſuſtained to make each liable *in ſolidum* to the Creditor; And after two of them were broken, found to operate in Favours of two who paid the whole Debt, Relief of a third Share from the other ſolvent *Correus debendi*, *December* 26, 1707, *Cleghorns* contra *Torſtoun*.

A Perſon having a Bond to himſelf and his Aſſignies, and failing of him by Deceaſe, to his three Sons equally and proportionably, and the Heirs of their Bodies, and failing one of theſe by Death without Heir of his Body, to the other two, and the Heirs of their Bodies; and two of them ſo failing to the Surviver and his three Siſters equally and proportionably their Heirs and Aſſignies: Two of the Sons happening to die childleſs before the Father (who was Fiar) the Sums in the Bond fell to the ſurviving Son and his three Siſters equally and proportionably, *January* 26, 1709, *Hill* and *Muirhead* contra *Muirhead*.

A Peer, for the Preſervation of his Family, diſponed to his Daughter and only Child, with the Burden of Debts and Legacies that ſhould be reſting at his Deceaſe, his Honours and Eſtate under the General of all Lands and Rights whatſoever pertaining, or that might be known to pertain and belong to him, with a Reverſion to him, his Heirs Male and of Tailzie, who in Caſe of Redemption were bound to relieve her of theſe Debts and Legacies. Upon the Father's uſing an Order, and obtaining a Declarator of Redemption, the Heir of Line renounced all Right and Intereſt in his Eſtate, with all Rights of Lands and others whatſoever pertaining or that might pertain and belong to him, in Favours of him and his Heirs aforeſaid. The Father having, betwixt the Dates of the Diſpoſition to his Daughter, and her Renunciation, acquired an Appriſing upon a third Perſon's Eſtate, for a Debt he the Father ſtood ingaged for as Cautioner before the redeemable Diſpoſition: The Heir of the Renouncer was found obliged to denude of the Appriſing in Favours of one retoured as Heir Male in ſpecial to him who was ſerved Heir Male in general and ſpecial to the Granter of the Diſpoſition, by Virtue of the old Infeſtments tailzieing the Eſtate and Dignity to Heirs Male, *June* 22, and *July* 20, 1709, Earl of *Lauderdale* contra Lord *Teſter*.

One who ſtood obliged to pay to his only Daughter 4000 Merks at her Marriage or Majority, and the like Sum after his Deceaſe, with Annualrent from the reſpective Terms, in caſe he ſhould have a Son with another Wife to exclude the Daughter from ſucceeding to 20000 Merks provided to the Father by a third Party, being married a ſecond Time, and having no Son; he was found liable to pay 4000 Merks to his only Daughter aforeſaid of the firſt Marriage who was married, with Annualrent ſince her Marriage; upon her finding Caution to reſtore the Mony in caſe of her ſucceeding to the 20000 Merks by her Father's having no Son, *July* 27, 1710, *Hay* and *Caruthers* contra Doctor *Hay*.

A Proviſion that one ſhould not quarrel or reduce a Right, but conſent to and ratifie the ſame, found to import that he ſhould aſſign and diſpone that Right, *November* 30, 1710, *Mckie* contra *Paton*.

A Woman having in her Contract of Marriage diſponed to her Huſband, his Heirs and Aſſignies her whole Goods and Gear, moveable and immoveable Debts and Sums of Mony, and two Tenements of Land; with Power to her, in caſe of her ſurviving him without Children of the Marriage, to diſpoſe upon the Half of the Goods, Gear, Sums of Mony and others contracted on her Part: The Clauſe was found to import that, in the Event aforeſaid, a Half of the heretable as well as the moveable Subjects diſponed ſhould return to her, *June* 19, 1711, *Linklatter* contra *Boſwell*.

A Perſon, who ſtood bound for 6000 Merks of Proviſion to his two younger Children, a Son and a Daughter, and had the Power of Diviſion thereof, having aſſigned to them ſome Debts owing to him, and further obliged himſelf to pay the Daughter 1000 Merks; declaring the Bond and Aſſignation to be in full Satisfaction to both of all they could claim of the 6000 Merks: The Lords found that the Daughter had ſtill *Jus quæſitum* to an equal Share of the 6000 Merks, notwithſtanding the ſecond Bond of Proviſion, which ſhe might refuſe; but thought that her repudiating the ſame, would exclude her Claim of the additional 1000 Merks as a *Præcipuum*, *July* 9, 1712, *Grant* contra *Grant*.

A Woman in her Contract of Marriage having diſponed her whole Means and Eſtate *per Averſionem* to her Huſband and her in conjunct Fie and Liferent, with a Faculty to her, if the longeſt Liver, failing Children of the Marriage, to diſpoſe upon the equal Half thereof; and the Huſband having predeceaſed without Children procreated betwixt them: In a Purſuit for Liquidation of the ſaid Means at her Inſtance againſt her Huſband's Repreſentatives, in Order to ſettle her Liferent and Fie *reſpective*, the Defenders were allowed Deduction of the Half of the neceſſary Expences diſburſed by the Huſband for an Adjudication and Infeftment in the Purſuer's Name and his own upon a Bond due to her, and alſo the Half of the neceſſary Expences wared out by him in rouping her Pleniſhing; ſhe having an Intereſt in the Half of the above Subjects. And the Debts owing by the Purſuer the Time of the Marriage and paid by her Huſband, were allowed to be deduced off the whole Head of the Means ſhe brought to her Huſband, and the Defenders obliged to reſtore to her only the Half of the free Gear, *January* 28, 1713, *Linklatter* contra *Boſwells*.

The Creditor in a Bond granted by a Principal and Cautioner, allowed to purſue the Cautioner, without being obliged firſt to diſcuſs the Principal; albeit they were not bound conjunctly and ſeverally. In Reſpect the Cautioner was bound as full Debtor with and for the Principal, and the Principal was inſolvent, *June* 18, 1713, *Montgomery* contra Enſign *Brown*.

Clerks.

EAch principal Clerk of the Seſſion muſt have a Box ſet out with the Lords Boxes; and Parties muſt put their Bills and Anſwers, or Informations of Cauſes to be reported, in the Clerk of the Proceſs's Box, when they are put in the Lords Boxes. No Clerk dare move any Bill or Anſwer to the Lords, that was not orderly put in his Box; except Bills that paſs of Courſe, or relate to Acts or Decreets ready to be extracted, when there is no Time to get Copies for the Lords, which Bills may be moved only the next *Sederunt*, *Act of Sederunt*, *July* 1, 1709.

A Clerk of an inferiour Court having by Miſtake given out a Precept of Poinding againſt all the Debtors in a Summons upon which Decreet proceeded, albeit one of them was not decerned againſt; and having when he perceived his Error, refuſed to give out an Extract of any Decreet againſt the excepted Perſon to ſupport a Charge upon the Precept, which was ſuſpended as wanting a Warrant: The Lords found the Clerk liable to the Creditor in the Precept, for the Sum mentioned therein to be due to him by the Perſon omitted in the Decreet. In Reſpect that Perſon died in the mean Time, whereby the Creditor in the Precept had nothing but that (whereof the Warrant was refuſed) to inſtruct his Debt, *December* 30, 1709, Sir *John Johnſton* contra *Pedder*.

Clerks of the Seſſion muſt upon their Peril give up no Writs without Receipt, and get back thoſe ſo given up before the calling of the Proceſs, or adviſing any Point thereof;

and the Party detaining ſuch Writs to be fined *toties quoties* at the Arbitrement of the Lords in 15 Shillings *Sterling* at leaſt, *Act of Sederunt*, *November* 20, 1711, §. 7.

Cocket-dues.

A Liferent Right of the Office of Clerk of the Cockets belonging to one before the Union, not taken away thereby: But he was found to have Right to exact in Name of Cocket-dues ſince the Union, no more than was payable in *England* at the Commencement thereof, tho' higher Dues were formerly paid by the Law of *Scotland*, *December* 13, 1710, Provoſt *Cuningham* contra Skippers of *Irving* and *Saltcoats*.

College of Juſtice.

A Perſon found not to have forfeited his Privilege of a Member of the College of Juſtice, by retiring to and reſiding in the *Abbey*, to ſhun the Diligence of his Creditors, *January* 11, 1710, Sir *Philip Anſtruther* contra *Gordon*.

Commiſſaries. *See* Regiſtration.

THE Dues of a Commiſſariot Court being in Uſe to be uplifted by the Clerk for the Time; and the preſent Commiſſary having inſiſted in a Compt, Reckoning and Declarator againſt the Clerk for two Thirds of all the Profits and Caſualities of Court ſince the Date of his Commiſſion, conform to the 25th Article of the King's Inſtructions to the Commiſſaries: The Defender was found liable as to Bygones preceding the Date of the Decreet only conform to Uſe of Payment made to the Purſuer and his Predeceſſors in Office for the Space of 40 Years; but liable to hold Compt to the Purſuer in Time coming for two Thirds of the Profits and Caſualties as due to the Commiſſary by the King's Inſtructions, *December* 4, 1712, *Horſburgh* contra *Cranſtons*.

Commiſſion.

A Clerk's Extract of Depoſitions of Witneſſes ſuſtained as the Report of a Commiſſion ſent Abroad, being adminiculated by a Declaration of the Magiſtrates of the Place, and a collationed Copy ſigned by the Witneſſes themſelves, and two publick Notaries; Documents being produced for inſtructing that this is the Method of reporting Commiſſions ſent there, *March* 18, 1707, Sir *Alexander Cuming* contra Sir *Andrew Kennedy*.

Communion Elements.

THE yearly Modification for the Communion Elements, can't, when the Sacrament is not adminiſtred, be diverted to the Benefit of the Miniſter, but ought to be applied to the Poors Uſe, *July* 21, 1713, *Heretors of the Pariſh of* Abdie *contra* Corſan.

Compenſation. *See* Retention, *Jus Mariti*, Preſcription, Bills of Exchange.

A Decreet in Abſence againſt Debtors doth not exclude the Defence of Compenſation in the ſecond Inſtance: And Compenſation proponed by Way of Exception doth not preſcribe, *March* 20, 1707, *Corbet* of *Hardgray* contra *Hamilton* of *Wiſhaw*.

Compenſation ſuſtained againſt a Charger upon this Ground, That he, as repreſenting his Father, was Debtor to the Compenſater in a proportionable Relief of Debt payed upon Diſtreſs by him, for which the Father was bound conjunctly and ſeverally with the Compenſater: He the Compenſater proving by the Charger's Oath that he was Heir ſerved and retoured to his Father; albeit the compenſating Debt was not conſtituted againſt him by a Decreet anterior to the proponing of Compenſation, *July* 31, 1707, *Mcdowal* of *Logan* contra *Agnew* of *Seuchan*.

An Executor having eiked ſome Goods to the Teſtament after an other had confirmed the ſame as principal Executor in a ſecond Teſtament; and having purſued an Intrometter therewith for Payment of the Value, who obtained a Decreet of Abſolviture by Compenſation upon a Debt due to him by the Defunct; And the Party abſolved being reconvened upon the ſame Account at the Inſtance of the ſecond Executor, whoſe Confirmation had been found null for not calling the firſt Executor: He was aſſoilzied, albeit the Citation at the Inſtance of the Purſuer was anterior to the firſt Sentence of Abſolviture; and the firſt Teſtament did not bear that the Executor made Faith at the Confirmation; and the Purſuer offered to improve the Warrant thereof as falſe, *December* 10, 1707, *Lees* contra *Dunwoodie*.

A Note or Ticket found not compenſated againſt an Aſſigny by another Ticket granted by the Cedent the Day before, for the equivalent Sum to the Granter of the laſt Ticket: Becauſe the granting of the laſt Ticket ſeemed a Contrivance to furniſh Credit to the Receiver, *June* 11, 1708, *Bundie* contra *Kennedy* of *Culzean*.

Members of a Company decerned to relieve their Book and Caſh-keeper of certain Sums of Mony borrowed by him for their and the Company's Uſe, *ex eorum Mandato, ante redditas Rationes*, *January* 4, 1709, *Irving* contra *Corbets*.

A Tenant, who was Creditor to his Maſter, purſued by Aſſignies to the Tack, allowed Compenſation and Retention of his Tack-duties that fell due before Intimation of the Purſuer's Aſſignation, but not of any ſubſequent Rents, which were found to belong to the Purſuers, *February* 26, 1709, Lord *Bowhill* and Sir *James Naſmyth* contra *Jackſon*.

A Ground of Compenſation not ſuſtained to interrupt the Preſcription of a cautionary Obligement in the Terms of the Act of Parliament 1695 during the Competency of the ſaid Ground of Compenſation: Becauſe it was never applied to extinguiſh the Cautionry, and on the contrary was afterwards paid to the Cautioner, without Reſpect to the Debt undertaken by him, *February* 16, 1711, *Bourboun* and her Huſband againſt *Montgomery*.

Compenſation of a Bond of borrowed Mony, not ſuſtained to the Granters, upon a Debt due by the Creditor to their Pupil, which they had no Right to: Albeit they offer'd to prove by his Oath that they borrowed the Mony from him upon the Pupil's Account, and the Pupil now Major was content to apply her Debt to extinguiſh the Bond, *June* 27, 1711, *Eliot* contra *Eliots*.

Compenſation of a Debt due by one to his Tackſman upon *Species* or *Corpora* preſtable by the Creditor to the Debtor in Name of Tack-duty, which the former by a Clauſe in the Tack was allowed to retain in his Hand, in ſo far as would compenſate his Annualrents yearly and termly during the not Payment of the principal Sum, takes not Effect at the Terms they fell due by the Tack, but only from the Time of the Liquidation, *November* 23, 1711, *Murray* of *Burghtoun* contra *M'guffog* of *Ruſco*.

Compenſation not ſuſtained to one upon a Tack-duty payable to him as Factor for another, to extinguiſh a Debt owing by the Factor to the Tackſman, *December* 27, 1711, *Ferguſon* contra *Mure*.

An Heir purſued for his Predeceſſor's Debt, allowed to compenſate the ſame with a Debt owing by the Creditor to the Defunct: Tho' that being a moveable Debt belonged to his Executors, and not to the Heir who proponed Compenſation thereon, *February* 20, 1712, *Hay* contra *Crawford* of *Ardmillan*.

Competition. *See* Fraud, Diſpoſitions, Reduction, Precepts, Arreſtments, Appriſings, Children, Eſcheats, Sale, Execution, Cautionry, Retention, Aſſignations.

A Diſpoſition not prejudiced by a poſterior Diſpoſition in Favours of the Granter's apparent Heir as to his Intereſt, tho firſt perfected by Infeftment, *November* 21, 1705, *Gilleſpie* contra *Gilleſpie* and *Carſes*.

A ſingular Succeſſor deriving Right from a Daughter publickly infeſt as Heir to her Father, paſſing by her Brother who ſtood infeſt baſe upon a Diſpoſition from the ſame Father, preferred to one having Right from the Brother: In Reſpect the Brother's Seaſin was not clothed with Poſſeſſion, nor regiſtred, *November* 29, 1705, Creditors of *Paterſon* and *Anderſon* contra *Douglaſſes*.

A Diſpoſition by a Bankrupt to ſome of his Creditors found null *ab Initio* upon the Act of Parliament 1696, as to Preference thereby given for a publick Debt due by the Diſponer

poner as Collector of the Supply to the Commiſſaries of the Army; as well as to the other Debts therein contained: And not ſuſtained to hinder Repetition of the bygone Rents *percepti*, before the Sentence of Reduction, *February* 8, 1706, Competition betwixt *Hamilton* of *Wiſhaw*, and the Creditors of *Cleland*.

An heretable Bond of Relief providing expreſly, That the Infeftment to be expede thereon, ſhould not be redeemable, till the Cautioner therein were reimburſed, of all Charges and Damages in general; and particularly of the Expences of the ſaid Infeftment, and the Infeftment only granted expreſly for Relief of certain Debts therein enumerated, but referring to a Charter that repeted theſe Obligements; ſuſtained to afford Preference to the Creditor in a Ranking for the principal Sum, Annualrents and Expences, paid by him to any of thoſe to whom he was ingag'd for the common Debtor, to be ſtated as a principal Sum, at the Time of the Advance: But not for the Expences of expeding his Infeftment, and ſupporting his Right againſt competing Creditors, *July* 17, 1706, *Campbell* of *Calder*, againſt the Creditors of *Parkhay*.

Arreſtment upon an Admiral Precept, for Payment of Bills of Exchange, found preferable to a Precept upon the Perſon in whoſe Hands Arreſtment was us'd, ordering him to compt and pay to a Third Party, for a certain Number of Bolls of Meal received from the Drawer, and for ſo many Stones of Iron, at a certain Price *per* Stone: The ſaid Precept not being intimated before the Arreſtment, *July* 19, 1706, *Turnbul* contra *Anderſon*.

A Diſpoſition *omnium Bonorum* by a Wife to her Huſband, bearing for Love and Favour, and for onerous Cauſes, not ſuſtained to compete with an anterior Obligement, for an Annuity granted by the Diſponer to her Aunt, *July* 24, 1706, *Weems* and *White* contra *Murray*.

A blind Man aſſigned to his only Daughter Foris-familiate, and the Heirs of her Body, a Bond of 4000 *Merks*, granted to him by his only Son; with the Reſervation of his own Liferent, the Burden of 48 *l.* payable to his Wife during her Life in Caſe ſhe ſurvived him, Warrandice from Fact and Deed, and a Declaration, That the Fie of the Sum aſſigned, is by and attour what the Aſſigny got in her Contract of Marriage; and a Clauſe mentioning, That the Bond and Aſſignation were depoſited in the Hands of a Third Party, to remain there during the Cedent's Lifetime, or till he ſhould have Uſe for the Bond, for Security of his reſerved Liferent, to be delivered after his Deceaſe to the Aſſigny, to be diſpoſed of by her and her foreſaids at their Pleaſure; and that the ſame being then in the Cuſtody of the Depoſitary, ſhould be ſufficient as if it had been a delivered Evident in the Cedent's Lifetime: In Corroboration of which Aſſignation, the Debtor in the Bond ſubſcribed Conſenter thereto. This Aſſignation to the Daughter was found to be a delivered Evident, not revocable by the common Cedent's granting a poſterior Aſſignation to his own Grand-child the Debtor's Son, revoking the former. And the firſt Aſſignation was ſuſtained as to the Fie of the Sums aſſigned thereby, and the ſecond Aſſignation reduced, *June* 26, 1707, *Sinclair* contra *Purveſſes*.

An Adjudication againſt an apparent Heir for his own Debt, who had been Three Years in Poſſeſſion without Infeftment, not a ſufficient Ground of Preference in a Competition for Mails and Duties, with a Diſpoſition from a Perſon infeft as Heir to the remoter Predeceſſor laſt infeft: without Prejudice to the Adjudger to purſue the Heir, paſſing by the immediate Predeceſſor, as liable *Paſſive*, for his Debt, *July* 1, 1707, *Simſon* contra *Hamilton*.

A Diſpoſition and Infeftment of Relief to a Cautioner, affected with a Clauſe, That the granting thereof, ſhould be no ways prejudicial to any former Right made by the Granter to his lawful Creditors, of their juſt and true Debts owing by him to them: Found to operate in Favours of the Receiver, a Preference to the Granter's perſonal Creditors, who had not ſecured themſelves by anterior preferable Diligence. In Reſpect by another Clauſe in the ſaid Diſpoſition, it was provided, That the Receiver after his own Payment by Intromiſſion, ſhould be comptable for the *Superplus* Intromiſſions to the other Creditors, who could only be the perſonal Creditors; The real Creditors being ſafe by the other Clauſe, preferring them to the Receiver of the Diſpoſition himſelf, *July* 15, 1707, *Stuart* of *Blackhall* contra Adjudgers of *Corſhill*.

A Perſon having taken a Diſpoſition of Land to himſelf in Liferent, and to his eldeſt Son his Heirs and Aſſignies in Fie; which failing, to his 2d, his Heirs and Aſſignies, *&c.* Upon which all were infeft, by Symbols given to the Father for himſelf, and as acting for his two Sons, named in the Inſtrument of Seaſin; after the Death of the Father and eldeſt Son, the ſecond ſerved Heir in general to his Brother and then diſponed the Land to his eldeſt Siſter. In a Competition after his Deceaſe, betwixt her, and her ſecond Siſter's Son infeft as Heir in ſpecial to his eldeſt Uncle: The Lords found the eldeſt Brother Fiar, and the ſecond only Subſtitute, who, without being ſerved Heir in ſpecial, could not diſpone, and therefore the Diſpoſition granted by him, was *a non habente*; and found the ſecond Siſter's Son not obliged to ſerve Heir to him, who was but ſerv'd Heir in general to his eldeſt Brother, *February* 11, 1708, *Ker* contra *Howiſon* and *Lookup*.

One who had arreſted a Subject upon a Bond, wherein his Debtor and other Two ſtood ingag'd as Co-principals, preferred to others who had arreſted the ſame Subject; not obliged to aſſign his Bond to them, for recovering off the other Two Co-principals therein, the Superplus paid to him, out of the common Debtor's Effects, more than his Third Share; albeit Relief of two Thirds was competent to the common Debtor himſelf againſt theſe Co-principals: In Reſpect the Creditors poſtponed, had not affected the ſaid Relief by Diligence, 24 *February* 1708, *Kennedy* contra *Vans* and *Crawford*.

Two Seaſins regiſtred on the ſame Day, brought in *pari Paſſu*; notwithſtanding of a Declaration produced under the Clerk's Hand, That the one was preſented and regiſtred 2 Hours before the other: Which the Lords found not probative, no principal Minute of the Time of preſenting in the Terms of the Act of Parliament, being produced to inſtruct the Priority, *February* 28, 1708, *Lockhart* of *Clegborn* contra *Wardrop* of *Dalmarnock*.

In a Competition upon Two Diſpoſitions, granted by an apparent Heir of an heretable Bond, belonging to his Predeceſſor: The Lords preferred the Receiver of the firſt Diſpoſition, intimated to the Debtor in the Bond, before granting of the other; albeit the common Granter was ſerved Heir upon the Procuratory contained in the ſecond, in Order to compleat and validate that Right. For the Service was found to accrew to the firſt Right, which contained alſo a Procuratory and Warrandice from Fact and Deed, *Eodem Die*, *Aliſon* contra *Chalmers*.

In a Competition for Merchant Goods, belonging to the Competitor's common Debtor, one who had intimated an Aſſignation thereto, and arreſted the ſame in the Hands of him, to whom they were conſigned by Commiſſion, before Intimation of the other's Right, who had got the principal Commiſſion indorſed and delivered up to him, was preferred to that other, 2 *July* 1708, *Souper* contra *Piper* and *Miln*.

Infeftment upon a Diſpoſition of ſome Tenements within Burgh, granted by an apparent Heir, with a Procuratory to ſerve him Heir to his Predeceſſor, ſuſtained as a Ground of Preference againſt a Perſon, who had received the like Diſpoſition before, without ſuch a Procuratory, and had before the other's Infeftment, required the Bailly of the Burgh, to cognoſce his Author Heir to his Predeceſſor, and then to infeft himſelf, and proteſted and took Inſtruments upon his Refuſal, 16 *July* 1708, *Williamſon* contra *Thomſon*.

A Lady being provided to a Liferent Annuity out of an Eſtate, wherein the Diſponer ſtood obliged to infeft her *a me*, and *de me*, by her Contract of Marriage, containing a Precept of Seaſin, and the Seaſin taken in her Favours, referring only to a Charter in general; ſhe was preferred for the ſaid Annuity to the real Creditors upon the Eſtate; albeit ſhe produced no Charter *de me*, but only a Charter to be holden of the Superior, not confirmed before the Creditors Infeftments: In Reſpect it was then the Cuſtom to grant Charters both ways, and to take Infeftment upon both at the ſame Time; and 40 Years Poſſeſſion had followed upon her Seaſin, *July* 22, 1708, Creditors of *Riccartoun* contra the Lady.

An Arreſter having purſued a Forthcoming; and the Defender having, after an Act therein was extracted, called the Debtor's other Creditors in a Multiple-poinding: The Purſuer was refuſed Preference for his Expences of raiſing the Summons of Forthcoming, and extracting the Act; tho' he alledged that theſe Expences were profitable to the Party that ſhould be preferred, *Eodem Die*, *Rollmainers* contra Lady *Blantire* and others.

In a Competition of inhibiting Adjudgers, and ſimple Adjudgers for Debts, anterior to the Inhibitions, within Year and Day of one another, and Annualrenters, whoſe Rights were prior to the Adjudications, but poſterior to the Inhibitions: The Inhibiting Adjudgers can only draw ſuch a Share, as would have belonged to them, if there had been no Annualrent granted poſterior to their Inhibitions; and cannot have Right to the Remainder of the whole Sums in their Inhibitions, before the Annualrenters draw any Share, 20 *January* 1709, Creditors of *Langtoun* competing.

An Appriſing being diſponed to one who had a partial Right to the Reverſion, by a redeemable Infeftment from the common Debtor; and the Diſpoſition being recorded in the Regiſter of Seaſins and Reverſions: A ſubſequent Diſpoſition by the Appriſer, or his Heir, in Favours of a Third Perſon, found null as to all Effects, and not in ſo far allanerly, as might prejudice the Perſon to whom the Appriſing was firſt diſponed. But the Receiver of the ſaid firſt Diſpoſition, was found capable to diſpone the Appriſing effectually to the Receiver of the ſecond Diſpoſition, as a Security for the ſums truly paid, *February* 8, 1709, Colonel *Erskin* contra *Hamilton*.

Arreſter of a particular Share of the Capital Stock of the *African* Company, preferred to the Donatar of the Debtor's Eſcheat, whoſe Declarator was not executed againſt the Directors, till after the Arreſtment, *March* 27, 1707, *Henderſon* contra *Aliſon*.

Arreſter of another Share of the ſame Companie's Stock preferred to the Stock of the ſaid Share in a Competition with a Donatar, whoſe Gift was declared before the Arreſtment: But the Annualrents thereof conſtituted by Act of Parliament, in Lieu of the Profits, found to fall under Eſcheat, and to belong to the Donatar, *June* 7, 1709, *Wightman* contra Creditors of *Bonhard*.

A Perſon having mortified a Sum in his Teſtament, for maintaining ſome Burſars; and his Executerix having aſſigned and delivered ſo many of the particular Bonds, as anſwered the ſaid Sum, to one who granted her a Back-bond, narrating the Debts aſſigned and delivered, and that the Aſſignation was granted for Payment of the mortified Mony, and obliging himſelf to free and relieve her thereof, and to pay ſo much of it as he ſhould receive and uplift of the Subject aſſigned; and the Aſſigny having renewed the foreſaid Bonds in his own Name: In a Competition with his Creditors, who had arreſted the Debts aſſigned, and obtained a Decreet of Furthcoming againſt the Debtor upon his deponing (*iis deferentibus*) That he was Debtor to their Debtor only, by Reaſon of the Aſſignation he got to his Bonds from the Executrix; The Lords preferred the Patrons of the Mortification, 12, *July* 1710, Creditors of Sir *William Forbes* of *Monimusk*, contra the Maſters of the Queen's Colledge of *Aberdeen*.

An Aſſigny in Truſt to a Debt, having transferred the Right to the Cedent's Creditor, with his Conſent under Back-bond, to hold Compt to the Cedent for what he ſhould recover, who obtained Payment by Virtue of that Tranſaction: In a Competition with the Donatar of the Cedent's Eſcheat falling after the Tranſlation, the ſaid Creditor was allowed Retention of the Sums due to himſelf before the Rebellion, and preferred *pro tanto*. Albeit the Tranſlation was not intimated to the Rebel's Debtor, before the Decreet of general Declarator of the Eſcheat, 5, *December* 1712, *Smith* contra *Stirling*.

A Relict hath no Preference to her Husband's other Creditors, for the Proviſion in her Contract of Marriage, but according to the Priority of her *Diligence*, 19, *February* 1713, *Allan* contra Creditors of *Cleghorn*.

One who confirmed his Debtor's Houſhold Pleniſhing, as Executor Creditor to him, preferred to the Receiver of a general Diſpoſition thereof, with ſymbolical Poſſeſſion *retenta naturali Poſſeſſione* by the Diſponer all his Lifetime: Albeit the Receiver of the Diſpoſition attained the natural Poſſeſſion after the Diſponer's Death, before the Executor's Confirmation, *June* 19, 1711, *Liddel* contra *Davidſon*.

A Creditor infeft preferred to another, whoſe Infeftment was poſterior; Albeit the former was *correus debendi*, with the common Debtor in a perſonal Bond granted to the Latter for the Debt contained in his Infeftment. And a Creditor, whoſe Infeftment was regiſtred after the ſaid poſterior Infeftment, preferred to it: In Reſpect the other, who had the firſt and moſt preferable Infeftment, did by his holograph Letter declare the ſaid Creditor, whoſe Infeftment was laſt regiſtred, preferable thereon to himſelf, *June*, 28, 1711, Sir *William Baird* contra *Mortimer* and *Deuchar*.

The Act of Parliament preferring Creditors of a Defunct, doing Diligence within three Years after his Death, to the Creditors of his apparent Heir; not ſuſtained to found Preference to the former, againſt the Receiver of a Diſpoſition *omnium Bonorum*, from one ſerved Heir in general, and Executor confirmed to the Defunct: The Creditors of the Defunct having only inchoated Diligence by Arreſtment, which they were hindred to complete, by the Heir's dying within the three Years, *June* 17, 1712, *Ker* of *Chatto* contra Creditors of *Harden*.

Compt and Reckonings.

PRoceſſes of Compt and Reckoning, are to be inrolled in the Regulation Roll, *November* 22, 1711, Act of *Sederunt* §. 1.

The Ordinary before whom any ſuch Proceſs is called, or a Proceſs of another Kind, reſolves into Compt and Reckoning, aſſigns a Day to the Accomptant, if compearing, betwixt and which, he is to give in to the Clerk of the Proceſs a Charge againſt himſelf, of the whole Subject, who, if he neglect or refuſe to charge himſelf, ſhall be holden as confeſt, upon the Charge given in by the Purſuer, the Purſuer always giving his Oath of Calumny thereupon; And where any Part of the Charge given in by the Defender, is found to be *doloſe* omitted, or he being directly and principally liable to compt and the actual Intrometter conceals any Part, he ſhall be decerned in the Double of what is found to be ſo omitted: It being always free to the other Party to make up, and add to the Charge, as he ſhall ſee Cauſe. *Ibid.* §. 2. The Defender or Accomptant ſhall with his Charge againſt the Day appointed, give in a Copy of his Diſcharge, both ſigned by him, if preſent, or by his Procurator if abſent, with the Vouchers, and whole Inſtructions he is Maſter of, and condeſcending upon the Articles inſtructed, and their Vouchers; and alſo upon the Articles not inſtructed, that the ſame may be conſidered by the Auditor, in Order to aſſign a Term for inſtructing them, with Certification to the Defender, That he ſhall not thereafter be heard upon any new Article of Diſcharge, unleſs made appear to be recently come to his Knowledge, and that then, if *in Culpa*, he pay a Mulct to the other Party for his Expence of the Delay, to be modified by the Ordinary, as he ſhall ſee Cauſe: without Prejudice always to the other Party to object againſt the Diſcharge as accords. *Ibid.* §. 3. The Ordinary before whom the Proceſs is firſt called, or turn'd to a Compt and Reckoning, ſhall at the ſame Time that he aſſigns a Day to the Defender, or Accomptant, to produce as aforeſaid, Name the Lord who, in Courſe, is to be Auditor to the next Compt and Reckoning, to be Auditor thereof; and that the Dues formerly given in with the Bill in Preſence craving an Ordinary, be paid to the Clerks Collector, and marked on the Proceſs. *Ibid.* §. 4. After the Charge and Diſcharge are produced, the Ordinary is authorized to appoint one or mo Advocates, not imployed in the Cauſe, or other proper Perſons, Men of Integrity, Judgment, and Experience, to conſider the whole Accompts, with the Writs and Inſtructions produced, and thereupon to ſtate the Points in Controverſy, and to prepare and adjuſt the Minutes for the Ordinary, to give his Interlocutor upon the whole; and that with Reſpect to ſuch Proceſſes raiſed, or to be raiſed. Theſe are required to be diligent and exact in their Work; and are authorized to appoint Days to the Parties and their Lawyers, with the Clerk of the Proceſs, to come and point out to them their ſeveral Alledgeances; They are to mark the State when ſo prepared, and date their marking; and immediately thereafter, it is to be lodged and to ly in the Clerk's Hands eight Days, to be ſeen by all concerned, without Fee or Reward. After which Time, no Objection ſhall be received againſt the Fact ſo ſtated, but upon Payment of 20 *ſh. Sterling* to the other Party delayed thereby; with Power to the Ordinary to increaſe the Mulct according to Circumſtances. If any new Point occur, the Ordinary may diſcuſs, or remit the ſame to be conſidered, and reported by the ſaid Advocates, or others as above: Who ſhall have ſuch Allowances from both, or either of the Parties for their Pains and Attendance, as the Lord Ordinary ſhall modifie and ordain. *Ibid.* §. 5.

Condictio ob Cauſam non ſecutam. See conditional Obligements.

A Bond bearing borrowed Mony, and renouncing all Exceptions in the Contrary ſuſtained, albeit it was granted for the Cure of a Diſeaſe, and the Debtor offered to prove, That the ſame was not effectually cured, but broke out after granting of the Bond worſe than ever, thro' the Creditor (who was a Debtor) his Negligence, in overſeeing the Medicaments diſpenſed, and his miſapplying them, *December* 24, 1708, Doctor *Trotter* contra *Telfer*.

A Bond granted by a Husband to his Lady, in Reſpect of her diſponing to their Son, the Fie of her Heretage, found null *Cauſa data non ſecuta*: Becauſe the Diſpoſition never being delivered, nor judicially ratified, appear'd cancell'd in her Cuſtody after her Husband's Deceaſe, and ſhe was preſum'd to have cancell'd it; albeit ſhe offered to renew the Diſpoſition, which her Son declined to accept of, *July* 19, 1711, Lady *Greenock* contra Sir *John Schaw* of *Greenock* her Son.

A Bond narrating, That three Perſons therein named had, at the Granter's Deſire, accepted the Overſight of his Interment, and Curatory of his Children, which would require Trouble and Expence; and therefore obliging him to pay 600 *Merks* equally among them, betwixt and the next Term thereafter: Found effectual in Favours of one of theſe Overſeers, who dyed a little after he had been at the Interment of the Granter of the Bond, the Term of Payment being elapſed; albeit he had not lived to be at Trouble, or Expence in overſeeing the Children, *July* 24, 1707, *Rule* contra Children of *Reid*.

Condictio ob Turpem Cauſam. See Adultery.

A Cautioner's taking Bond from the Principal Debtor for a Sum of Mony, as a Reward for becoming Cautioner for him, found to be *contra bonos Mores*, and the Bond annulled, *January* 24, 1711, *King* contra *Ker*.

Condictio ſine Cauſa. See Offices.

Conditional Obligements.

A Writ narrating a Recommendation from the Privy Council to Her Majeſty, for procuring a Paſs, to retire the Granter's Effects from *France*, and obliging him upon the ſafe Arrival of his Ship, the Royal *Ann* at *Leith*, to deliver to the Clerk of Privy Council, a Hogſhead of the beſt Wine, (as Payment of his Dues, for extracting the Act of Recommendation) was found to entitle the Clerk to ſo much Wine brought Home in another Ship, altho' the Recommendation took never Effect, *July* 27, 1705, Lord *Minto* contra *Gordon*.

Confirmation. *See* Executors, Eſcheat, Teſtaments, Commiſſaries, Licence to purſue, *African* Mony.

A Perſon aſſoilzied in a Proceſs at the Inſtance of an Executor dative, from Reſtitution of Goods belonging to the *Defunct*, and eiked to the confirmed Teſtament; being afterwards purſued upon the ſame Head by a principal Executor *qua* Creditor, who had confirmed after the Executor dative: The Purſuer's Confirmation was found null, for not calling the firſt Executor dative; and not allowed to ſubſiſt as a Dative *ad omiſſa*. Albeit his Edict was taken out and executed before the firſt Executor's Confirmation; and his Confirmation expede before the Goods acclaimed were eiked to the firſt Teſtament, *July* 18, 1706, *Lees* contra *Dunwoodie*.

A confirmed Teſtament wherein the neareſt of Kin, who were Pupils, were ſurrogated to the Procurator-fiſcal, without being authorized by Tutors for that Effect, not found null as if contrary to the Act 26. Parl. 1690, *July* 23, 1707, *Aliſon* contra the Children of *Pitcullo*.

The Teſtament of a Soldier dying without any fixed Habitation in *Glaſgow*, where the Regiment he belonged to lay at the Time, and had reſided 60 Days before his Death, ought to be confirmed by the Commiſſaries of *Edinburgh*, *tanquam commune Forum*: Unleſs the Defunct had reſided at *Glaſgow* 40 Days immediately preceeding his Deceaſe, *February* 16, 1711, *Niſbet* and *Bell* contra *Monro*.

One having died in the Expedition to *Darien*, before he went out of the *Scottiſh* Seas, the Confirmation of his Teſtament in the Commiſſariot of *Glaſgow* by an Executor Creditor, was preferred to another's Confirmation before the Commiſſaries of *Edinburgh*: In Reſpect the Defunct had left his Wife and Family in *Glaſgow* where ſhe lived, proſecuting his former Trade of a Merchant till ſhe got Notice of his Death, *February* 22, 1711, *Henry* contra *Glaſſels* and his Factor.

One who had uplifted a Sum aſſigned to him by his Debtor deceaſed, allowed, after the Aſſignation was reduced, to fortifie his Right by confirming the Mony as Executor Creditor to the Defunct, *December* 22, 1709, *Henry* contra *Glaſſels* and *Coning*.

A Woman who intrometted with the Goods of her deceaſed Huſband, by Virtue of ſingular but inſufficient Titles, and was found liable *in Valorem* in a Proceſs againſt her as vitious Intrometter at the Inſtance of the Defunct's Creditor; not allowed to affect the Subject of her Intromiſſion *pendente Lite*, by Confirmation, in Prejudice of the Purſuer, *July* 23, 1713, *Black* contra *Lindſay*.

Confuſion. *See* vitious Intromiſſion,

Conjunct Perſons. *See* Fraud, Bankrupts, Reduction.

UNcle and Nephew by Affinity not reckoned conjunct Perſons in the Senſe of the Act of Parliament 1621 concerning Bankrupts, *February* 8, 1712, Lord *Elibank* contra *Adamſon* and her Huſband.

Conqueſt.

A Wife by Contract of Marriage diſponed her Land to her Huſband and her in Liferent, and to the Heirs of the Marriage, which failing, to her own Heirs and Aſſignies whatſoever; and it was agreed that the Conqueſt of the Marriage ſhould go to the longeſt Liver and the Heirs betwixt them, and failing theſe ſhould be equally divided betwixt both their Heirs and Aſſignies whatſoever. The Wife having thereafter *ſtante Matrimonio* diſponed her Land for onerous Cauſes to the Huſband, his Heirs and Aſſignies whatſoever, failing Heirs of the Marriage, reſerving her own Liferent, whereupon he was infeſt: It was found that the Diſpoſition was a Right of Conqueſt to the Huſband; and that the Fie of the one Half of the Lands diſponed fell to the Wife's Heirs, *December* 12, 1707, *Fergus* contra *Birrel*.

Conſervator of the *Scots* Privileges in *Holland*. *See* Indemnity, and Offices.

TAking Poſſeſſion upon the Queen's Gift of Conſervatorſhip, after intenting Reduction thereof by the former Conſervator, and a Declarator of his Right and Poſſeſſion, unwarrantable, *January* 3, 1706, Sir *Andrew Kennedy* contra Sir *Alexander Cuming*.

The Conſervator deprivable of his Office, for taking his Dues for Staple Goods coming directly from *Ireland* to the Staple Port at *Campvere*: Notwithſtanding that former Conſervators had been guilty of the like Practice, and that the Royal Burrows upon a Complaint concerning a Factor's covering Staple Goods belonging to Strangers as *Scots* Goods, did not expreſly diſcharge the Conſervator from taking his Dues for ſuch Goods, *January* 16, 1708, Sir *Alexander Cuming* contra Sir *Andrew Kennedy*. And his Office of Reſident found to fall with that of Conſervator, *January* 29, 1708, *inter Eoſdem*.

Conſtabulary. *See* Juriſdiction.

Contracts of Marriage. *See* Clauſes, Bankrupts, Reduction.

THE Heir of a Huſband being purſued for his Wife's Jointure-annuities upon a Contract of Marriage perfected in *Holland*, with Conſent of the Bride's Father and Mother, but ſigned only by the Bridegroom, Bride and her Mother, and not by her Father, tho' he was preſent, bearing, That the Bride brings with her, and the Parents give with her Obligations amounting to 18600 Gilders, with this Condition, That if the Bridegroom die firſt, leaving Children of the Marriage, the Bride ſhall during her Lifetime enjoy a certain yearly Annuity out of his readieſt Effects lying in *Scotland*; all which the Parties Contracters promiſe to perform to each other upon Faith and Honour, and further under Obligation, Submiſſion and Renunciation according to Juſtice: The Purſuer for theſe Jointure-annuities was found under no Obligation to pay the Tocher; in Regard the Bride's Father did not ſign the Contract, and there was no ſeparate Bond for it. But it was found that, albeit his not ſigning did not annul the Contract, yet the Jointure could not be required without paying the Tocher, except in ſo far as it exceeds the Tocher, *February* 3, 1710, Laird and Lady *Airth* contra *Hamilton* of *Grange*.

Correi debendi. *See* Cautionry, Clauſes.

ONE of two *correi debendi* for the Price of a Wood ſold to them *pro indiviſo*, liable *in ſolidum*, tho' not bound conjunctly and ſeverally, *December* 16, 1710, *Muſhet* of *Calziebat* contra *Harvey* of *Blackhouſe*.

One of ſeveral *correi debendi* bound conjunctly and ſeverally (whereof ſome were inſolvent) having paid the Debt upon the Creditor's Diſcharge without getting an Aſſignation, entitled to Repetition from the reſt of the ſolvent Co-obligants, only *pro rata* of what he paid more than his own Share; and for their Proportions of thoſe who were inſolvent at the Time of the Payment, *December* 21, 1710, Sir *William Craigie* of *Gairſey* contra Heretors of *Orkney*.

Corroborative Security. *See* Bonds, Innovation.

AN Aſſignation taken by a Creditor from his Debtor, to Mails and Duties, not expreſly in Satisfaction, and intimated to the Tenants, found to be only a corroborative Security, and not to oblige the Aſſigny to compt for theſe Rents, unleſs he had debarred the Cedent or his Creditors from uplifting, *June* 27, 1706, *M'micken* contra *Kennedy* of *Glenour*.

Courts inferiour. *See* Diſpenſations.

Courteſie.

COurteſie extends not to Lands the Wife acquired by ſingular Titles, but only to ſuch ſhe had Right to by Succeſſion, *June* 22, 1709, *Lawſon* contra *Gilmoir*.

Crafts.

CHirurgion Apothecaries in a Burgh, under no Deaconry, who accepted Burgeſs-tickets *in ſua Arte*, reſtrained by the Magiſtrates from exerciſing Merchandiſe there; notwithſtanding they be willing to enter Gild-brethren, and pay the ordinary Dues for their Admiſſion, *December* 20, 1711, *The Dean of Gild and Magiſtrates of* Aberdeen *contra* Gordon *and* Burnet.

Curators. *See* Tutors and Curators.

Cuſtoms. *See* Diſpenſations, Arreſtments, Reſignation, Inhibitions, Sale.

Cuſtoms petty. *See* Ale and Beer.

D.

Damages.

A Perſon charged upon his Obligement to deliver to the Charger an Adjudication upon a third Party's Eſtate againſt a preciſe Day, under a Penalty by and attour Performance, having made diligent Search for the Adjudication in Order to Delivery, and not being able to find it, found liable only for Damage and Intereſt to the Charger, in ſo far as his Right to the Sums in the Adjudication might have been made effectual againſt the adjudged Eſtate, had the Adjudication been delivered in due Time, *June* 20, 1710, Sir *George Hamilton* contra Laird and Lady *Airth*.

Action not competent againſt an Heir for Damages ſuſtained by the Predeceſſor's Relict, thro' the Want of her Jointure-houſe all the Years of her Widowhood, occaſioned by the not Performance of her Huſband's Obligement in her Contract of Marriage to build and repair the Houſe for her Accommodation: Unleſs the Heir had been required to build and repair in her Lifetime. And tho' Requiſition was then made, Action was ſuſtained for Damages only from the Date thereof, *November* 18, 1712, *Nairn* contra *Barclays*.

Death-bed. *See* Preſcription.

AN Heir's Acceptance and Poſſeſſion of an Eſtate by Virtue of a *Diſpoſition* with the Burden of Proviſions made and to be made in Favours of the younger Children, without the Words *Etiam in Articulo Mortis*, ſuſtained to exclude him from founding on the Reaſon of Death-bed againſt a Bond of Proviſion to one of theſe Children, *February* 8, 1706, *Bertram* of *Niſbet* contra *Weir* of *Stonebyres*.

A Bond of Proviſion granted to a Child by her Father on Death-bed, who by his Contract of Marriage with her Mother was bound to provide the Bairns of the Marriage to the Fie of a certain Sum, ſuſtained, as being in Effect but a Diviſion thereof, and Implement of the Contract, *July* 19, 1706, *Edmonſton* and her Huſband contra *Edmondſton*.

A Perſon's Moveables, notwithſtanding of gratuitous Rights thereof made on Death-bed, found liable both to the Payment of a Debt due by him to his Heir, and for the Heir's Relief of the Defunct's other moveable Debts, and the foreſaid Rights found reducible *ex Capite Lecti*, in ſo far as prejudicial to the Heir *qua talis*, or as a Creditor, *July* 22, 1707, *Cowie* and *Hardie* contra *Brown* of *Seabegs* and others.

A Tailzie made *in Liege Pouſtie* with a reſerved Power and Faculty to the Granter to alter, at any Time in his Life, found revocable and revoked on Death-bed by his Holograph Declaration thereon indorſed, bearing an Exception of the reſerved Faculty, and that it ſhould ſubſiſt for validating a ſecond Tailzie made by him *in Lecto Ægritudinis*: But the ſaid Quality in the Revocation not relevant to ſuſtain the firſt Tailzie for ſupporting the ſecond againſt the Reaſon of Death-bed, *February* 25, 1707, *January* 23, 1708, *Livingtoun* contra *Menzies* and *Livingtoun*.

The Reaſon of Death-bed not ſuſtained againſt an heretable Bond of Corroboration of a moveable Bond granted *in Liege Pouſtie*: The former being a ſufficient onerous Cauſe of the latter, *January* 18, 1709, *Darling* contra *Hay*.

A Bond heretable *quoad Creditorem* by a Clauſe ſecluding Executors, extinguiſhed by his holograph Receipts wanting Witneſſes: Albeit theſe Receipts not proving their Date, were preſumed to have been granted on Death-bed, *February* 5, 1712, *Eliſes* contra *Watſon* of *Saughtoun*.

Debitor non præſumitur donare. *See* Preſumptions.

Declaration of an Agreement.

AN Heretor's Factor having, by a Writ under his Hand, declared that a Perſon had agreed with him for the Purchaſe of Lands belonging to his Conſtituent, and was to pay ſuch a Price at the Terms therein-mentioned, and to give Security for the ſame to the Heretor who was to diſpone with abſolute Warrandice; and having afterward acquainted the Purchaſer by a Letter, That the Heretor acquieſced, and would not reſile from their Agreement, and therefore deſired the Purchaſer to haſten into *Edinburgh* to perfect the ſame; and the Heretor notwithſtanding, having ſold the Lands to another: The Writer of the foreſaid Declaration was found liable to make up the Damage ſuſtain'd by the firſt Purchaſer, through his not getting the Bargain perfected, *June* 25, 1708, *Bell* contra *Dunlop*.

Decreets. *See* Proteſtations, Arreſtments.

THE Charger on a Decreet reduced upon Nullities allowed to inſiſt *tanquam in Libello* for his Claim in the ſame Proceſs, *June* 27, 1705, *Stuart* contra *Baillie* and *Robertſon*.

A Decreet's being marked in the *Reſponde*-book as extracted, and an Atteſtation from the Keeper of the Minute-book that the Dues of Extracting were paid, not ſuſtained as ſufficient Proof that there was ſuch a Decreet extracted, ſince it was not to be found in the Regiſter, *July* 3, 1705, *Dickſon* contra *Miln*.

A Baron Baillie having arreſted an *Engliſhman* according to the Border Law, till another became Cautioner for him *Judicio ſiſti & judicatum ſolvi*, gave Decreet againſt them conjunctly and ſeverally, which was ſuſtained, *July* 20, 1705, *Pots* and *Hunter* contra *Mitchelſon* and *Robſon*.

A Decreet againſt a Minor and his Curators not cited with him *in Initio Litis* upon two Diets, but only cited *cum Proceſſu* by Virtue of an Incident to compear upon two Days Warning, turn'd into a Libel, *December* 28, 1705, Captain *Gavin* contra Sir *Robert Montgomery* of *Skelmorly*.

A Commiſſary's Decreet *Cognitionis Cauſa* upon the Extract of an apparent Heir's Renunciation produced by a Procurator compearing for him ſuſtained; altho it did not bear expreſly the apparent Heir to have been cited in the Proceſs, *February* 14, 1706, *Ker* of *Moriſtoun* contra *Calderwood* and *Elderſhaw*.

A Charge againſt the Cautioner of a Caſh-keeper upon a Decreet againſt the Repreſentatives of the Principal, for a certain Ballance due by him to his Conſtituents, turn'd into a Libel; and the Charger ordained to proceed againſt the Cautioner as if he were but newly cited. In Reſpect he the Cautioner was not called in the Proceſs againſt the Caſh-keeper's Repreſentatives, *July* 18, 1706, *Fleming* of *Farm* and *Hamilton* contra *Calder* of *Muirtoun*. And the Decreet was found not to be *Res judicata* either as to Relevancy or Probation, in ſo far as concerns the Cautioner; but any Thing done therein was conſidered only as Practique or Interlocutors which the Obtainer might found on and repeat againſt the Cautioner, without Prejudice to object both againſt the Relevancy and Import of the Probation, *December* 28, 1709, *inter eoſdem*.

A Decreet not reducible upon this Ground of Nullity, That the Preſident for the Time had delayed to give his caſting Vote till ſome Days thereafter, and then when another preſided, ſigned the Interloquitor *in Præſentia* of the Date when it was voted; and yet the ſamen was put up in the Minute-book of the Date when it was ſigned: In Regard the Lords afterwards allowed it to be put up *de novo* of that preſent Day's Date, *July* 5, 1707, *Turner* contra *Roſs* of *Tilliſnaught*.

An Admiral's Decreet in Abſence, for not finding Caution *Judicio ſiſti & judicatum ſolvi* found null, and turned into a Libel upon this Ground, That the Decerniture or Warrant thereof, was not ſigned by the Judge: Notwithſtanding that by Cuſtom of the Court, the Judge had not for a long Time ſigned any ſuch Decernitures, *July* 15, 1708, *Houſtoun* contra Lord *Roſs*. And the Purſuer inſiſting before the Lords *tanquam in Libello*, againſt the Repreſentative of the former Defender upon the Paſſive Titles, was not found obliged to find Caution *in Initio Litis*, as is done before the Admirality, *February* 14, 1710, *inter eoſdem*.

A ſecond Extract of a Decreet found Null, albeit conform to the Minutes: In Reſpect a firſt Extract in other Terms had been judicially produced, and the ſecond was amended without Application to the Lords for that Effect, *February* 15, 1709, *Forreſt* contra *Craig*.

An Advocate's compearing for a Party, and making no Defence, but declaring that he had nothing to object againſt the Debt therein claimed, doth not make a Decreet *in Foro*, *December* 14, 1711, Repreſentatives of *Smith* contra *Semple* of *Fulwood*.

A Party reponed againſt a Decreet of the Juſtices of Peace, pronounced in a Compt and Reckoning in the Vacation Time, without a Diſpenſation, and decerning him to pay 8 *l. Sterling* to the Purſuer, as his Share of 100 *l.* due to the Partners of a Manufactory; albeit the Defender had compeared, proponed Payment, and ſuffered the Term to be circumduced againſt him for not proving, and not deponing upon the Verity of the Libel referred to his Oath, *July* 2*d*, 1712, Lord *Pitmedden* contra *Douglaſs*.

A Decreet *in Foro*, holding a Defender as confeſt upon the Verity of a Debt referred to his Oath, not annulled upon this Reaſon, That the Decreet proceeded upon a Licence to purſue, and doth not mention that the Debt was confirmed before Sentence; in Reſpect it was ſo duly confirmed; nor yet annulled for being obtained at the Inſtance of Tutors nominated acting for their Pupil without producing the Nomination; in reſpect the purſuit was founded on a Decreet dative decerning them Executors for their Pupil, and a Licence to them to purſue procured before the Commiſſaries, upon Production of the Nomination, *January* 20, 1713, *Johnſtoun contra Houſtoun*.

Defences.

All *Dilatory* Defences to be proponed at one Time, & theſe being diſcuſs'd, all peremptory Defences or other Alledgeances to be proponed at leaſt before any Report, or Application to the Lords in Preſence; with Certification that any Alledgeance not proponed timouſly as ſaid is, ſhall not be heard, unleſs it be inſtructed by Oath to be come recently to Knowledge, or to the Proponer's Obſervation; and that he pay a Mulct to the other Party for his Expences, to be modified as there ſhall be Cauſe. Where an Alledgeance proponed, is to be inſtructed *Scripto*, and either Party is Maſter of the Writ to be us'd *in Modum Probationis*, and doth not produce it inſtantly, but occaſion the aſſigning of Terms, or granting Diligence for Recovery thereof, he ſhall pay ſuch a Mulct, as the Ordinary before whom in the Courſe of the Proceſs, the ſame is made appear, ſhall modifie, or as the whole Lords ſhall modifie in Preſence, when the Cauſe happens in the Inner-houſe, not under 40 *Shillings Sterling* for the Uſe of the other Party, Act of *Sederunt*, *November* 20, 1711, §. 16, 17.

Delegation. *See* Improbation, Retention.

Delivery of Writs. *See* Diſcharges, Competition.

A *Bill* with a *Receipt* of the Contents, written and ſubſcribed by the Creditor therein, found among his Papers after his *Death*; not ſufficient to exoner the *Debtor*. In *Reſpect* Law preſumed, That the *Receipt* was written *Spe numerandæ Pecuniæ*; and that Payment was never made, ſeing the Bill with the Receipt, was undelivered, *July* 16, 1709, *Cochran* contra *Pringle*.

An Aſſignation by a Father to his Son forisfamiliate, ſuſtained as valid; tho' never delivered in the Cedent's Lifetime, *December* 16, 1712, *Monro* contra Major *Monro*.

Denunciation. *See* Eſcheat, Horning.

NO Annualrent due upon a general Denunciation at the Market-croſs of *Edinburgh*, where the Party denounced liv'd in another Shire, *July* 17, 1711, *Gordon* of *Daach* contra *Gordon*.

Denunciation upon a Horning ſuſtained: Albeit it did not bear, That a Copy was affix'd and left upon the Market-croſs, *November* 30, 1711, Lady *Semple* contra Lord *Semple*.

Depending Action. *See* Arreſtments.

A Libelled and ſigneted Summons, makes not a depending Action, before it be executed, *July* 23, 1706, Competition betwixt Sir *James Elphinſton*, and the other Creditors of *Strichan*.

Depoſitum. *See* Exhibition.

THE Maſters of two Veſſels, ſent with Salt and other fiſhing Materials to the *Lewes*, not finding a good Market at the Time, depoſited their Loading with an Inhabitant of the Place, upon his granting two Receipts: In one of which, *he obliged himſelf to preſerve and reſtore the Goods to the Owners*, (*incident Hazards excepted*) *or to deliver to them, or their Order, the equivalent Goods at* Leith; and by the other, *obliged himſelf to keep the Goods as he would do his own, to be diſpoſed of by their Order*. And the Owners failing to call for them the next fiſhing Seaſon; the Depoſitary imployed the Salt in curing Herrings. The Owners having afterwards required *Redelivery*, and purſued him either to reſtore in the Terms of his Obligement, or to pay the current Prices at the Time of the *Requiſition*, when by *Reaſon* of the Union, the Value of Salt was raiſed to a great Height; The Lords found, That by the firſt Obligement, the *Defender* was bound to make the like Quantity and Quality of Salt furthcoming to the Purſuer, at the *Time* of the *Requiſition*, or the Queen's Price, conform to the Act of Parliament 1709: And found that the Salt being depoſited by the ſecond Obligement, the Defender's unwarrantable Intromiſſion therewith, was relevant to make him liable for the ſaid Price, *January* 19, 1711, *Watſon* of *Muirhouſe* contra *Mackenzie* of *Applecroſs*.

Deſignation. *See* Spuilzie, Writs.

A Bond being thus docked. *I have ſubſcribed theſe Preſents, written by* G. H. *at* Auchterhouſe, *before theſe Witneſſes*, A. N. *Hammerman there*, P. H. *eldeſt lawful Son to the ſaid* G. H. *and the ſaid* G. H. The Writer and Witneſſes were found ſufficiently deſigned, *February* 19, 1706, *Duncan* contra *Scrimzeour* of *Kirktoun*.

The Writer of a *Bond* ſufficiently deſigned by the general Deſignation of Notary, *June* 27, 1706, *M'micken* contra *Kennedy* of *Glenour*.

Dignity. *Vid.* Precedency, Preſcription.

THE Deſcent of *Dignity* by Propinquity of Blood, from *William* Earl of *Sutherland*, who married K. *David* the *Bruce*'s Siſter, to Earl *John*, who ſucceeded in the Year 1512, found ſufficiently inſtructed: But not that the *Dignity* was conveyed from him with the Eſtate to his Siſter *Eliſabeth*, *January* 25, 1706, E. of *Sutherland* contra *Earl* of *Crawford*.

Diſcharges.

Diſcharges. *See* Fraud.

DIſcharge of a particular Sum, with a general Clauſe in full of all Demands, found to extend to a greater Sum than that particularly mentioned, *June* 29, 1705, *Chappel* contra *Guydet*.

A Diſcharge granted by a Son to his Father, of all Actions, Cauſes of Action, Suits, Bills, Bonds, Judgments, Challenges, and Demands whatſoever, not extended to a Sum before aſſigned by the Father to him. Nor yet was a ſubſequent Diſcharge granted by the Aſſigny to his Father's Heir upon a Decreet Arbitral, determining all depending Proceſſes and Differences betwixt them, wherein he diſcharged all Clags and Claims he had againſt the Heir, for himſelf, and as repreſenting his Father, ſuſtained to exclude the Aſſigny from repeting the Sum aſſigned from the Heir who uplifted the ſame after the ſaid Diſcharge: In Reſpect the Aſſigny had no Claim againſt the Heir for that Mony, till it was uplifted by him, *December* 16, 1712, *Monro* contra Major *Monro*.

One who had ſerved ſeveral Years for a Shire, as their Commiſſioner to the Parliament, having write to one of the Heretors thus, *I confeſs, Sir, I had never Occaſion to do you any Act of Kindneſs; but I hope, I have ſerved the Shire faithfully, and burdened them with no Expences; and I do fully diſcharge you of any Expences, upon the Account of my repreſenting the Shire:* The Letter was found to import a full Diſcharge and Exoneration to the whole Heretors of the Shire, as well as him the Letter was directed to, of all Commiſſion Fees preceding the Date of the Letter, *June* 18, 1713, Sir *Thomas Burnet* contra Heretors of the Shire of *Kincardin*.

A Woman having made a Diſpoſition *omnium Bonorum* to her Husband, and at her Death, left her wearing Clothes to her Aunt, to whom ſhe before her Marriage had granted an Obligement for an Annuity: The Creditor in the Annuity obtained a Decreet againſt the Husband for the Value of the Clothes, and granted a Diſcharge to him, narrating the Decreet, and containing a general Clauſe of all ſhe could ask or crave from him. The Diſcharge was found to concern that Decreet only, and not to cut off the Granter from her Claim of Annuity, *July* 24, 1706, *Weems* and *White* contra *Murray*.

Diſpenſations.

A Decreet of the Commiſſaries of *Edinburgh*, pronounced 21 *March*, by Virtue of a Diſpenſation from the Lords ſuſtained; notwithſtanding the Act of *Sederunt*, *July* 21, 1696, diſcharging the Clerks of the Bills to write upon any Bills for Diſpenſation to inferior Courts, beyond the 20 *March*: In Reſpect of the Diſpenſation produced, and it had been the Cuſtom of the Commiſſaries ever ſince the ſaid Act, to ſit and judge till the 22 *March*. But the Clerks of the Bills were deſired to beware of ſuch a Practice in Time coming, *January* 9, 1711, *Ruſſel* of *Braidſhaw* contra *Miller*.

A Decreet of an inferior Court annulled, for being pronounced on the 20 *March*, without a Diſpenſation, *July* 23, 1713, *Honyman* contra *Oliphant* and her Husband.

Diſpoſition. *See* Competition.

A Relict having, in Implement of her Contract of Marriage, a Diſpoſition from her Huſband, to his Goods and Gear, Merchant Ware in his Shop and Cellars, Houſhold-pleniſhing, Gold, Silver, Compt-books, Tickets; and a ſecond Diſpoſition (narrating the former, and a Faculty therein to alter) of the Liferent of all free Goods and Gear, Debts, and Sums of Mony heretable and moveable belonging to the Huſband at his Deceaſe, with the Burden of Entertaining his Grand-child, with whom ſhe was equally to ſhare the Fie of all, and to whom ſhe and other Two were named Tutors: The Goods in the Houſe, Ware-houſe and Cellars, were ordained to be inventored and valued, without Neceſſity to inventory the Compt-book, or the Writs concerning the Heretage. But in Reſpect of the foreſaid Diſpoſitions, the Relict was allowed to poſſeſs without finding Caution, *July* 8, 1707, *Dobie* contra *Oliphant* and her Huſband.

A Clauſe in a Contract of Marriage, obliging a Perſon to reſign his Eſtate in Favours of himſelf, and the Heir Male of the Marriage, with Inhibition uſed thereon by the Friends, at whoſe Inſtance Execution was appointed to paſs, found to diſable that Perſon to diſpone gratuitouſly in Prejudice of the Heir Male of the Marriage, *July* 16, 1708, Sir *Robert Hume* contra Sir *Patrick Hume*.

A naked Diſpoſition of Land, containing a Procuratory of Reſignation, Precept of Seaſin, and Aſſignation to all Writs in the Granter's Perſon, by one who had only a perſonal Right by Diſpoſition, not clothed with Infeftment, fully denudes the Diſponer, without Neceſſity of Intimation; ſo as the Subject could not be thereafter adjudged from him: And the Receiver of the Diſpoſition preferred to the Adjudger, albeit the former took Infeftment upon the Procuratory and Precept in the Diſpoſition granted to him; and the Adjudger was infeſt upon the Procuratory and Precept in the Diſpoſition, granted in Favours of their common Author by the Perſon laſt infeſt, *December* 8, 1710, *Rule* contra *Purdie*.

Donations. *See* Preſumptions, Marriage.

A Debtor's Aſſignation of her wearing Clothes to her Creditor the Cedent's Aunt, who had attended her the Time of her Sickneſs, and at the bearing of her Children, not conſidered as Payment or Satisfaction, but as a meer Donative, *July* 24, 1706, *Weems* and *White* contra *Murray*.

A Perſon having, after his granting a Bond of Proviſion of 4200 *Merks Scots* to his Children of a ſecond Marriage procreated, or to be procreated, granted an heretable Bond to each of two of his three Children of that Marriage, and afterwards granted Bond for, and paid 500 *Merks* to one of theſe two: The Lords in a Proceſs at the Inſtance of the Third Child, againſt the Repreſentative of the Father found, That the 500 *Merks* was not to be imputed in Payment of any Part of the 4200 *Merks* contained in the Bond of Proviſion. Becauſe the 500 *Merks* Bond bore to be granted to the Child therein-mentioned for his Education, by and attour the 1000 *lib.* provided to him, in Reſpect that was liferented, *July* 14, 1710, *Barclay* contra *Barclay* of *Touch*.

An Heireſs's Diſpoſition of her Heretage to her Huſband *ſtante Matrimonio*, found not to be a revocable Donation: There being no anterior Contract of Marriage betwixt them, *July* 25, 1710, *Chalmers* contra Creditors of *Lyon*.

Donatio Mortis Cauſa. *See* Truſt.

AN Aſſignation *omnium Bonorum*, which ſhould belong to the Cedent the Time of her Deceaſe, reſerving her own Liferent, with a Faculty to alter *etiam in Articulo Mortis*, found to be *Donatio Mortis Cauſa*, and ſo void by the Cedent's ſurviving the Aſſigny, and the Subject found to belong to the Cedent's Executor, tho' the Faculty was never exerced by the Defunct, *March* 7, 1707, Doctor *Irving* contra *Skene* of *Halyards*.

E

Earls. *See* Preſcription.

ERection of Lands into an Earldom, with as ample Powers as were competent to any other Earl in *Scotland*, doth not give the Earl a Right of Regality, nor to his heretable Bailly of the Earldom, a Right to be heretable Bailly of Regality, whoſe heretable Office of Bailliary of the Earldom doth not comprehend an heretable Office of Bailliary of Regality, *July* 9, 1713, *D.* of *Montroſe* contra Mc*Aulay* of *Ardincaple*.

Edicts.

THE Execution of an Edict ſerved by a Commiſſary Officer, in Order to confirm an Executor, found null for Want of ſubſcribing Witneſſes, *January* 24, 1711, *Moir* and *Moriſon* contra *Dons*.

Edinburgh. *See* Ale and Beer.

THE Town of *Edinburgh* having by Act of Parliament, for Payment of their Debt, an Impoſition of two Penies upon the Pint of Ale and Beer to be brewed, inbrought, or vended within the City and Privileges thereof, (except what is ſold within the Palace of *Holyrudehouſe*, and the Caſtle of *Edinburgh*) for a certain Number of Years, to be paid, uplifted, liſted, and gathered Weekly, Monthly, Quarterly, or other ways, as the Magiſtrates, and Town Council ſhould preſcribe and order, who are impowered to farm and ſet the ſame in Tack, by Way of publick Roup to the beſt Advantage, at the Sight of the Privy Council, or their Nominees; And in Caſe of Miſapplication of the ſaid Fund, the Magiſtrates as well as the Receivers thereof, being liable to refound the ſame with Intereſt, to the Creditors of the Town, at the Inſtance of them or any Burgeſs: The Lords found, That the Magiſtrates and Town Council of *Edinburgh*, had Power by the ſaid Statute to diſpoſe of the Impoſition of two Penies on the Pint, other ways than by Tack and publick Roup, *July* 26, 1711, *Paterſon* and others contra the Town of *Edinburgh*.

Elections.

A College conſiſting by the Foundation of a Provoſt (who was a Church-man and a Preacher) a Licentiate and Batchelor of Divinity, and four Maſters of Arts, Theology Burſars and ſix Scholars of Philoſophy, governed by the Provoſt, Licentiate and Batchelor, who were impowered to elect for ſupplying of Vacancies; being converted ſince the Reformation into a College of Philoſophy and Arts, conſiſting of a Provoſt and four Regents, whereof one is Profeſſor of *Greek*, and three Profeſſors of Philoſophy, who were in Uſe to vote in Elections, and to concur with the Provoſt in Acts of Adminiſtration of the College Revenue: Upon a comparative Trial of Competitors for one of theſe Profeſſions vacant, two of the Regents gave their Opinion in Favours of one as beſt qualified for the Poſt, a third was *non liquet*, and the Provoſt declared for, and at his own Hand admitted another. The Lords preferred the Perſon for whom the two Regents had voted, and declared the other's Admiſſion void and null, *July* 22, 1707, *Halden* contra *Rymer* and *Ramſay*.

The King having given by Charter to the Maſters of a College *incorporatis & incorporandis* all Rights and Privileges competent to other Univerſities; and the founded Maſters having been the only Perſons in Uſe beyond the Years of Preſcription to elect Profeſſors of Philoſophy: A Profeſſor of Mathematicks lately ſet up in that College by the Sovereign, with the ſame Privileges and Immunities that any other Profeſſor there *clamare & frui poteſt aut potuit*, was found entitled to vote in the Election of a Profeſſor of Philoſophy, jointly with the other Maſters formerly in Uſe to vote, *December* 21, 1711, *Burnet* contra *Simpſon* and the founded Maſters of the King's College of *Aberdeen*. And his Vote was ſuſtained good, notwithſtanding he was not qualified by taking the Oaths to the Government in the Terms of Law, at the Time of the Election; he being then in the Exerciſe of his Office, and not objected againſt upon that Account, *Eodem Die*, *inter Eoſdem*.

Sollicitations and Offers of Mony for a Candidate in an Election by his Friend to the Electors, without being received by them, or ordered by the Candidate, not relevant to caſt his Election, *Eodem Die*, *inter Eoſdem*.

A *Præſes* pretending to have both an elective Vote, and in the Caſe of Equality a caſting Vote, having from a Miſapprehenſion that the Votes were equal, not given his elective, but only his caſting Vote, not allowed afterwards in a Proceſs before the Lords (wherein that Election was quarrelled) to recur and claim an elective Vote therein, *January* 2, 1712, *inter Eoſdem*.

Emptio-venditio.

A Declaration of a Weigh-houſe Clerk bearing, That one had weighed over to another's Wife a Parcel of Tobacco weighing ſo much, and marked with the initial Letters of the Huſband's Name, found to tranſmit the Property to him, *July* 27, 1710, *Main* contra *Maxwell* and Partners.

Victual being ſold conform to Samples not ſealed at the making of the Bargain, and the Buyer having then declined to ſeal them; it was found that the Samples were not the Rule of the Bargain, and that the Buyer relied upon the Faith of the Seller, *January* 29, 1713, *Cheap* contra *Cleugh*.

Equivalent. *See* Irritancies, Teinds, Quakers, Payment.

Arreſtments or Intimations of Aſſignations by Perſons pretending Right to the Equivalent, are to be laid on in the Hands of, and made to the Commiſſioners in their ordinary Meetings; and in the Intervals of their Meetings, to be laid on and made at the Equivalent-office, any lawful Day of the Week betwixt the Hours of 9 and 10 before Noon, or betwixt 2 and 6 in the Afternoon, except on *Saturday* Afternoon. And if none be found attending at the Office the Times aforeſaid, to receive Copies and Intimations, or the Doors thereof be ſhut, Arreſtments and Intimations may be made at the Door of the Office, and affixt thereon, *June* 21, 1707, *Act of Sederunt.*

Eſcheat. *See* Denunciation, Horning.

THE Queen's Confirmation of baſe Infeſtments granted by her Vaſſal to his Creditors after he was Year and Day at the Horn, without a *Novodamus*, doth not ſecure the Rights confirmed againſt the common Debtor's liferent Eſcheat, tho but gifted and declared after the Confirmation, *February* 10, 1710, *Leſly* of *Kincraigie* contra the Creditors of *Riccartoun Craig.*

An Executor Creditor confirming after his Debtor's ſingle Eſcheat was gifted to another Creditor, and the Gift ſealed and regiſtred but not declared, for a Debt due to the Executor before the Rebellion, preferred to the Donatar, *November* 8, 1710, *Borthwick* of *Fallahill* contra *Arbuthnot.*

A Perſon having granted to his Creditor an heretable Bond, containing an Obligement to infeſt, and Precept of Seaſin, and thereafter being denounc'd and regiſtred at the Horn, and Year and Day having elapſed before Infeſtment taken on the Bond, which Infeſtment was prior to the gifting the liferent Eſcheat: The Gift of his liferent Eſcheat was found preferable to the heretable Bond, *November* 28, 1710, Lord *Alexander Hay* contra E. of *Glaſgow* and other Creditors of *Spot.*

Not competent to one deriving Right by Aſſignation from another after his ſingle and liferent Eſcheat were gifted and declared, to quarrel the Gift upon the 145 Act, Par. 12. *J.* 6. as ſimulate and null by the Donatar's allowing the Rebel to continue in Poſſeſſion, *January* 10, 1712, *White* contra *Reid.*

A Gift of ſingle and liferent Eſcheat aſſigning all the Maills and Duties, Annualrents, *&c.* belonging to a Rebel, the Time of his Rebellion, or that ſhould belong to him at any Time during his Lifetime, ſuſtained to carry the Rents of the Lands, whereof he acquired an Adjudication after the Gift, in Reſpect the Bond whereon that Diligence followed was in the Perſon of the Rebel or his Truſtee before the annual Rebellion, whereby the Donatar had Right to the Annualrents of the Sum in the Bond, and conſequently to the Rents of the Lands. Albeit the Adjudication before expiring of the Legal had been diſponed by the Rebel to a third Party, *Eodem Die, inter Eoſdem.*

A Donatar of Eſcheat declared in general preferred to one arreſting after the Gift before Declarator, for a Debt due before the Rebellion; upon this Speciality, That the Donatar's Gift proceeded upon his own Horning, and he obtained Declarator before the Arreſter recovered a Decreet of Furthcoming, *January* 24, 1712, *Erſkine* contra *Eliot.*

A Gift of ſingle and liferent Eſcheat bearing not only what pertained to the Rebel at the Rebellion, but what had fallen or ſhould fall, accrew or belong to him during his remaining at the Horn, found to carry Right to a Debt falling due to him many Years after the Rebellion, *February* 8, 1712, Lord *Minto* contra *Marſhall.*

A Donatar of Eſcheat preferred to the Receiver of a voluntary Diſpoſition from the Rebel, after he was denounced and regiſtred at the Horn: Tho' the Diſpoſition was completed by Intimation and Citation before the Gift, *June* 17, 1712, *Ker* of *Chatto* contra Creditors of *Harden.*

A Gift of liferent Eſcheat not found to be ſimulate and null for the Rebel's continuing to poſſeſs a ſmall Part of his Eſtate remote from the reſt; The Donatar's Aſſigny having ſo far proſecuted his Right as to obtain Poſſeſſion of the great Part of the Eſtate by Virtue of the Gift and other Rights in his Perſon, *February* 19, 1713, *White* contra *Reid.*

Eviction.

A Perſon having bought Land, and granted Bond to another than the Seller for a certain Sum as the Remainder of the Price, with this Quality, That if two Inhibitions affecting the Purchaſe were not purged before the Term of Payment of the Bond, the Granter ſhould have Retention of the Mony for five Years after the Date, at leaſt ſo long as theſe Incumbrances ſhould continue unpurged, in Order to get Allowance of what Expences he might be put to in Defence of any Actions of Eviction within the five Years; found not to have Right to retain the Mony, tho it was the Price of Land after elapſing of theſe five Years, *July* 2, 1706, *Somervel* contra *Smith* of *Cammo*.

Executions. *See* Subſcriptions, Inhibitions, Citation, Summons.

AN Arreſtment at the ordinary and principal Dwelling-houſe of the Perſon in whoſe Hands it was laid (tho he at the Time had a temporary Reſidence in another Houſe of his own for doing his Affairs, with a Deſign to return) ſuſtained and found preferable to a poſterior Arreſtment executed againſt him perſonally at that other Houſe; He not having given up his former Habitation, but left his principal Furniture, Coach-horſes, and Servants there, and returned accordingly, *March* 13, 1707, *Irving* of *Kincauſſie* contra *Deuchar*.

Executions of an Inhibition found null, for that it bore three Knocks only to have been given at the moſt patent Door of the Perſon's Houſe, againſt whom the Letters were executed, and the Act 75, Par. 6. *J.* 5. requires the giving of ſix Knocks, where the Executer cannot get Entry. Albeit the Certification expreſſed in the Statute for not obſerving that Formality is Impriſonment and an arbitrary Puniſhment of the Officiar contravening, *June* 24, 1707, *Gordon* of *Auchintoul* contra *Duff* of *Drummure*.

Execution of an Arreſtment in the Hands of the Directors of the *African* Company, bearing, *This I did after the Form and Tenor of the ſaid Letters in all Points, whereof I left a juſt for the ſaid Directors and Managers with their Servants in their Office*, &c. And thereafter, theſe Words, *The ſaid Copy bearing the Date hereof, Witneſſes Names and Deſignations*, and the Copy being duly recorded in the *African* Books; And the Word *Copy* wanting in the Beginning of the ſaid Clauſe, being added and ſigned on the Margin by the Meſſenger before any Interlocutor in the Cauſe, who abode by the Verity thereof: The Lords ſuſtained the Execution to prefer the Arreſter, in a Competition with an Aſſigny whoſe Aſſignation was intimated after the Arreſtment, *July* 20, 1708, *Forbes* contra *Grants*.

Executions of a Horning againſt one not perſonally apprehended, ſuſtained, albeit it bore not expreſly that the Meſſenger left a Copy, but only that he left a juſt and authentick in the Lock-hole of the moſt patent Door of the Party's Dwelling-houſe, which could import nothing but a Copy, *February* 23, 1709, Earl of *Seafield* contra Creditors of *Boyn*.

Execution of a Summons of Wakening being quarrelled as null, for that the Defender's Dwelling-houſe was not deſigned: The Purſuer was allowed to produce another more formal Execution under the ſame Meſſenger's Hand, deſigning the ſaid Dwelling-houſe, he offering to abide by the ſame, *February* 26, 1709, *Junkiſon* contra Lady *Arvorlick*.

Execution bearing that a Man was perſonally cited, and that his Lady was cited by giving a Copy to himſelf and in Name of his Lady, found not to be a legal Citation of the Lady, who ought to have been cited by giving a Copy to her ſelf perſonally, or by leaving a Copy at their Dwelling-houſe, in the Terms of the Act of Parliament, *June* 30, 1709, Earl of *Galloway* contra *Hamilton* of *Baldoon* and his Mother.

Execution of Letters of Intimation, bearing for it's Warrant, *Conform to the within Letters of Intimation of an Aſſignation in Favours of* G. W. *Merchant in* Edinburgh, *raiſed at his Inſtance and executed againſt Colonel* R. L. *Major* G. M. *and Captains* P. E. W. M. *in Colonel* G. H*'s Regiment*, ſuſtained: Albeit it was on a Paper apart from the Letters of Intimation, and did not bear the Date of theſe Letters which were the Warrant thereof, *February* 16, 1711, Sir *Robert Forbes* and his Factor contra *Watſon*.

Executions of a Summons ſuſtained, albeit they did not bear Copies to have been left at the moſt patent Doors of the Defender's Dwelling-places, but only at the Doors of their Dwelling-places, without the Addition of *moſt patent*, *June* 19, 1712, Doctor *Garden* contra *Anderſon*.

Executry. *See* Teſtament, Confirmation, *Negotiorum Geſtor*, Licence to purſue.

PAyment of a ſimple Annuity not acceſſory to a Stock for Years ſubſequent to the Debtor's Deceaſe, made by his Executor without Diſtreſs, not ſuſtained as an Article of Exoneration in the Executor's Accompts; as being an heretable Debt whereof the Heir was bound to relieve the Executor, *June* 13, 1705, *Robertſons* contra Commiſſary *Baillie*.

Annualrent due by an Executor for Sums in the Inventory, bearing Annualrent from the Date of the Confirmation, but not for Sums which it mentioned not to bear Annualrent, *June* 26, 1705, *inter Eoſdem.*

Confirmation of one as Executor *qua* Creditor to his Debtor's Heir and Executor without a previous Decreet of Conſtitution againſt him, ſuſtained, *December* 26, 1705, *Dickie* contra *Cowie* and others.

A neareſt of Kin preferred to the Office of Executor, in a Competition with the Defunct's Relict, who had a general Diſpoſition *omnium Bonorum* belonging to him with the Burden of Debts, *January* 27, 1708, *Scot* of *Harden* contra Lady *Harden.*

Two Perſons who ſucceſſively confirmed the ſame Subject as Executors Creditors within ſix Months of the common Debtor's Deceaſe, brought in *pari Paſſu* : The poſterior Executor paying a Proportion of the Expences of the firſt Executor decerned and confirmed, *January* 2, 1708, *Ramſay* contra *Nairn* of *Dunſinnen.*

An Executrix found liable for Diligence and Omiſſions: Albeit by the Teſtament the Legatars and others therein honoured had Power, in Caſe of her refuſing or delaying to implement the Defunct's Will, to purſue for and affect the whole Goods conveyed in her Favours, as effectually as if the ſame had directly been diſponed to themſelves by the Defunct, *July* 23, 1708, Lord *Elibank* and his Siſters againſt the Lord *Preſtounhall* and his Son.

One being decerned Executor dative *qua* neareſt of Kin when there was a nearer, his Title in a Proceſs at his Inſtance againſt the Defunct's Debtors, is not quarrellable ſummarly before the Lords upon the Act 26 Parliament 1690, by the neareſt of Kin compearing for his Intereſt; but he muſt firſt apply to the Commiſſaries for Reduction of the Decreet dative and Preference, *December* 6, 1709, *Hamilton* of *Bangour* contra Lady *Ormiſtoun* and her Children of the firſt Marriage.

An Executrix in a Compt and Reckoning at her Inſtance againſt one as Heir to the Defunct, not allowed out of the Executry extraordinary Expence neceſſarily diſburſed in expeding the Confirmation, occaſioned by the Fault and Means of the Defunct's apparent Heir, againſt whom no Action was brought in his Lifetime; in Prejudice of the Defender his Heir ſerved *cum Beneficio Inventarii,* who alſo repreſented the apparent Heir, *December* 15, 1710, and *January* 17, 1711, The Lord and Lady *Ormiſtoun* contra *Hamilton* of *Bangour.* Nor yet was ſhe found to have Right to retain the extraordinary Expence of the Defunct's Funerals, ſuppoſe the ſame were furniſhed by Order of the ſaid apparent Heir, *Eodem Die, inter Eoſdem.*

Funerary Expences, Aliment of the Defunct's Family till the next Term after the Defunct's Deceaſe, the Expence of confirming his Teſtament, and his Relict's Mournings, don't affect the Dead's Part only, but come off the whole Head of the Executry; all theſe being conſidered as the Defunct's Debts. But the Charges of building a Monument to the Defunct, by Warrant of his Teſtamentary Deed, come off the Dead's Part only, *June* 20, 1713, *Moncrieff* and her Huſband contra *Monipenny.*

An Executrix getting Eaſes of the Defunct's Debts from ſome Creditors, bound to communicate the Benefit thereof to the reſt, *December* 16, 1710, Sir *James Elphinſton* contra *Paton.*

A Cautioner in a confirmed Teſtament cannot take from the Executor a Diſpoſition to all the Goods confirmed, ſo as thereby to make them his own Property, in Prejudice of the Defunct's Creditors, to whom his Executry is to be made furthcoming, *June* 17, 1712, *Ker* of *Chatto* contra Creditors of *Harden.*

A Wife's Proviſion in her Contract of Marriage doth not exclude her from the legal Share of her Huſband's Moveables, where the conventional Proviſion bears not expreſly to be in Satiſfaction: But the Huſband's Executor hath Right to confirm the whole Subject, and the *Jus exigendi, December* 12, 1712, *M'Aulay* of *Ardincaple* contra *Bell.*

Bonds bearing Annualrent affect the Dead's Part only, if ſufficient to ſatisfie the ſame, *January* 27, 1713, *Moncrieff* and her Huſband contra *Monipenny.*

Exercitoria Actio. See Seamens Wages.

Exercitoria Actio not competent againſt the Owners of a Ship for a Stock-purſe, truſted by Fraughters to the Skipper upon his Receipt for the buying of Timber and Tar in *Norway*: In Reſpect the Skipper was not *huic Rei præpoſitus,* and Owners are only liable upon Contracts entred into with him in Relation to the preſumed Subject of his Truſt; as the taking Goods on Board, refitting and victualling the Ship, and paying the

Seamens Wages, or upon Contracts with him in the Terms of his *Præpoſitura*; *December* 12, 1707, *Matthie* contra *Coltran* and *Gulen*.

Exhibition.

A Bond of Cautionry blank in the Creditor's Name being left in the Hands of the principal Debtor to be a Fund of Credit to him as his Occaſion ſhould require; and delivered by him after the Term of Payment, to his own Creditor for Security of what he owed him: The Receiver was found not liable to exhibit the ſame as *Inſtrumentum penes Debitorem repertum*, in a Proceſs of Exhibition at the Cautioner's Inſtance, *July* 7, 1708, Lord *Saltoun* contra Sir *James Elphinſton*.

In an Exhibition at the Inſtance of a Woman againſt her Mother, for exhibiting a Bond of Proviſion granted to the Purſuer by her Father, the Defender having deponed, *acknowledging that a Bond in Favours of the Purſuer, with a Clauſe declaring it effectual only in Caſe ſhe married with the Deponent's Conſent, and were no Diſgrace to her Father the Granter's Family, was delivered to the Deponent in Truſt by her Huſband, with Power to give it up or not, as ſhe ſaw Cauſe, and that ſhe, purſuant to his Direction, had burnt it, upon the Purſuer's running away with a Man ſhe married without her Conſent*: The Lords found that the Defender had unwarrantably deſtroyed the Bond, the Purſuer not having married to the Diſparagement of her Father's Family: And remitted to the Ordinary to hear Parties as to the Liquidation of Damages and Payment, and how far *Loco Facti impreſtabilis ſuccedit Damnum & Intereſſe*, *July* 8, 1712, *Forbes* and *Paterſon* her Huſband contra Lady *Colodden*.

Exhibition *ad deliberandum*.

THE Defender in an Exhibition *ad deliberandum*, not liable to produce Writs granted by the Purſuer's Predeceſſors to Perſons *extra Familiam*, *January* 16, 1706, *Buchanans* contra the Marqueſs of *Montroſe*. Nor can an apparent Heir, in a Proceſs *ad deliberandum*, inſiſt to have the Writs exhibited tranſumed, *March* 20, 1707, *inter Eoſdem*.

A Father having, as Adminiſtrator of Law to his own Child, diſponed a Wadſet Right to the Reverſer, which his Pupil was entitled to as apparent Heir to the Wadſetter laſt infeft: The Reverſer was found obliged in an Exhibition *ad deliberandum*, at the apparent Heir's Inſtance, to produce the Wadſet Right, notwithſtanding the Diſpoſition thereof by the Adminiſtrator in Law, *June* 19, 1712, *Dick* and *Cubiſon* contra *Roriſon* and others.

Expences.

EXpence of an Action whereupon Decreet was extracted without Modification of Expences, refuſed to be allowed in a new Proceſs for Payment thereof; the former Plea being terminated by the Decreet: Albeit the firſt Summons contained a Concluſion of Damage and Expences againſt the Defender, *January* 26, 1709, *Menzies* contra *Gordon* of *Pitlurg*.

The Lords are to modifie large Expences to Parties leſed by calumnious Allegeances, either in ordinary Actions, or Suſpenſions, Act of *Sederunt*, *November* 20, 1711, §. 14.

Extracts. *See Fraud.*

A Young Man diſcharged for ever to meddle in any Buſineſs in the Clerks Chambers, or about the Parliament Houſe, and committed to Priſon during the Lords Pleaſure, for giving out an Extract of a Bond granted to his Father by three Co-principals, bearing the Witneſſes inſert in the Body to be ſubſcribing, whereas only one of them ſubſcribed; induſtriouſly to validate the Bond, *December* 23, 1707, *Crawford* and others contra *Cuningham*.

F

Factories.

A Warrant or Commiſſion to manage the Eſtate and Affairs of an Heretor, who had gone abroad without leaving a Factory for that Effect, refuſed to be granted to one who offered Caution to hold Compt for his Intromiſſions to the abſent Heretor, and all others concerned, *July* 13, 1708, ***William Stewart*** Supplicant. Factors upon, and Tackſmen of ſequeſtred Eſtates, or interpoſed Perſons for their Behoof, incapable to buy in, or compone Debts affecting the Eſtate; And any ſuch Purchaſes or Tranſactions, are to be held equivalent to a Diſcharge, Renunciation and Extinction of the Debts ſo acquired. So as theſe Factors or Tackſmen ſhall not be allowed to impute any of the Tack-duties, or Intromiſſions with the Rents of theſe Eſtates towards the Payment of any Part of theſe Debts ſo bought in, nor, retain the Rents in their own Hands on that Pretence. The Benefit of any Abatement or Gratuity got by ſuch a Factor or Tackſman from the Creditors to whom they make any Payment of the Rents, ſhall accrew to the common Debtor, and his Creditors, *December* 25, 1708, Act of *Sederunt*.

A Perſon having accepted a Factory from another bearing, *Power to manage the Rents of his Lands, and to ſubmit, tranſact, compone and agree, all Pleas and Differences thereanent, without Prejudice to the Factor of any Acquiſition of the ſaid Lands made or to be made by him, upon his own Induſtry, Pains and Expence, before, during, or after the Factory:* It was found, That any Rights of the ſaid Lands acquired by the Factor, conform to the laſt Clauſe of Factory, *Viz.* That his Acceptance ſhould not be prejudicial to his bygone or future Acquiſitions, muſt be effectual only as a Security to him for the Sums Principal, Annualrents, Expences, and Intereſt thereof, disburſed by him in purchaſing and purſuing theſe Rights during the Factory; and that upon the Conſtituent's making Payment thereof, deducing the Factor's Intromiſſions, he the Factor ſhould be obliged to denude in his Favours, and communicate to him the Benefit to the Eaſes, without Prejudice to Rights in the Factor's Perſon prior to the Factory, *June* 16, 1710, *Murray* contra *Murray*. And the ſaid Factor having purchaſed a Right to the ſaid Lands before the Factory, and entred to Poſſeſſion by Virtue of an Appriſing acquired by him during the Factory, cannot alter the Title of his Poſſeſſion; but is underſtood to poſſeſs by the Appriſing, and comptable to his Conſtituent for his Intromiſſions, till the ſaid Right be extinct, or he denuded thereof in Favours of the Conſtituent: But after Extinction and denuding as aforeſaid, he may compete for the Poſſeſſion upon the other Right in his Perſon, *January* 4, 1712, *inter Eoſdem*.

A Factor appointed upon an Eſtate by the Lords, found liable to compt to the Creditors, either according to the Fiars, or the Prices he ſold at; reſerving to him to be heard as to what Diligence he was liable for, and what Eaſe he may claim upon the Account of his not receiving Payment from the Merchants of the whole agreed Prices, *July* 5, 1710, the Creditors of *Dumferling* contra *Cowper*.

In a Compt and Reckoning at the Inſtance of an Heretor of a ſequeſtred Eſtate, againſt the Factor appointed by the Lords, who during his Factory got a Diſpoſition in Truſt from the Purſuer, and by Virtue thereof had tranſacted all his Debts: The Defender was found liable to compt at a Rental, and not for his actual Intromiſſions only; albeit the Purſuer had a promiſcuous Intromiſſion, *July* 18, 1710, *Gibſon* contra *Cochran*.

Writers and other Dependers on the Seſſion, incapable to be named Factors upon Bankrupt and incumbered Eſtates, by Authority of the Lords, tho' the Creditors ſhould conſent; and if they ſuppreſs their Deſignation by their ordinary Imployment, to obtain ſuch Factories, they are incapable to manage Proceſſes thereafter, and liable to Impriſonment during the Lords Pleaſure. And if any ſuch Factory in Favours of a Writer and Depender on the Seſſion be extracted, the ſame is null: Without Prejudice to the Creditors to call ſuch Factors and their Cautioners to Accompt, as if they were lawfully appointed, *November* 23, 1710, Act of *Sederunt*.

The Cautioner of a Factor upon a ſequeſtred Eſtate, liable to compt to the Creditors for the Victual Rent only, either according to the Fiars, or according to the Prices received by the Factor, deducing all Loſſes: And liable for Annualrent of the Factor's Intromiſſions, as Factors are liable by the Act of *Sederunt* 1690; Albeit the Bond of Cautionry did not expreſly bear Annualrent *January*, 23, 1711, the Creditors of *Parkhay* contra *Falconer*.

A Factor to a Bankrupt Eſtate, allowed no Factor-fee: In Reſpect he had been negligent, and had given up in his Accompts ſome Articles of Reſts that had been really paid to him; and to allow him a Salary, would incourage Factors to endeavour to wrong their Conſtituents, *June* 22, 1711, *Heriot* contra *Ker*.

All Factors upon ſequeſtred Eſtates, ſhall within ſix Months after extracting of the Factory, make up a Rental of the Eſtate, and of the bygone Reſts, to be reported to the Lords, and lodged in the Hands of the Clerk of the Proceſs, to ly there as a Charge againſt the Factor, to be made furthcoming *gratis* to all Parties having Intereſt, *November* 22, 1711, Act of *Sederunt* §. 6.

The Alteration in the Rentals by Increaſe or Decreaſe, muſt within three Months thereafter be reported, and put in the Clerk's Hands. *Ibid.* §. 7.

The Factor ſhall once every Year give in a Scheme of his Accompts Charge and Diſcharge to the Clerk of the Proceſs. If ſuch Factors fail in any Part of the Premiſſes, it ſhall be a Ground to remove them. Further if the Rental reported by them, be found deficient and concealed, or any Addition thereof be omitted to be eiked in Manner abovementioned, they ſhall be decerned in the Double of what is omitted: And for neglecting yearly to give a Scheme of their Accompts in Manner aforeſaid, ſhall be liable in a Mulct, to be modified by the Lords, not under Half a Year's Salary, *Ibid.* §. 8.

Factors already appointed are within ſix Months after the Date of this Act, to give in Rentals, and within a Year, Schemes of their Accompts ſince their Entry in Manner aforeſaid, and to renew them every Year thereafter, under the Certification and Penalties above-mentioned, *Ibid.* §. 9.

Bonds of Cautionry for ſuch Factors ſhall contain an Obligement for their Obſervance of the Rules and Inſtructions appointed them by the Lords in this and former Acts, and otherways according to Law, *Ibid.* §. 10.

Faculty reſerved. *See* Death-bed.

A Perſon and his eldeſt Son having with one Conſent tailzied their Eſtate to themſelves and the Son's eldeſt Son in Liferent *ſucceſſive*; and to his younger Brother and the Heirs Male of his Body in Fie; with a Right of Reverſion to the elder Brother and his Heirs Male; and a Faculty to the Father and Grand-father, or either of them to diſpone and contract Debt: The Grand-father after his Son's Death renewed the Tailzie, with the Alteration of a Diſcharge of the eldeſt Grand-ſon's Liferent, and a Suſpenſion of his Right of Reverſion, till the Conſent of ſome Friends therein-named was obtained, and Powers to them to diſcharge the Reverſion, which they afterward did. The Lords found, That the Grand-father had, by Virtue of the Faculty reſerved in the firſt Tailzie, Power to alter the Succeſſion, and to ſuſpend, or diſcharge the Reverſion therein-contained. And found the diſcharging of the Liferent, and ſuſpending the Reverſion, with Power to the Friends to diſcharge the ſame; and the Plurality of them diſcharging accordingly, reſolved into an Extinction of the Reverſion; ſo as they could never after concur therein, nor he to whom it was once competent, or his Heirs Male, redeem without the Concurſe of theſe Friends, *January* 2, 1706, *Dundas* of that Ilk contra *Dundas*.

A Fiar and Liferenter having jointly diſponed, with a Faculty to alter reſerved to them, and longeſt Liver; the Liferenter ſurviving, found ſufficiently impowered to alter and diſpone, *Eodem Die inter Eoſdem*.

A ſpecial Aſſignation, with a Faculty reſerved in Favours of the Diſponer and his Lady, or either of them, to alter and diſpoſe as they thought fit; revoked and conveyed to a Third Perſon by a general Diſpoſition *omnium Bonorum*, containing a Reſtriction of the Lady, to the Proviſion in her Contract of Marriage, and a Revocation of all additional Rights in her Favours, *February* 17, 1708, *Hall* contra Dam *Mary Campbell* and her Huſband.

Faculty to burden or contract Debt, or diſpoſe otherways, reſerved in a Diſpoſition by a Father to his Son, not ſuſtained to make a Bond granted by the Father without Infeftment real, in Prejudice of a poſterior Diſpoſition granted by him to a Third Party: Albeit the Bond narrated the Faculty to burden the Son's Right, and that the Granter had actually burdened the ſame with the Debt in the Bond, *December* 16, 1708, *Davidſon* of *Tullimorgan* contra Town of *Aberdeen*.

A ſpecial Aſſignation by a Father to one of his Children, without Delivery, not revoked by a poſterior general Diſpoſition *omnium Bonorum* to another Child, to whom the former Aſſignation was delivered, *December* 16, 1712, *Monro* contra Major *Monro*.

Fairs. *See* Sheriffs.

A Gift from the King to a Burgh, of the ſole Power of holding Fairs within two Miles of the Liberties thereof, ſo denudes the Sovereign in Favours of the Burgh, as no poſterior Donatar could hold Fairs within that Bounds, *February* 7, 1706, the Town of *Stirling* contra *Murrays* of *Polmais*.

Falſhood. *See* Improbation.

A Receipt of Mony ſuperinduc'd to one's Subſcription in the Blank Page of a Compt Book, found null, and not probative; and the Writer and Uſer thereof fined and incarcerated, *December* 1, 1705, *Grieve* contra *Thomſon*.

The Purchaſer of an Eſtate, who gave Back-bond to the Diſponer, for a certain Sum of Mony, of the Date of the Diſpoſition, being purſued many Years after in a Declarator of Truſt and Extinction of the Diſpoſition at the Inſtance of an Aſſigny, to a poſterior Back-bond, alledged to have been granted by the Purchaſer to the Diſponer, acknowledging his Right by the Diſpoſition, to have been only in Security of a certain Sum; and having raiſed Improbation of the poſterior Back-bond: The Lords allowed his Creditors to object Nullities againſt the ſaid Back-bond, as inconſiſtent with the former, notwithſtanding the Exception of Falſhood proponed by himſelf; and found the ſaid Back-bond rendring the Right redeemable, upon Payment of the Sums therein-contained, null, as incompatible with the firſt, *February* 13, 1706, *Dareſon* and *Hill* contra *Murray* of *Spot* and his Creditors.

A Suſpender who offered to improve Bonds, he was charged upon as falſe allowed, after his conſigning 40 *l.* and giving in Articles of Improbation, and the Charger's abiding by the Verity of the Writs quarrelled *ſub Periculo Falſi*, but before any Act extracted, to paſs from this Improbation, and found upon Payment, inſtantly verified by Diſcharges produced: He always deponing, That theſe Diſcharges came to his Hand after proponing Falſhood. But the Lords ordained the 40 *l.* conſigned by the Suſpender, to be given up to the Charger, *July* 16, 1713, *Dunbar* contra Earl of *Cromartie*.

Fie.

A Perſon having in his Daughter's Contract of Marriage aſſigned him and her, and their Heirs of the Marriage, which failing, the Wife's Heirs and Aſſignies, to all Goods and Gear belonging to the Cedent, the Time of his Deceaſe: The Wife was found to be Fiar, *February* 4. 1709, *Fead* contra *Maxwell* of *Dalſwynton* and others.

The Fiar of a Sum found to have *Jus exigendi*, Power to uplift the ſame, upon ſecuring the Liferentrix by finding Surety in the Place where ſhe lived, to pay her the Annualrent there during her Lifetime; albeit the Debtor was reſponſible, and the Liferentrix unwilling to alter the Security, *December* 3, 1709, Lady *Pitmedden* and her Huſband contra *Bathgate* and *Wedderburn*.

One having, for Love and Favour to his Daughter, and other onerous Cauſes, aſſigned to her and her Huſband, their Heirs and Executors, a certain Sum owing to him by a Third Party: The Lords found, That the Huſband had Right to the Fie, and the Wife to the Liferent of the whole, *July* 23, 1713, *Edgar* contra *Sinclair*.

Feu-duties.

Heretors not liable perſonally to pay Feu-duties of Years that their Authors to whom they were ſingular Succeſſors poſſeſſed: Tho' it were inſtructed that they had intrometted with as much of the Rents, as would ſatisfie the bygone Feu-duties, *February* 7, 1712, *Hamilton* and her Huſband contra Lord *Burleigh* and *Wright*

Fiars. *See* Emptio Venditio.

The Brewers having raiſed Reduction of the Sheriff-Fiars of *Edinburgh*, as being made without an Inqueſt, and exorbitantly exceeding the common Price betwixt *Yule* and *Candlemas*, and produced with their Reduction an Extract of theſe Fiars: The Lords refuſed either to appoint the Summons to be ſummarly inrolled and diſcuſſed, or to take Cognizance of the Matter, upon a Petition offered by the Purſuers, *June* 18, 1712, the Brewers Supplicants contra the Sheriff Deputs of *Edinburgh*.

Fines. *See* Juſtices of Peace, Mulcts.

Fiſhing. *See* Servitudes.

Forces.

A Sum of Mony being deſtined by the Sovereign's Letter for the Equipage of a Regiment going Abroad, and received by the Colonel: The ſubaltern Officers were found to have Right to claim their Shares thereof, according to the Eſtabliſhment, from his Repreſentatives, ſeven Years after his Death, without Regard to former Payments made to the ſuperiour Officers, conform to a Caſt and Diviſion framed by him and them, *June* 21, 1706, Captain *Preſton* and others contra Lady *Semple*.

Forfeiture. *See* Holden as confeſt, Paſſive Titles.

Payment of a Sum for the Compoſition of a Forfeiture probable by the Donatar's Oath, *June* 12, 1705, *Cochran* and *Dykes* contra *Urquhart*.

A Perſon having accepted a Diſpoſition from his Grandfather with the Burden of all his Debts, liable for the Grandfather's Intromiſſions as Donatar with the Rents of a forfeited Eſtate, without any previous Conſtitution of the Debt againſt his Heirs of Line; the Forfeiture being reſcinded *per Modum Juſtitiæ*, tho' not in the Donatar's Lifetime, by a ſpecial ſtatutory Act, which was not to fall under the Act *ſalvo*. Nor was the Act of Parliament declaring the Forfeiture, with the Sovereign's Gift ſuſtained, as *Titulus coloratus* to afford the Benefit of *bona Fide* Poſſeſſion, ſo as the Poſſeſſor might *lucrari Fructus conſumptos*, *February* 19, 1706, The Ladies of *Caldwell* contra Sir *Thomas Dalziel*.

Form of Proceſs. *See* Wakening, Summons, Paſſive Titles, Hearing of Cauſes, Interlocutors, Bills, Stops, Rolls, Side-bar, Proteſtations, Reports, Lords, Advocates, Bankrupts, Compt and Reckoning.

Fornication. *See* Indemnity.

A Fine of 100 *Lib. Scots* impoſed by Juſtices of Peace on an Heretor *qua* Gentleman, conform to the Act 38 of the Parliament 1661, for antenuptial Fornication, reſtricted to 10 Pound: In Reſpect the Party denied he had any Pretence to the Title of a Gentleman, and had not the Air or Aſpect of a Gentleman, *November* 9, 1709, *Sandilands* contra *Purdie*.

Forthcoming. *See* Arreſtment.

Fraud. *See* Competition, Reduction, Extracts.

Adjudication on a Bond of 3000 Merks granted by one Brother to another, payable in five Weeks Time, led inſtantly after the Term of Payment; found reducible upon the Act 1621, as gratuitous and made *in Fraudem* of the Granter's Relict and Creditrix by her Contract of Marriage: Unleſs the Adjudger inſtruct the onerous Cauſe of the Bond, *December* 5, 1707, *M^{c}lirie* contra *Glen*.

A Diſpoſition *omnium Bonorum* by one Merchant to another, in Security of Debt, reducible *quoad* Goods in the Shop and Houſhold-pleniſhing upon this Ground, That the Diſponer retained Poſſeſſion of the Shop and Goods therein, and of the Houſhold-pleniſhing, until he broke: But ſuſtained in ſo far as concerned the Heretage, albeit the Diſponer was likeways allowed to continue to uplift the Rents thereof, *July* 27, 1708, *Boigs* contra *Watſon*.

A Diſpoſition made by a Man with Conſent of his eldeſt Son, in Favours of his Children of a ſecond Marriage under Pupillarity, for an anterior onerous Cauſe in their Mother's Contract of Marriage, reduced as *contra Fidem Tabularum nuptialium*: In Reſpect it was made betwixt the eldeſt Son's Contract and his Marriage, wherein the Father ſtood oblig'd to make the Eſtate diſponed to him to be worth ſo much yearly out of his other Lands and Eſtate, *January* 28, 1709, *M^{c}guffock* of *Ruſco* contra *Blairs*.

A Father in his Son's Contract of Marriage having obliged himſelf to pay a certain Sum to him and his Spouſe in conjunct Fie and Liferent, and to the Heirs or Bairns of the Marriage in Fie, which failing to the Son's Heirs and Aſſignies whatſoever, in Security whereof they were infeft in the Father's Lands; And the Son having after the Wife's Deceaſe, granted a Diſpoſition of the Obligement, bearing for certain Sums of Mony received, to one therein deſigned his Brother in Law, which was adjudged by the Receiver's Creditors: It was found that the Granter's Daughter and only Child of the Marriage is in the common Caſe of an Heir of Proviſion, and has Intereſt thereby to quarrel, upon the Act of Parliament 1621, any gratuitous Deeds done by her Father to her Prejudice; and that the Father's Diſpoſition doth not prove the onerous Cauſes thereof; and in Reſpect it bore the Receiver to be the Diſponer's Brother in Law, the Creditors of the former are in no better Condition than he, and therefore behoved to inſtruct the onerous Cauſe, otherways than by the Narrative of the Writ it ſelf, *June* 15, 1710, *Leſlie* contra Creditors of *Leſlie*.

A Perſon having granted a Bond for Love and Favour, and other onerous Cauſes and Conſiderations, payable at his Death to his Siſter in Caſe of her ſurviving him, and revocable at the Granter's Pleaſure: Both his prior and poſterior Creditors were found preferable to her, unleſs ſhe could prove that the common Debtor left, at his Deceaſe, an Eſtate ſufficient to ſatisfie the Bond and all his other Debts, *December* 22, 1710, Creditors of Mr. *David* and *James Dewars* competing.

A Diſpoſition to a conjunct Perſon bearing for Security of a Sum owing to him by the Granter, who was ſolvent at the Time, having never been quarrelled for 58 Years; a ſingular Succeſſor to the Receiver of the Diſpoſition, was not found obliged to prove the onerous Cauſe thereof other ways than by the Narrative, in a Competition with anterior Creditors of the Granter, when his Eſtate had proven inſufficient to pay his Debts, *February* 2, 1711, *Guthrie* and *Williamſon* contra *Gordon*.

The onerous Cauſe of a Bond granted to a conjunct Perſon for the Ballance of a fitted Accompt due to him by the Granter, relative to Payments made for the latter long before, ſufficiently inſtructed by the fitted Accompt betwixt them, ſubſcribed by both before Witneſſes, wherein the Granter of the Bond acknowledged himſelf to be reſting to the Receiver the Ballance for which the Bond was granted: Albeit the ballancing of the Accompt was of the ſame Date with the Bond, *July* 4, 1711, *Gray* contra *Chieſly*.

An Advocate's Servant puniſhed as *Hugh Riddel* was by Act of *Sederunt*, *July* 20, 1675, and further declared incapable to ſerve about the College of Juſtice; for fraudulently abſtracting his Maſter's Papers, and propaling them to his Prejudice, *February* 22, 1712, *Houſtoun* contra *Muſhet*.

Not competent to an apparent Heir, to quarrel a Deed elicited from his Predeceſſor upon Fraud and Circumvention, until he be ſerved Heir to the Perſon alledged to be circumvened, *July* 23, 1713, *Douglas* of *Hiſleſide* contra *Somervell* of *Kennocks*.

Creditors who *bona Fide* accepted heretable Bonds from their Debtor in Satisfaction of former Debt, after the Debtor was denuded of his Eſtate by Diſpoſition and Infeftment in Favours of his Son with the Burden of his Debts, allowed to be ranked as a Creditor of the Father, with thoſe whoſe Debts the Son's Diſpoſition was burdened with, the Grounds of the original Debt being produced, *July* 24, 1713, Creditors of *Roſs* of *Auchloſsin* competing.

Frumenti Bollas.

F*Rumenti Bollas*, contained in the *Reddendo* of a Feu-charter, determined to be Wheat by immemorial Uſe of Payment, *February* 28, 1708, Earl of *Marr* contra Feuars of *Bothkennar*.

Funeral Expences. *See* Executry.

A Wife's Funeral Expences come not off her Huſband, but affect her Executors to whom ſhe left ſufficient Eſtate to defray the ſame, *January* 16, 1706, *Aitkin* contra *Guidlet*.

Actio funeraria competent only for Expences that were neceſſary and decent, with Regard to the Defunct's Quality and free Eſtate deſcending to his Heirs and Executors: But where ſo much of free Gear doth not come to them as is ſufficient to bury him, the Expences of his Funerals, in ſo far as is decent and neceſſary, ſhould come off the Legacies, *December* 14, 1709, Lord Juſtice-clerk and his Lady contra *Hamilton* of *Bangour*.

Funerary Expences affect not the Dead's Part only, but come off the whole Head of the Executry, *June* 20, 1713, *Moncrieff* and her Huſband contra *Monipenny*.

General Clauſe. *See* Diſcharge.

General Letters.

A Charge upon general Letters of Horning, ſuſtained againſt the Freeholders of a Shire for meeting and ſtenting themſelves, for Payment of the Fees of their Commiſſioner to the Parliament, *February* 10, 1713, Sir *Thomas Burnet* contra *the Freeholders of the Shire of* Kincardin.

Gifts. *See* Office.

A Gift under the Great Seal ſuſtained, albeit the Words *per Saltum* were ſuperinduced in the Warrant, and ſome Words not material therein ſcored. In Reſpect the ſuperinduced Words were in Effect in the Warrant in other Words not ſuperinduced; and the Margin ſubſcribed by the Keeper of the Seal, bore that the ſcoring was by Order of the Chancellor, and Conſent of the Donatar, who had moſt Reaſon to quarrel it, *February* 4, 1709, Sir *Alexander Cuming* contra *Vere Kennedy*.

The Privilege of being the Sovereign's Printer, with an Immunity and Exemption from all Taxations, Stents, Annuities, and Impoſitions upon that Office or Trade, being granted to a Perſon, his Partners, Subſtitutes and Aſſignies; an Aſſignment by one of theſe Partners of the Half of his Share of the Gift, was found not to transfer to the Aſſigny an Immunity from publick Burdens, when the Cedent retained that Privilege to himſelf, *July* 17, 1711, *Magiſtrates of* Glaſgow *and their Stent-maſters againſt* Sanders.

Glebe-lands, or Glebes of Miniſters. *See* Manſes.

THE Act of Parliament about the *Deſignation* of Glebes, doth only warrand the Preſbytery to deſign a Glebe to a Miniſter who has none; or to make up the legal Quantity of 4 Acres to one whoſe Glebe is leſs: But doth not impower them to change and alter Glebes, or to deſign a new Glebe to a Miniſter already poſſeſſed of a competent Glebe, albeit it lie at ſome Diſtance from the Church, *December* 24, 1709, *Linning* contra *Baillie* of *Walſtoun*.

The Deſignation of a Glebe advocated from the Preſbytery to the Lords upon Grounds of Iniquity, *December* 5, 1710, *Potter* contra *Ure* of *Shirgartoun*.

H.

Hearing of Cauſes in the Inner-houſe. *See* Rolls.

AFter elapſing of the Time which the Lords think fit to imploy in adviſing concluded Cauſes in the Beginning of the Seſſion, two Days weekly at leaſt, *Viz. Tueſday* and *Wedneſday* appointed for hearing ordinary Actions in the Inner-houſe Roll, from 11 a Clock at furtheſt till 12, except the laſt five *Sederunt* Days of the Seſſion, *November* 20, 1711, §. 10. *Act of Sederunt*.

Heirs. *See Inventarii Beneficium*, Adjudications, Spuilzie, Paſſive Titles, Competition, Bankrupts, Service of Heirs.

A General Retour as Heir of Line without Infeftment, carried Right to the Proviſion in a Contract of Marriage in Favours of Heirs Male, and impowered the Party to evacuate the Proviſion by diſponing to Heirs whatſoever, *January* 22, 1706, *Livingtoun* contra *Menzies*.

Perſonal Bonds ſecluding Executors fall to the Heir of Line, *January* 23, 1706, *Begbie* contra *Begbie*.

A landward Heretor's principal Dwelling-houſe belongs to the eldeſt Heir Portioner, *February* 26, 1707, *Cowie* contra *Cowies*, without any Compenſation or Equivalent to be given to the younger Heirs therefore, *March* 5, 1707, *inter Eoſdem*. And an Orchard not having been ſet for Rent goes with the Houſe to the eldeſt, without any Recompence to the reſt, *June* 24, 1708, *inter Eoſdem*. Which eldeſt was alſo preferred to the Cuſtody of the Writs, upon her granting Obligement to make the ſame furthcoming to, or to allow Tranſumpts to be made upon the equal Charges of all concerned, *July* 22, 1708, *inter Eoſdem.*

Heirs and Bairns of Proviſion, not bound to relieve the Cautioner for their Proviſion, *December* 18, 1707, *Dickſon* of *Hartrie* contra *Miln* of *Carridden.*

One having diſponed to another all Right he might happen to have to a Woman's Eſtate, to whom he the Diſponer was preſumptive Heir, with a Procuratory to ſerve him Heir, in Caſe ſhe died without Heirs of her own Body: The Procuratory, tho' granted in her Lifetime, was ſuſtained as a ſufficient Warrant to ſerve the Granter, who was out of the Kingdom, Heir to her, when the Succeſſion fell due to him by her Death, *July* 28, 1708, *Ragg* contra *Brown.*

Proceſs ſuſtained at the Inſtance of an Heir Male againſt the Heir of Line, for declaring that their Predeceſſor had Right to an Appriſing upon another's Eſtate; and that the Appriſing is affectable for the Purſuer's Relief of the Predeceſſor's Debts; altho' theſe Debts were not libelled or produced: In Reſpect no Concluſion of Payment was libelled againſt the lineal Heir, *February* 2, 1710, Earl of *Lauderdale* contra Lord *Yeſter.*

Adjudication of Lands from an apparent Heir, upon a Charge to enter Heir to one ſerved *legitimus & propinquior Hæres* to his Father, and infeft in the ſaid Lands; found null at the Inſtance of an Appriſer thereof from the Perſon ſo indefinitely ſerved neareſt lawful Heir. In Reſpect of a Charter of the Lands granted to his Predeceſſor and his Heirs Male, with a Precept of Seaſin, tho' no Seaſin thereon was produced, there being no Right to Heirs whatſoever *in Campo*, *January* 3, 1712, *Ferguſſon* contra *Irving* of *Gribtoun.*

An Heir of Line ſerved *cum Beneficio Inventarii*, having no Intromiſſion with the Defunct's Eſtate, but what was exhauſted by Payment of preferable Debts, and being debarred from the reſt by a Competition for Preference with the Heir Male, decerned to aſſign the Inventory to the Defunct's Creditor, or to pay the Debt due to him, *November* 8, *Vint* contra Lord and Lady *Hawley.*

An eldeſt Son who was both Heir Male, and of Line to his Father, being ſpecially ſerved *tanquam legitimus & propinquior Hæres* to him in Lands, provided to the Father and his Heirs Male; the Service was underſtood in the Terms of the laſt Inveſtiture, *November* 13, 1712, Earl of *Dalhouſie* contra Lord and Lady *Hawley.*

A Father in one of his four Daughters Contract of a ſecond Marriage, for himſelf, and as Burden-taker for his Daughter, obliged himſelf to make her a Bairn in the Houſe, and that ſhe ſhould ſhare equally with his other Daughters, of his Lands and Heretages, reſerving Power to himſelf to uſe and diſpoſe as he thought fit; and the Daughter was obliged to provide her Share of her Father's Eſtate to the Heirs of that Marriage. She ſurviving her Father, who made no Settlement, and dying without entring Heir to him: The Son of her firſt Marriage, who procured himſelf, as come in Place of his Mother, to be ſerved Heir in a Tenement of Land, as one of the four Heirs Portioners to the Grand-father; was found obliged to fulfil the Grand-father's Obligement to the Heir of Proviſion of the ſecond Marriage, and denude in his Favours, of that fourth Part of the Grand-father's Land wherein he was infeſt as Heir Portioner, *February* 5, 1713, *Balfour* contra *Greig.*

One ſerved Heir in general to the Receiver of a Diſpoſition (who died infeſt *a me*, without the Superior's Confirmation) having renounced and diſcharged the Diſpoſition: The whole Right in the Defunct's Perſon, was found conveyed by the general Service to the Heir; and the Heir's Diſcharge and Renunciation found to be a Mid-Impediment and effectual Stop to any ſubſequent Confirmation of the Infeftment *a me*, to hinder it to operate *retro*, to validate another's Infeftment upon a ſpecial Service, as Heir to the Obtainer of the Diſpoſition, *July* 10, 1713, *Douglaſs* of *Hiſleſide* contra *Somervell* of *Kennocks.*

No Proceſs ſuſtained in a Reduction *ex Capite Lecti*, at the Inſtance of Perſons deriving Right from one in *Ireland*, as apparent Heir to the Granter of the Deed quarrelled: Unleſs the pretended apparent Heir's Propinquity to him, were inſtructed by a Service, or otherways, *July* 23, 1713, *Gordon* and *Osburn* contra *Campbell* and others.

An Heir of Proviſion to the Granter of a Charter, not allowed to quarrel the ſame for Want of Infeftment, in an Improbation at his Inſtance, but repelled *Exceptione* in the firſt Inſtance, upon his being *ſubſidiarie* liable to warrant the Right; without Neceſſity to call the Heir of Line, *January* 31, 1712, E. *Forfar* contra *Gilbagy.*

A Wife having diſponed ſome Tenements to her Huſband's Children of any other Marriage, which failing to her own Brother, with this Proviſion, That the former ſucceeding by Virtue of that Diſpoſition, ſhould pay 100 *l. Sterling* to the latter; and he hapning to ſucceed by Virtue thereof, ſhould pay ſome particular Sums to Perſons therein-mentioned; the Brother ſucceeding *ab inteſtato*, without acknowledging the Diſpoſition, found not liable ſimply to theſe Perſons for the Sums payable to them, but liable only for ſo much thereof as he had free in his Hand, over and above the 100 *l. Sterling*, intended by the Diſpoſition for himſelf *tanquam præcipuum*, *February* 22, 1712, *Turnbul* contra *Kinnier*.

Heretable and Moveable.

A Bond for Mony to be imployed on Heretable Security, in Favours of Heirs or Aſſignies, without Mention of Executors, and declared to be Heretable, and noways Moveable thereafter; not rendred Moveable by a Charge of Horning, *July* 14, 1705, *Gray* contra *Panton*.

A Perſon having, in his Contract of Marriage, obliged himſelf, his Heirs and Succeſſors in his Eſtate, to pay to the reſt of the Children, to be procreated of the Marriage, a certain Sum to be divided equally amongſt them at ſuch an Age; with this Proviſion, That the Portion of any of theſe younger Children dying unmarried, ſhould accreſce to the Survivers; and there having been four Children, whereof one went abroad without returning: The Father diſponed his Eſtate to his eldeſt Son, with the Burden of paying his anterior Debts, and with the Burden of the Proviſions of his other two Children, as their Portion natural. It was found, That the younger Childrens Proviſion became Heretable by the Father's ſupervenient Diſpoſition to his Son, *December* 4, 1707, *Aitken* contra *Goodlets*.

A Bond payable to one, and failing of him by Deceaſe to a blank Perſon, his Heirs, Executors, or Aſſignies; upon which, tho' it bore a Precept of Seaſin, the Creditor never took Infeftment, but by his Teſtament ordered his Son's Name to be inſerted in the Blank; found to be heretably conceived, and the Nature thereof not altered by the Teſtament, *January* 16, 1711, *Gray* contra *Cairncroſs*.

High-ways.

NO publick High-way can be made upon a private Perſon's Property without his Conſent, or the uninterrupted Preſcription of 40 Years. But it being proved, That Fiſhers on *Dunbar* Coaſt, (when they could not by Reaſon of High-winds make the Harbour of *Dunbar* with their Boats) are in Uſe of landing on the Duke of *Roxburgh's* Ground, and the Lieges in Uſe of leading Fiſhes and Neceſſaries for fiſhing to and from *Dunbar*, and the neighbouring Country, through that Ground, upon Payment of 8 *d. Scots* for the loaded Horſe, and 16 *d.* for the loaded Cart: The Lords declared the Duke's Property affected with the ſaid Quality, That there ſhould be ſtill Acceſs to the Lieges, for paſſing thro' the ſaid Ground for the ſaid Ends, upon Payment of the Duties aforeſaid. But found, That the Duke could not, for incloſing his Ground, run his Dike within the *Littus Maris*, *June* 5, 1713, D. of *Roxburgh* contra Town of *Dunbar*. And it being made appear, That there is no Paſſage for Cart or Horſe, betwixt the Place to which the *Littus Maris* comes, and a certain Rock in the Sea: The Lords found, That the Duke had Right to build the Wall of his Incloſure upon the ſaid Rock, but with ſuch Steps over the Wall within the *Littus Maris*, as will allow a Paſſage for walking on Foot upon the *Littus Maris*, for publick Uſe allennerly, *June* 19, 1713, *inter Eoſdem*.

Holding as confeſt. *See* Inhibitions.

A Decreet of Circumduction holding a Perſon as confeſt, after he had been forfeited, not ſuſtained to conſtitute a Debt in Prejudice of the Donatar of the Forfeiture, *February* 20, 1707, *Callander* of *Craigforth* contra L. of *Lundin* of that Ilk.

A Perſon out of the Kingdom, holden as confeſt upon a Citation at the Market Croſs of *Edinburgh*, Peer and Shore of *Leith*, as equivalent to a perſonal Citation of one within the Kingdom, *July* 3, 1708, *Kinloch* of *Gilmertoun* contra *Forbes* of *Tolquhon*.

Holograph. *See* Writs.

A Holograph Teſtament ſuſtained, tho' wanting Date, Place, Writer's Name, and Witneſſes: In Reſpect there was not any Teſtament of a particular Date competing therewith, *January* 20, 1709, Doctor *Pennicook* contra *Campbell* and *Edgar* and their Husbands.

And a Holograph Writ not found null, upon this Ground, That it mentioned not the Place where it was granted, *July* 14, 1709, *Vallange* of *Poſſils* contra *M'Doual* of *Freugh*.

Homologation. *See* Vis & Metus.

ONe's uſing and founding on a Decreet, determining controverted Marches *per Modum Tituli*, in Actions at his Inſtance and againſt him; No Homologation of a verbal

Error in the ſaid Decreet, *December* 1, 1711, *Wauchop* of *Cakemuir* contra *Hamilton* of *Fallahall*.

Horning. *See* Arreſtment.

A Charge of Horning on ſix Days upon a Decreet Arbitral, ordaining Letters to proceed in Form as effeirs, ſuſtained, in Reſpect the Submiſſion contained a Warrant to charge upon ſix Days, *January* 17, 1706, Lord *Pitmedden* contra *Balfour*.

A Charge of Horning upon a Bond for Payment of Principal, Penalty, and Annualrents reſting unpaid in general, without reſtricting to ſo much Annualrent as was truly reſting, ſuſtained as a ſufficient Ground to aſſoilzie the Debtor from the Penalty, *November* 27, 1708, *Forbes* contra *Forbes*.

A Creditor at whoſe Inſtance his Debtor was denounced, having conſented to his Relaxation, he was not allowed to quarrel the ſame upon the Account of any Nullity or Informality; whatever a Third Party might do, *February* 10, 1710, *Wallace* of *Ingliſtoun* contra Creditors of *Spot*.

Houſes.

A Man obliged in his Contract of Marriage to imploy a Sum upon Bond, Annualrent or other Security, and take the Rights to himſelf and his Spouſe in Liferent, and to the Children of the Marriage in Fie, found not to have implemented the Contract, by taking Rights in the Terms foreſaid to a Lodging in *Edinburgh* bought by him, eſtimated by knowing Perſons to be worth ſo much, *December* 29, 1710, *Hay* and *Caruthers* contra Doctor *Hay*. But in Reſpect, that the Contract bore, That the Security to be taken for the Mony ſhould be ſuch as he thought ſufficient at the Time; The Lords found the Tenement to be a ſufficient Security, *January* 18, 1711, *inter Eoſdem*.

Houſhold-pleniſhing.

UNcutted Cloth not reckoned Houſhold-furniture; but Silver-plate, tho' not deſtin'd for daily Uſe, as a great Baſon, Laver or Caddel-pot, underſtood to fall under the Denomination of Houſhold-pleniſhing, in Favours of a Lady, who, by her Contract of Marriage, was provided to the Half of the Houſhold-furniture, Heirſhip not excepted, or to 500 Merks in her Option. Albeit the Silver Veſſels in Controverſie, abſtracting from other Furniture, were of a far greater Value, than the alternative Sum, *July* 8 and 23, 1709, Lady *Rankeillor* contra Lady *Aytoun*.

Huſband. *See* Wives.

A Huſband liable for the Annualrents only of a Debt contracted by his Wife before the Marriage, and not for the principal Sum, *July* 13, 1708, *Gordon* of *Cults* contra Lady *Gight* and her Huſband.

Hypothecks.

IN a Competition betwixt a Tenant's Creditor who had poinded his whole Corns before the Maſter's Rent was paid, and one deriving Right to the ſaid Rent by Aſſignation from an apparent Heir: The Lords found that the Aſſigny had *Jus Hypothecæ*, for the Year's Rent, as the Cedent the apparent Heir would have had, *July* 23, 1707, *Wedderburn* of *Blackneſs* contra Baillie *Man*.

A Perſon who, intimating his Right to a Tenant's Moveables and Houſhold-pleniſhing by an Inſtrument of Poſſeſſion, debarred the Maſter from poinding the ſame for his Year's Rent *Jure Hypothecæ*, and did backſet the Goods to the Tenant, found liable to the Maſter for the ſaid Rent; albeit the Poinding was to have been executed in a Houſe not belonging to him, whither the Goods had been removed before granting of the Diſpoſition, *June* 30, 1708, *Selkrig* contra *French*.

A Right of Hypotheck competent to the Repairer of a Ship for his Expences in refitting her, and the Owner liable alſo perſonally for the ſame: Becauſe he looſed the Repairer's Arreſtment of the Ship upon Caution, and carried her off to proſecute a Voyage after the Looſing, *November* 16, 1711, *Watſon* and others contra *Arbuckle*.

I.

Idiotry.

THE neareſt Agnate or Kinſman to a fatuous Perſon on the Father-ſide, hath Right to be his Tutor of Law; and the full Blood is preferred, *Jure Repræſentationis*, to the Half Blood, who got a Gift of Tutory dative, when the other was Minor, *February* 23, 1710, *Moncrieff* of *Mornipea* contra *Maxwell* of *Leckiebank*.

One who got a Gift of Tutory dative to a fatuous Perſon, while his neareſt of Kin was Minor, having confirmed his Pupil ſole Executor *qua* neareſt of Kin to a Perſon who had another Friend in the ſame Propinquity of Blood at the Time, and became Cautioner for his Pupil; and having uplifted the whole Subject confirmed: In a Proceſs againſt him at the Inſtance of that other neareſt of Kin, for Payment of her Share, after he was exauctorated by the Tutor of Law's coming in his Place, he was found liable only *tutorio Nomine*, or as Cautioner for the Executor; and not liable *tutorio Nomine*, unleſs he have the Pupil's Effects in his Hand; nor yet as Cautioner for the Executor, till he and his preſent Tutor be firſt diſcuſſed, *December* 14, 1711, *Bonnar* and *Swinton* contra *Eundem*.

Ignorantia Juris. *See* Priſoners.

Impoſt. *See* Ale and Beer.

Improbation. *See* Reduction, Falſhood.

THE Defender in an Improbation, not allowed to abide by the Writ quarrelled with this Quality as a true Writ and Deed; except as to the Writer's Deſignation, *February* 1, 1706, *Maxwell* of *Monrieth* contra *Irving* of *Stank*.

Certification in an Improbation at the Inſtance of an Heir ſerved *cum Beneficio Inventarii* againſt ſome Bonds of Proviſion, granted by the Defunct to a Wife and Children of a ſecond Marriage, not ſtopped upon this Ground, That the Writs called for were in the Hands of his the Defunct's Writer, *November* 22, 1705, *Aytoun* of that Ilk contra *Colvill* Lady *Aytoun*.

The Debtor of a Defunct abſolved in a Purſuit at the Executor's Inſtance, by Compenſation upon a Debt due to him by the Defunct; being reconvened on the ſame Account by another Executor, who offered to improve *incidenter* the Execution of the Edict whereupon the firſt Confirmation proceeded: It was found, That the Defender was not oblig'd to abide by the Verity of the Execution; and that Improbation was not competent in that State of the Proceſs, *February* 12, 1708, *Lees* contra *Dinwoodie*. See *December* 10, 1708, *inter Eoſdem*.

Certification in an Improbation for not Production of a principal Right, refuſed, and an Extract thereof ſuſtained to ſatisfie the Production: In Reſpect the Defender was deſired by a Letter from the Purſuer to purchaſe that Right, *January* 28, 1708, *Glendinning* contra *Irving* of *Drumcoltran*.

In a Competition for Maills and Duties betwixt two Adjudgers, the one having offer'd to improve a Diſcharge granted to the common Debtor, produced by the other Adjudger, for proving that his Competitor had adjudged for a Debt that was ſatisfied; and the Producer of the Diſcharge having ſuffered the Term to be circumduced againſt him for not abiding by: The common Debtor was admitted for his Intereſt in the Proceſs, and allowed to abide by the Verity of the ſaid Diſcharge, *June* 25, 1708, *Coupland* contra *Caruthers*.

An inſtrumentary Witneſs admitted *cum Nota* to depone for improving a Party's Subſcription; albeit he was to have been a Gainer by annulling the Writ. And the Subſcription of one of three Diſponers by two Notaries and four Witneſſes being improved, for that one of theſe Witneſſes diſowned his Subſcription, the Subſcriptions of the other two Diſponers were not found to fall as Acceſſories with it; albeit they ſubſcribed as Conſenters: In Reſpect the Right diſponed was then in their Perſon, & *utile per inutile non vitiatur*, *November* 23, 1708, *Sym* and *Scot* contra *Donaldſon*.

In Improbations all Acts for the ſecond Term are to be once called judicially among other Acts, in Order to intimate to the Defender's Procurators to ſatisfie the Deſire thereof betwixt and a certain Day, to be appointed by the Ordinary, not exceeding ten Days: And the ſaid Intimation to be marked by the Clerks on the Margin of the Act, and ſubſcribed by the Ordinary. Where a ſecond Production is once made, and the Dues for a ſecond Calling paid in with it, and great *Aviſandum* made therewith, and Certification granted *contra non producta*, all after Productions made before extracting Decreet of Certification ſhall be received by the Clerks, and inſert in the Decreet without Neceſſity of any new Calling to make *Aviſandum* therewith, or to obtain a new Decreet of Certification *contra non producta*, *Act of Sederunt*, *January* 1, 1709.

The Defender in an Improbation having produced a Charter and Seaſin upon an Appriſing prior to the Purſuer's Right, without producing the Appriſing; The Lords granted Certification *contra non producta*: Albeit the Defender offered to ſupport his Right, by proving 40 Years Poſſeſſion thereby, which was not competent, in that State of the Proceſs, to exclude the Purſuer, *January* 25, 1709, *Farquharſon* contra *Frazer* of *Doors*.

The Defender in an Improbation who took Terms to produce, reponed againſt an extracted Certification for not Production pronounced in the Hurry of the End of a Seſſion, upon Application made for Redreſs in the Beginning of the next, and Payment of the Purſuer's Expences modified by his Oath, *November* 4, 1709, *Murray* contra *Wood*.

Writs againſt which a Certification in an Improbation was fairly extracted, not allow'd to be received in upon Payment of the Expences of the Decreet, *November* 24, 1710, Colonel *Preſton* contra Colonel *Erſkine*.

A Bond being granted for the Price of Land by the Purchaſer to a third Party, payable only after the Seller's purging all Inhibitions uſed againſt him before the Sale; that third Party was found entitled to purſue Reduction and Improbation of Inhibitions obſtructing his Payment, *January* 29, 1712, *Ogilvie* contra E. *Levin*.

Defenders in an Action having proponed Improbation againſt the Execution of the Summons, and conſigned 40 *Lib.* The Purſuers were not found obliged to abide by the Executions *ſub Periculo falſi*: In Reſpect the Meſſenger at the Bar abode by his own Execution, *November* 21, 1712, *M'kenzie* contra Inhabitants of *Burntiſland*. And the Defenders were not allowed a Term to improve, unleſs they would propone the Exception of Falſhood *peremptorie*, *December* 2, 1712, *inter Eoſdem*.

The Uſer of a Meſſenger's Execution offered to be improved as falſe, ordained to abide by the ſame *ſub Periculo falſi*, and not ſuffered to abide by with this Quality, That he found it lying in a Proceſs among his Father's Writs. Albeit he was an Infant at the Date of the Execution; And the Perſon who now quarrels it, tho' compearing in the Proceſs where it was produced, never objected againſt it in the Father's Lifetime. But the Lords allowed him to proteſt at his abiding by upon any Quality he thought fit, *July* 30, 1713, *Blair* of *Dunſkey* contra *M'dowal* of *Logan*.

Inædificatum Solo cedit. *See* Poſſeſſion.

Incloſures.

PRoceſs upon the Act of Parliament for regulating Incloſures, ſuſtained before the Lords, the Purſuer producing the Right to the Land he was incloſing *cum Proceſſu*; albeit the like Proceſs had been commenc'd before the Juſtices of Peace in King *William's* Time: Since that was taken up before Litiſ-conteſtation, *February* 7, 1706, Lord *Beilhaven* contra Lord *David Hay*.

The Act 41. Parl. 1. *Ch.* 2. found to be a perpetual Law, in ſo far as, to incourage Incloſing, it impowers Juſtices of Peace to caſt about the High-ways: Tho' the Clauſes appointing Heretors and Liferenters to incloſe and plant a certain Quantity of Ground, and exempting from Ceſs, be temporary, *July* 28, 1713, *Dunbar* of *Thundertoun* contra *Gordon* of *Gordonſtoun*.

Indemnity. *See* Bankrupt.

A Defence founded on the Queen's Indemnity in *March* 1703, which pardons and remits all Breaches, or Abuſes of, or Malverſations in publick Truſt, with all other Crimes, Delinquencies, or Tranſgreſſions of Omiſſion or Commiſſion, in ſo far as the ſame may infer any Pain or Puniſhment in the Lives, Fortunes, or Reputations of her *Scotiſh* Subjects; ſuſtained to exculpate the Conſervator of their Privileges in the united Provinces, for any Malverſations in his Office of Conſervator, preceding the Date of the Indemnity: Albeit he was called in Queſtion for the ſame before the Indemnity, and re-acted them after it, *November* 19, 1707, Sir *Alexander Cuming* contra Sir *Andrew Kennedy*.

One Partie's invading another during the Dependence of a Proceſs, which in the Act 219. *Par.* 14. *J.* 6. infers Loſs of the Plea, not pardoned by the Act of Indemnity, *February* 22, 1712, *Robertſon* contra *Robertſon* of *Strowan*.

One committing Fornication ſince the Indemnity, ſubjected to the double Penalty of a repeated Tranſgreſſion, upon the Account of Fornication, committed by him before the Indemnity, *November* 19, 1712, *Agnew* contra *Campbell*.

A Profeſſor of Divinity, having quitted his Office, in Obedience to a Sentence of the Commiſſion of Parliament for viſiting Univerſities, *&c.* *January* 25, 1697, depriving him for refuſing to qualifie himſelf, by taking the Oaths to the Government, and ſubſcribing the Confeſſion of Faith; and the Poſt being legally ſupplied by another Profeſſor admitted thereto after the Year 1703 : He was not reponed upon the Act of Indemnity in that Year, *July* 21, 1713, Doctor *Garden* contra *Anderſon*.

Infeſtments.

A Curator having procured Suſpenſion of a Decreet againſt him, at the Inſtance of a Co-curator, for a great Ballance due to the Minor, by the Suſpender as his Factor, upon conſigning a Diſpoſition of all his Eſtate, for Security of the ſaid Ballance : During the Dependance of which Suſpenſion, the Lords, upon a Bill given in by the Charger, repreſenting, That the Suſpender's Affairs were gone in Confuſion, and that himſelf had abſconded, and his Creditors were affecting his Eſtate by Diligence, allowed the conſigned Diſpoſition to be regiſtred, and given up to the Charger, in Order to take Infeſtment thereon, for Security of what Ballance ſhould be found due to the Minor, in the Event of the Compt and Reckoning, *February* 24, 1709, *Dow* contra *Seton*.

A Perſon having an Infeſtment of Annualrent in ſeveral Lands belonging to his Debtor, in one of which another Creditor hath a poſterior particular Infeſtment ; and having alſo a general Infeſtment for another Debt, poſterior to the other's particular Infeſtment : He may exact the whole Annualrent in his firſt Infeſtment, out of any of the Lands affected thereby ; and being ſo paid, that Right extinguiſheth, ſo as it cannot be aſſigned to the Creditor excluded. But if that Creditor pay the Sum in the preferable Infeſtment out of his own Means and Effects, he may oblige the Creditor whom he ſatisfieth, to communicate and aſſign the ſaid Infeſtment to him, for recovering proportionable Payment of his Annualrent, out of the other Lands, with this Quality, That the Aſſignation ſhould not be made Uſe of againſt the Cedent's other Infeſtment, *December* 21, 1710, *Pitcairn* contra *Haliday*.

An Annualrenter's Intromiſſions applyed, not only for ſatisfying the bygone Annualrents, but even for extinguiſhing the principal Sum, for which the Infeſtment of Annualrent was granted : Albeit that Infeſtment was then in the Perſon of a ſingular Succeſſor, who had adjudged it, *February* 20, 1711, *Baillie* of *Lamingtoun* contra Sir *William Menzies*, *Vid. January* 25, 1711.

Infeſtment upon an heretable Bond of Relief of certain Debts, granted by one who had Right by ſimple Diſpoſition to an Appriſing of the Lands in which the Infeſtment was taken, containing a Procuratory of Reſignation, and Aſſignation to the Mails and Duties ; found to convey the Diſpoſition for Security and Relief of the Debts mentioned in the Infeſtment ; and to exclude a poſterior Diſpoſition of theſe Lands, containing an Aſſignation to the Writs and Evidents, *December* 19, 1710, Colonel *Erſkine* contra Sir *George Hamilton*.

Informations and Petitions.

THe Act of *Sederunt February* 6, 1692, regulating the Order of Informations and Petitions, is to be duly obſerved, and that all Papers given in to the Boxes, muſt have the Name of the Advocate Drawer, ſubjoined thereto, who ſhall anſwer for the Contents, and be cenſurable in the Terms of the 23 Article of the Regulations 1695. Reclaiming Bills ſhould bear the Date of the ingiving, and of the Interlocutor complained of ; and Printers ought to print no Petition, Anſwer or Information without a Warrant, ſigned by an Advocate, whoſe Name ſhall be printed at the Bottom thereof : With Certification, That the Lords will give no Deliverance upon any Paper not offered in the Order abovementioned, *December* 19, 1710, Act of *Sederunt*.

Inhibition. *See* Diſpoſition, Executions, Reduction.

EXecutions of an Inhibition upon a Paper apart ſuſtained, tho' the Inhibiter and Perſon inhibited, were only therein-mentioned by their Names, with the Quality of *within-deſigned* ; and the Lieges inhibited *in Manner within-written*, without ſpecifying what they were inhibited to do ; and the Execution at the Market Croſs bore not the Words *open Proclamation*, but only *Three Oyeſſes, open and publick Reading* : In Reſpect many Executions of Inhibition about that Time were found to run in that Strain, and the Regiſtration of the Letters, and Executions aſcertained the Parties, *February* 14, 1706, E. of *Levin* contra *Durham* of *Largo* and *Nicolſon* of *Trabroun*.

A Wife's being allowed to tap and receive in Ale from Brewers, with her Huſband's Knowledge, after an Inhibition executed againſt her by him ; found relevant to make him liable to the Brewers for the Price of that Ale, and probable by his Oath, *July* 5, 1709, *Ker* contra *Gibſon*.

Inhibition ſuſtained, albeit the Execution bore not that a Copy was delivered to the Party inhibited: In Reſpect it bore, That he was duly and lawfully inhibited, and perſonally apprehended, *November* 16, 1709, *Crombie* contra *Robertſon.*

Inhibition needs not to be executed at the Head Burgh of the Regality, where the inhibited Perſon's Lands ly: But it ſufficeth, after executing againſt him perſonally, or at his dwelling Place, to execute at the Market Croſs of the Head Burgh of the Shire where he dwells, and regiſtrate either in the particular Regiſter of the Juriſdiction where his Lands ly, or in the general Regiſter, *February* 14, 1710, Lord *Gray* contra Sir *William Hope.*

Inhibition ſuſtained, albeit the Names and Deſignations of the Witneſſes in the Execution were only added upon the Margin, and ſigned by the Meſſenger; and the Writ bore not, That the Witneſſes therein were alſo Witneſſes to the marginal Note, *July* 5, 1710, *inter Eoſdem.*

Neither was it held to be a Nullity in the Execution, That it bore only, That the Meſſenger affixed a Copy at the Market Croſs, and not that he both affixed and left a Copy there. Nor yet was it found null, for not mentioning that the Witneſſes, but only that the Meſſenger did ſign the ſame: Seeing it was *de Facto* ſigned by the Witneſſes, *July* 21, 1710, *inter Eoſdem.*

Inhibition not effectual againſt a Decreet in Abſence, holding the inhibited Perſon confeſt upon a Debt due by him to the Obtainer of the Decreet. Here the inhibited Perſon was dead when the Decreet againſt him was quarrelled *ex Capite Inhibitionis, July* 11, 1711, *Nairn* of *Drumkilbo* contra *Betſon* of *Kilry.*

One having, after he ſtood inhibited at a Creditor's Inſtance, diſponed certain Lands to others, in Implement of his anterior Bond, to relieve them of their Obligement, to infeft a Lady in theſe Lands: The Diſpoſition was found ſufficiently ſupported againſt Reduction *ex Capite Inhibitionis,* by the Bond of Relief granted before the Inhibition, *January* 16, 1713, *Gordon* contra *Gordon* and others.

Inhibition ſuſtained upon a general Charge to enter Heir, in ſo far as concerned Debts particularly libelled in the general Charge, *February* 17, 1713, *Livingſton* and *Tait* her Husband contra *Forreſt.*

Execution of an Inhibition ſuſtained: Albeit 1. it did not deſign the Inhibiter, or Party inhibited, otherways than by a general Relation to the Letters; 2. It did not bear Delivery of a ſubſcribed Copy to the Party; Nor yet 3. That there were Witneſſes to the leaving of the Copy, but only to the affixing. All which Nullities, objected againſt the Execution, were repelled, *July* 8, 1713, *Baillie* of *Parbroth* contra *Nisbets.*

Inhibition upon a conditional Debt diſcharged, in Reſpect there was no preſent juſt Reaſon for inhibiting, *July* 17, 1713, *Wier* Supplicant contra *Deuchar.*

Innovation. *See* Precepts, Bills of Exchange, Fraud.

TAking a Precept by a Creditor upon the Debtor of his Debtor by Bond (whereby the Perſon drawn upon, was to retire the Drawer's Bonds and Tickets, with all Diligence done againſt him, and to get a general Diſcharge in his Favours from the Creditor) obtaining the Precept accepted, receiving partial Payment, and a Bond of Corroboration for the Remainder, payable at a certain Time, found to be no Innovation of the firſt Bond, *July* 10, 1706, Sir *Alexander Brand* contra *Torſton.*

A Bond being granted by a Father to his infant Daughter, payable 13 Years thereafter, with Annualrent from the Term of Payment; and a poſterior Bond for a greater Sum, payable and bearing Annualrent Two Years and a Half ſooner than the firſt; Both which Bonds bore, *That in Caſe the Daughter hapned to die Childleſs, before ſhe were Year and Day married, the Sums ſhould return to the Father's Heirs,* and alſo, *That the ſame was granted in Satiſfaction of all that he could claim by her Father's Deceaſe*; But the 2d Bond, *excepted what he ſhould pleaſe to leave her*: The Lords found, That the Daughter had not Right to both Bonds, but that the firſt was innovated by, and included in the laſt, *February* 24, 1709, *Burnet* and her Husband contra Baron *Maitland,* and *Young* of *Oldbar.*

One having obliged himſelf by Ticket to pay to another a certain Sum, as the Price of Rigging furniſhed to him for a Ship, belonging to the Government, whereof he was Captain, payable when a Ceſs impoſed, for outrigging that Ship is paid; and the Creditor in the Ticket having afterwards taken a Bill from the Debtor upon his Factor, ordering him to pay the ſaid Sum to the Creditor out of the firſt and readieſt Mony due to the Drawer, out of the Equivalent, which Bill was accepted: The Ticket was found payable at the Term, when the Ceſs aforeſaid fell due by the Country to the Publick; and

the Creditors taking the poſterior Bill, was found to be no Innovation of the Ticket, *June* 26, 1711, Captain *Oſwald* contra Captain *Gordon*.

One having charged for the whole Sum in a Bond, after the Debtor had accepted a Bill for a Part thereof, drawn by the Charger payable to a Third Party, who by his Declaration produced, appeared to be only a Truſtee for the Drawer's Behoof: The Debtor in the Bond was, notwithſtanding his Acceptance of the Bill, found liable to pay the whole Sum charged for; the Charger finding Caution, upon Payment, to warrand the Payer, againſt all further Payment by Virtue of the Bill, *July* 10, 1713, *Ramſay* and *Reid* contra *Spalding* of *Aſhintilly*.

Inſtruments. *See* Aſſignation.

Inſtrumentum penes Debitorem repertum.

RElevant to extinguiſh an heretable Bond, upon which Infeftment had followed, and an Aſſignation thereto, that both were in the Hands of the Debtor after the Creditor's Deceaſe, before Delivery to the Aſſigny, *January* 26, 1710, *Simſon* and *White* her Husband contra *Rollo* of *Powhouſe*.

An heretable Bond of Proviſion to a younger Child clothed with Infeftment, innovated by a poſterior Contract, wherein the Creditor accepted the Heir's Obligation for the Mony, in full Satisfaction of all former Proviſions made to her by her Father, which ſhe diſcharged the Heir of, *July* 17, 1712, *Clark* and *Reid* contra Creditors of *Broadlees*.

Interdictions.

A Diſpoſition by a Perſon interdicted after the Interdiction fell by Death of the *Quorum* of Interdictors, not reducible *ex Capite Interdictionis*, *December* 8, 1708, *Hepburn* contra *Hepburn*; Nor yet upon the Head of Prodigality and Weakneſs, *January* 5, 1709, *inter Eoſdem*.

Not ſufficient to ſuſtain a Bond granted by an interdicted Perſon, without Conſent of his Interdictors, that theſe ſubſcribed Witneſſes to it, *November* 24, 1710, *Law* contra *Turnbull*.

Lands being diſponed to one, and the Heirs Male of his Body, which failing to another, with this Proviſion, That it ſhould not be in the former's Power to burden the Lands with more, as ſo much Debt; and he having afterwards interdicted himſelf, and, with Conſent of his Interdictors, granted for Love and Favour an heretable Bond with Infeftment to his neareſt of Kin, when he had no Proſpect of Children of his own Body: The Lords ſuſtained the Bond, tho' gratuitous, it being granted with Conſent of the Interdictors, *July* 19, 1711, *Rae* and *Corſan* contra *Maxwell* of *Munſhes*.

Interlocutors.

INterlocutors pronounced by any Ordinary in Abſence of the Party, muſt be ſigned the Day when pronounced; and thoſe proceeding on Debate, muſt be ſigned at fartheſt within ſix Days after pronouncing, otherwiſe they're null: Except Interlocutors on Debate the Two laſt Days of the Seſſion, which are to be ſubſcribed within 48 Hours of the pronouncing, and otherwiſe are null. Interlocutors ſigned after the Seſſion is up, are alſo null. Where Interlocutors are not ſubſcribed of the Date of pronouncing, the Clerk muſt prefix to the Minute the true Date of the Pleading and Pronouncing, and ſubjoin to the Interlocutor the Day it was ſigned. Acts, Decreets, and Proteſtations are to be put up in the Minute Book of the Date when they are ſigned. Act of *Sederunt*, *July* 8, 1709.

Interlining. *See* Gifts, Writs.

Interruption. *See* Preſcription.

Intimation. *See* Aſſignation.

Inventarii Beneficium.

INventarii Beneficium not allowed to an Heir who had given up and recorded Inventories in another Sheriff-court, than that of the Shire where the Subject inventored lay; and where the Inventory mentioned only the Extent of heretable Debts due to the Defunct in Groſs, without ſpecifying the particular Bonds and Debtors, *February* 11, 1708, *Mckay* contra *Sinclair* of *Stempſter*.

Nor yet was the Benefit of Inventory profitable to one who gave up Inventories after the Service, tho' within the *Annus deliberandi*, and before he had any Intromiſſion, or was cited by any Creditor, or infeſt upon the Service, *February* 19, 1709, *Campbell* contra *Campbell* of *Burnbank*.

Jointure-houſe. *See* Damages.

Irritancy. *See* Clauſes, Reverſion.

A Perſon having taken a Tack of his own Tithes, and given Bond for a *Graſſum*, upon receiving a Backbond, with this Quality, That if againſt a certain Term he produced a better Right to his own Tithes than the Setter had, the Bond ſhould be null; and his not producing ſuch a Right in the Interval ſhould irritate the Backbond, and give full Force to the Bond; was a Matter of three Years after elapſing of the Term, allowed, in a Suſpenſion of a Charge on the Bond, to purge the Irritancy of the Backbond, by producing a preferable Right; the Irritancy not being declared, *January* 8, 1708, *Cochran* contra Lord *Bargeny*.

A gratuitous Bond for a Sum of Mony, with this Quality, That it ſhould be null, if the Granter were decerned to pay to a third Party another Sum for which he was then under Proceſs before the Seſſion, irritated and void by the Granter's Payment of that other Sum, by Virtue of a Decreet-arbitral, upon a Submiſſion of the Proceſs entred into by him without Conſent of the conditional Creditor, *February* 5, 1708, *Scot* contra *Seton*. Unleſs he the conditional Creditor could alledge a Defence whereupon the Debtor might have been aſſoilzied from the depending Plea, *November* 12, 1708, *inter Eoſdem*.

A Lady having by Contract with her Huſband's Heir of Tailzie, for the Weal and Standing of his Family, reſtricted her Liferent-annuity with ſeveral ſtrict Clauſes irritant: The Eaſe thereof was found affectable for a Proviſion and Aliment to the Relict of a former Heir, albeit the Irritancies in the Reſtriction were incurred; ſo long as the Lady who reſtricted, did not claim the Benefit of her full Annuity, *December* 24, 1709, Lady *Lee* contra Laird of *Lee*.

A Clauſe in a Daughter's Bond of Proviſion that it ſhould be null, in Caſe ſhe married without Conſent of one of two Perſons, not relevant, upon her marrying without ſuch a previous Conſent, to reſtrict the Proviſion as extravagant: Becauſe the Match was not unreaſonable, the Truſtee, by whoſe Conſent it ſhould have been concluded, declared judicially, That he had nothing to object againſt the ſame, and the Narrative of the Bond bore the Proviſion to be moderate according to the Father's Fortune, and he was beſt Judge of his own Condition, *July* 7, 1710, *Buntine* contra *Buchanan* of *Drummakill*.

A Man who, by his Bond granted to a young Woman in Conſideration of a Sum aſſigned to him by her Friend, under that expreſs Condition, obliged himſelf to pay to her ſuch a Sum at the next Term after her Marriage, ſhe always acquainting him therewith, and taking his Conſent thereto, found liable to pay the Mony to the Creditor after her Marriage; albeit he was not acquainted therewith: In Reſpect ſhe had married regularly with her Father's Conſent, and there was no ſuch Quality in the Aſſignation, which was the onerous Cauſe of the Bond, *July* 20, 1710, *Aliſon* contra *Duncan*.

A Lady having renounced her Jointure with this Proviſion, That if it ſhould happen the Party in whoſe Favours ſhe renounced to die without Heirs Male of his Body; or to have but one Daughter, then and in either Caſe the Renunciation ſhould be null: The Lords found the Renunciation null upon his dying without any ſuch Heir Male, tho' he left ſeveral Daughters, *July* 17, 1712, Dame *Rachel Nicolſon* contra Doctor *Oſwald*.

One having corroborated his former Bonds with this Proviſion, That in Caſe he ſhould betwixt and a certain Term inſtruct Payment of any Part of the Sums corroborated; the ſame ſhould be diſcounted to him, without Prejudice of his Action of Recourſe for Repetition after elapſing of the ſaid Term; but that the aforeſaid Proviſion ſhould not afford any Ground of Suſpenſion after the ſaid Term: Compenſation proponed by the Granter

of the Bond by Way of Suſpenſion, was allowed, notwithſtanding that the Writs for inſtructing the ſame were not offered to the Creditor before the Term aforeſaid, but only now produced, *February* 18, 1713, *Gordon* contra D. of *Gordon*.

Judges.

BAillies of a Burgh competent to judge concerning Debts due to the Burgh, *July* 17, 1706, *The Town Treaſurer of Dunbar* contra *Pringle*.

Abſolvitor in Favours of a Judge purſued for Damages the Purſuers were put to by a Poinding executed upon an unjuſt Decreet of poinding the Ground pronounc'd by the Defender againſt Tenants, without allowing the Heretor to be called, *July* 23, 1706, *Black* and other Tenants of *Gogar* contra *McGill* of *Grange*.

A Sheriff-clerk competent to judge in Abſence of the Sheriff-depute, by Virtue of a Commiſſion from the Sheriff-principal, and his Clerk-depute to officiate as Clerk, *January* 24, 1711, *Binning* contra *Cook* and *Arnot*.

Juriſdiction. *See* Judges.

A Lord Conſtable having named one of the Baillies of a Royal Burgh to be his Juſticiary-depute; and it being ordained by an Act of Council thereof (the ſaid Depute and not the Principal, being preſent and conſenting) that ſo long as the Conſtable had the naming of one of their Baillies to be his Depute, the Fines of the Juſticiary-court ſhould belong to the Town, and be uplifted by their Treaſurer: The ſaid Act of Council with 40 Years Poſſeſſion, was not ſuſtained a Title of Preſcription, to ſeparate the Benefit of the Fines impoſed by the Juſticiary-depute, from the Juriſdiction, and apply the ſame to the Town; tho' fortified by a ſolemn Contract betwixt them and the Conſtable's Predeceſſors, acknowledging that the Town had ſome Pretenſion to the Juriſdiction of Juſticiary within it ſelf, and obliging the Conſtable to grant a yearly Deputation of the Office of Juſticiary and Conſtabulary to one of the Baillies thereof to be named by himſelf, *July* 24, 1707, Town of *Brechin* contra E. of *Panmure* and the Lord *Grange*.

Jus accreſcendi. *See* Truſt.

INhibition uſed by an Aſſigny found to accrue to a poſterior Aſſigny, after Reduction of the firſt Aſſignation, if it be not reduced *ex Capite Fraudis*, *July* 23, 1713, *Duncan* contra *Miller*.

Jus Mariti. *See* Huſband, Wives, Terce, Aliment.

A Huſband not allowed to repete a Legacy given by his Wife in Money before her Death: In Reſpect ſhe had diſponed to him a conſiderable Eſtate in Bonds bearing Annualrent, that fell not under the *Jus Mariti*, *July* 14, 1705, *Somervell* contra *Dundas* and *Anderſon*.

A Wife (whoſe Huſband was Major) reponed upon the Head of Minority and Leſion, againſt a Diſcharge by her and her Huſband of Debts belonging to her; and againſt a Diſpoſition of her Lands granted with his Conſent, and him as taking Burden for her to her Father and Tutor; was excluded from the Annualrent and Rents during the Marriage, as falling under the Huſband's *Jus Mariti*, which with his Courteſie was found cut off by the Deeds aforeſaid, *July* 25, 1705, and *July* 4, 1706, *Hamilton* and *Boſwell* againſt *Boſwell*. But theſe Rents were ſuſtained to compenſate *pro tanto* the Articles of the Tutor's Diſcharge, *November* 22, 1705, *inter Eoſdem*.

A Man and his Wife having by a Contract agreed to live ſeparately, and renounced *hinc inde* what either could claim of other as if they had never been married; and the Wife having, after this Separation *bona Gratia*, agreed with her Son of a former Marriage to reſtrict the Jointure payable by him: The Reſtriction of the Jointure was found effectual during the ſtanding of the Contract of Separation; but found to fall with that Contract, and the Huſband and his Wife found to have Right to her full Jointure, how ſoon the Separation was paſt from by mutual Conſent, and they came to be reconciled and to cohabit, *February* 12, 1713, *Forbes* of Blacktoun contra *Abernethy* of *Meyen*.

The Benefit of a Man's Renunciation of his Wife's Jointure before their Marriage, which he obliged himſelf to renew in Favours of her Aſſignies, when and how oft he ſhould be required, found to recur to himſelf *Jure Mariti*, immediately after the Marriage; the Wife not having exerced the Faculty of aſſigning before the Marriage, *July* 14, 1709 *Vallange* of *Poſſils* contra *McDowal* of *Freugh*.

A Bond granted to a Lady, in Lieu of the ordinary Compliment of a Gown, for conſenting to the Alienation of her Huſband's Lands, found not compenſable by another Bond of the ſame Date, granted by her Huſband for the like Sum to the Granter of the firſt Bond: In Reſpect the firſt Bond was of the Nature of *Paraphernalia*, which exclude the *Jus Mariti*, *July* 26, 1709, *Murray* Lady *Pitfirren* contra *Wood*.

A Man having, to oblige his Wife to return to his Family which ſhe had deſerted, becauſe of his maltreating her, granted Bond to pay her a certain yearly Aliment, in Caſe of a ſupervening Separation thro' his Fault; and ſhe having upon juſt Grounds of his further Severity towards her again diverted from him, and procured a Decreet, modifying a yearly Aliment to her, which ſhe extracted: A Charge thereafter at her Inſtance againſt her Huſband for the alimentary Proviſion in the Bond, as being greater than the Lords Modification, was *ſimpliciter* ſuſpended, *January* 6, 1710, *Blair* contra *Hunter* her Huſband.

Jus ſuperveniens. *See* Clauſes.

A Wife having diſponed her Eſtate to her ſecond Huſband, upon his granting Back-bond, to provide her to a Liferent of the whole, and the Children to be procreated betwixt them, to the Fee of the equal Half; and he having acquired a former Right made by his Wife to her firſt Huſband's Father, after that he the ſecond Huſband had entred to, and continued many Years in peaceable Poſſeſſion by Virtue of the Diſpoſition to himſelf: It was found, That the ſecond Huſband could not make Uſe of the ſupervenient Right, to exclude the only Child of the Marriage from the Benefit of his Back-bond; and that his neceſſary Expences ſhould come off the whole Eſtate, and not off the Child's Half only, *July* 24, 1706, *Carruthers* and her Huſband contra *Carruthers* of *Dormont*.

Jus tertii. *See* Superiority.

NOT competent to an Adjudger of a Tenement, to quarrel the Formality of the Execution of a Warning in a Proceſs of Removing againſt the Tenants, at the Inſtance of another Adjudger: He being neither a Poſſeſſor, nor called in the Removing, *June* 30, 1708, *Rule* contra *Purdie*.

A Perſon having a real Right upon Lands, allowed to object againſt a competing Adjudication, that it was null, for being led upon a Bond paid by the Debtor: Albeit he who quarrelled the Adjudication, derived no Right from the Perſon againſt whom it was led, *December* 18, 1708, Colonel *Erskine* contra Sir *George Hamilton*.

Juſtices of Peace. *See* Fornication.

AN exorbitant Fine impoſed by Juſtices of Peace for a Riot, reſtricted to a leſs Sum by the Lords, *January* 19, 1710, *Dickſon* contra *Hume*.

Their Sentences in Matters of Exciſe are final, and not liable to the Lords Review, *January* 25, 1710, *Paterſon* contra Sir *James Ramſay* of *Bamf* and others.

Juſtices of Peace having fined a Perſon in 50 *l. Scots*, for double Contumacy in not appearing to anſwer to a Complaint againſt him for a Riot, and to find Bail for keeping the Peace, after he was Twice perſonally cited: The Lords reſtricted the Fine to Ten Pounds; and thought that none could be fined for not finding Caution to keep the Peace, but only be committed to Priſon, *November* 9, 1710, Juſtices of Peace of the Shire of *Wigtoun* contra *Martin* of *Mool*.

Juſtices of Peace not competent to judge in Actions upon the paſſive Titles, except for ſmall Debts, expreſly allowed to be purſued before them by the Act of Parliament 1661, *December* 15, 1710, *Forſyth contra Richie*.

A Suit depending before the Juſtices of Peace, againſt Tranſgreſſors, by running and reſetting uncuſtomed Goods, advocated at the Purſuer's Inſtance, and remitted to the Exchequer, after Witneſſes had been examined, *January* 9, 1711, *Eyres*, *Mure*, and *Ballantyne* contra *Hunter* and *Campbell*.

Juſtices of Peace not competent to judge of Scandal, or verbal Injuries, *July* 17, 1711, *Sharp* of *Hoddam* contra *Maxwell* of *Cowhill*.

Juſtices of Peace have Juriſdiction by the Act of Parliament to judge the Inhabitants of a Burgh (which before the regular Conſtitution of Judicature had by Charters from the Sovereign, a Power to repledge their Inhabitants) for the unwarrantable Import of *Iriſh* Victual; and may ſuſtain the Libel relevant to be proved by their Oaths. But the Lords thought fit to modifie a Fine impoſed by the Juſtices upon each of theſe Offenders, according to their reſpective Circumſtances, and Quality of the Offence, *January* 24, 1712, Juſtices of Peace of the Shire of *Air* contra Town of *Irving*, and ſome Inhabitants thereof.

L.

Legacies.

A Perſon having left to his eldeſt Nephew, 6000 Merks, and to the ſaid Nephew's Brothers and Siſters 7000 Merks, all to be liferented by the Legatar's Father, with Power to the Executors nominate, without Conſent of the ſaid Father, to pay the 6000 Merks to the eldeſt Nephew, or ſo much thereof as they ſhould think fit, they always paying the Superplus of the ſame to his ſaid Brother and Siſters, by ſuch Proportions as they, with Conſent of the Father, ſhould think expedient: The Lords found, That the Executors could not, after the Father's Deceaſe, exerce their Power to evacuate the Legacy left to the eldeſt Nephew, by ordaining the Whole to be paid to his Brother and Siſters, in Prejudice of his lawful Creditor, 24 *December* 1709, Executors of *Burnet* contra *Panton*.

A Teſtator having burdened his Executor with the Payment of his Debts, with putting a Through ſtone upon his Grave, and finiſhing the building of a Tenement out of the firſt and readieſt of the Executry; and left a ſpecial Legacy to a Child, of a Sum contained in a Bond granted to the Teſtator by the Child's Father; and the Executor having charged the Father, as Adminiſtrator in Law to the Legatary, for Payment of the Debt and denounc'd him: The Charge was found unwarrantable, and the Horning and Executions ordained to be put in the Clerk's Hands, in order to be cancelled and raz'd at the Signet, 27 *December* 1711, *Gray* contra *Cockburn*.

Letter of Credit. (*See* Bills of Exchange.) Writs.

A Man having given Credit by a Letter to his Brother for Thirty Pound *Sterling*, which he deſired him to take up by Bill from one or other of Two Perſons, and it ſhould be punctually honoured; and he having received the whole Thirty Pound from the one, and Thirteen Pound from the other; The Writer of the Letter was found liable to ſatisfy both, *July* 26. 1705, *Eliot* contra *Hume*.

Letter Miſſive.

Payment of a Bond not inſtructed by a miſſive Letter, not being holograph, nor in *re mercatoria*, 27 *December* 1710, *Gordon* of *Buckie* contra *Macintoſh* of *Borlam*.

Libel. *See* Summons.

Licenſe to purſue. *See* Executry, Commiſſaries, Confirmation, Decreets.

A Wife decerned Executrix *qua* Creditrix to her Father upon a Bond of Proviſion, having taken out a Licenſe to purſue a Debt due to the Defunct, by vertue whereof ſhe commenced a Proceſs againſt the Debtor, and uſed Diligence by Inhibition upon the Dependance, and dying before Decreet or Confirmation: It was found that the Inhibition fell; and that a Decreet and Confirmation at the Inſtance of her Children, Executors Dative as neareſt of Kin to her, and Executors Creditors to their grand Father, with Adjudication thereon, could not ſupply the Defect, to make the Inhibition ſubſiſt in their Favours, in a Competition with the Debtor's other Creditors, *June* 30 1705, *Jackſons* contra *Carnwath* and the Creditors of *Cockburn*.

A Licenſe to purſue before the Commiſſaries for a Debt unconfirmed, not neceſſary to the Executor decerned and confirmed by the ſame Commiſſaries, 10 *January* 1710, *Bothwel* of *Glencorſs* contra *Trotter* of *Mortounhall*.

Liferents.

Eight Hundred Merks, payable to a Lady out of her Jointure-Lands, at two Terms of the Year, *Witſunday* and *Martinmaſs* by equal Protions, yearly, termly and proportionally during her Lifetime: Due only for the laſt Term preceeding her Deceaſe: And no Proportion thereof due from that Term, till the Day of her Death, which happened about four Months after, 22 *February* 1711, *Laurie* contra Sir *Alexander Maxwell*.

Lis alibi pendens. *See* depending Action, Incloſures.

AN Indenture enter'd into, in *England*, and render'd litigious there before the Court of Chancery, ſuſtained as the habile Title of Action in *Scotland*, without regard to the *lis pendens* before the Chancery of *England*, *July* 5, 1706, Colonel *Cunningham* contra Lady *Semple*.

Litigioſa Res. *See* Aſſignations.

Locus pœnitentiæ. *See* Declaration of an Agreement, Roup.

R*EI interventus* by a Perſon's accepting ſome Guinea's upon a Set for ſtating the Price of Shares in the *African*-Company, and allowing the Giver his Choice, who made his Option; ſuſtained, to cut off the Benefit of *locus pœnitentiæ*; tho' the Aſſignations to theſe Shares were not perfected and delivered, *July* 14, 1708, *Graham* contra *Corbet*.

A Perſon having ſigned a Minute of Sale of his Eſtate, and delivered it to a Third Party upon his Obligement to procure ſome Preſtations from the Purchaſer, and to cauſe him ſubſcribe the Minute; and the Purchaſer having ſigned and got up the Minute from that Third Party, and charged the Seller to implement the ſame: The Bargain was found to be complete, ſo as there was no *locus pœnitentiæ*. Albeit neither did the Truſtee's Obligement contain any expreſs Warrant to deliver up the Minute, nor had the Purchaſer performed what the Truſtee undertook in his Name: And the Minute bore the Victual-Rent to be ſold at ſo many Years Purchaſe, as paid at a certain Time bygone, reckoning the Chalder of Victual at the Sum of which Blank was filled up by the Truſtee after the Seller had ſigned the Minute, but before Delivery thereof to the Purchaſer, 23. *December* 1709, *Lockhart* of *Carnwath* contra *Baillie* of *Walſtoun*.

One having by a Letter to his Debtor, given him Credit for a Sum due to the Debtor by a Third Perſon, *pro tanto*, and intreated him to pay the Balance and make a Right to that Debt; and ſome Months after, when the Perſon whoſe Debt was to have been aſſigned became in worſe Circumſtances, his Creditor having offered the Papers with an Aſſignation thereto, under Form of Inſtrument, bearing that the inſtrumented Party acknowledged that ſuch an Offer had been made before *debito tempore*: The Lords found, That there was no *locus pœnitentiæ* competent to the Writer of the Letter; it being always proved by the Notary and inſtrumentary Witneſſes, that he had acknowledged by his Anſwer to the Proteſt, that the Offer was made formerly in due Time, 13. *December* 1710, *Young* contra *Niſbet* of *Dean*.

Lords of Seſſion. *See* Confirmation, Reports.

A Lord may grant a ſecond Diligence to a Perſon againſt whom the Term had been circumduced by another Ordinary; whether in Abſence, or for not reporting the firſt Diligence, 18. *November* 1709.

The Lords are to meet in the Afternon, to receive Reports, and adviſe Bills and Anſwers when there is Occaſion for it, Act of Sederunt, 20. *November* 1711. § 13.

Lords preſent at their down-ſitting in the Morning, are to be marked in the *Sederunt*; and then Abſents coming in after their entring upon Buſineſs, to be ſo marked by themſelves. If any Ordinary Lord remove out of the Parliament-Houſe, before the uſual Time at 12 a-Clock, his Removing ſhall be ſo marked, and himſelf held as wholly abſent. Lords coming in after the Reſt are ſet and entred upon Buſineſs, loſs 10 Shillings *Sterling*. And Abſents altogether, or reckoned ſo as aforeſaid, loſe 40 Shillings for each Sederunt. The Ordinary on the Bills ſhould attend at leaſt *Tueſday* and *Thurſday* weekly. The precedent Week's Ordinary, the Ordinary for the Time, and for the ſubſequent Week, muſt attend at leaſt every *Thurſday*, for diſpatching ſuch Bills as require Three Lords. The Ordinary upon the Bills loſeth for each Day's Abſence 20 Shillings, Each of the other Lords loſeth for their Abſence every *Thurſday*'s Meeting 40 Shillings. The Clerks are ordained to extract Abbreviates of the Diets wherein any of the Lords are late or abſent, in Seſſion or Vacation Time *reſpective*; and deliver the ſame to the Lord's Collector at the End and Beginning of every Seſſion, that the Deductions may be made accordingly, which ſhall accrew to and be divided among the reſt of the Ordinary Lords. No Excuſe in the Premiſſes is to be admitted, except the being called away by the Government, or neceſſary Abſence upon the Account of their own Indiſpoſition, or the Death or Sickneſs of ſome near Relation, intimated to, and allowed by the Lotds; unleſs in Vacation-Time, the abſent Lord prevail with another to ſerve in his Room. But during the Time that the Lords of Juſticiary are in Circuit, the next in Courſe are to officiate in their Week, 25. *December* 1708, Act of Sederunt.

The Week before a Lord is Ordinary in the Outer-houſe, he is Ordinary upon the Bills; and the Week after he hath ſerved as Ordinary in the Outer-houſe, he ſhall be upon the concluded Cauſes: And the Two Lords who in Seniority are next, and immediately before the Ordinary upon the concluded Cauſes, ſhall be Ordinaries upon the Oaths and Witneſſes. It ſhall not be regarded in appointing the Ordinaries upon the Bills, concluded Cauſes, Oaths and Witneſſes, that the Lords to whom theſe Three Pieces of Service *reſpective* may fall, were employed in any of them during the laſt Weeks of the Seſſion immediately preceeding, Act of Sederunt 5. *June* 1711.

M.

Magiſtrates. *See Mutuum.*

PRoducing to Magiſtrates an atteſted Double of an expede Suſpenſion under the Hand of the Meſſenger who intimated the ſame, not ſufficient to excuſe them for not obeying Letters of Caption for the ſame Debt, by receiving the Debtor into their Priſon when required. But they were allowed to be heard upon any Reaſon of Suſpenſion againſt Payment of the Debt, that they could inſtantly verify, 3. *December* 1709, Sir *John Mackenzie* contra Magiſtrates of *Inverneſs*.

If a private Burgeſs of a Burgh be intitled to purſue the Magiſtrates thereof, for Maladminiſtration and Miſapplication of the Revenue, 26. *July* 1711, *Paterſon* and others contra the Town of *Edinburgh*?

Mandats.

A Perſon having deſired his Friend, by one Letter, to ſubſcribe for him 2 or 300 lib. *Sterling* in the *African*-Company; and by another, to place 250 of the 500 lib. he had ſubſcribed for to his Accompt; and by a Third, after the Company broke, to do for his Share of the Stock, as he was to do for his own: Theſe Letters were found not to inſtruct the Writer thereof to be Debtor in 250 lib. to the Subſcriber for the 500 lib. he having ſubſcribed the whole Sum for himſelf, without ſtating a Part to the others Accompt; or making or obliging himſelf to make any Transfer of the Share to the Writer of the Letter, while the Company's Circumſtances were intire, *June* 15. 1705, Competition betwixt the Creditors of *Walwood*.

An Advocate compearing for a Defender out of the Kingdom, allowed, by the Privilege of his Gown, to ſee the Proceſs, tho' not to plead and make Defences, without a ſpecial Mandat, 31. *July* 1708, *Butler* and *Gordon* contra *Ragg*.

One having accepted a Bill of Exchange for a certain Sum, as the Price of the Part of a Ship, he had commiſſion'd the Drawer to buy for him, payable to the Drawer or Order at a certain Term, upon his delivering a Vendition to the Accepter: The Sum in the Bill was found due, albeit the Ship was bought in the Poſſeſſor's own Name, and he never offered to tranſmit the Vendition to the Conſtituent, till ſome time after the Ship came to be damnified by a Diſaſter; the Conſtituent never having required him to do it upon Payment of the Money, 2. *January* 1711, *Gibſon* and *Wilſon* contra *Leith*.

Manſes for Miniſters. *See* Glebes.

THE Act 21. Parliament 1663, impowers the Miniſters therein appointed, and Two or Three of the moſt knowing or diſcreet Men of the Pariſh, with the Tradeſmen named by them, to proceed, in Abſence of the Heretors edictally cited, not only to appoint a Place where the Manſe ſhould be erected, but alſo to liquidate the Value thereof, and proportion it among the Heretors conform to their valued Rent, and name a Factor for uplifting of the ſame. After which Eſtabliſhment, any of the Heretors may be proceeded againſt for their Proportions; notwithſtanding that the Proceſs muſt ſiſt as to others, in reſpect of their Privilege of Parliament. But a Miniſter, in whoſe Favours a Sum is thus modified and proportioned among the Heretors, cannot claim from them Annualrent of their reſpective Proportions for the Time bygone that he ſerved the Cure, and was unprovided with a Manſe, 29. *January* 1712, *Steil* Miniſter of *Lochmaben* contra his Pariſhioners.

Marriage. *See* Clauſes, Aliment, Irritancies, *Jus mariti.*

The Fine of an irregular Marriage purſued by a Procurator-Fiſcal, applied to pious Uſes within the Pariſh of the Contraveener's Reſidence, with the Burden of the Purſuer's Expences to be modified by the Lords: And not to be diſcharged by the Pariſh Miniſter, *December* 5, 1705, The Procurator-Fiſcal of *Annandale* contra *Carruthers* of *Holmains*.

A Widow not liable to reſtore to her Huſband's Repreſentative, a Silver Medal that had beeen giſted to her by her Huſband *intuitu matrimonii*, the Marriage having been completed; albeit it diſſolved within Year and Day, 14 *November* 1710, *Dewar* contra *Wright*.

One having, for Love and Favour to a young Boy of his Name, and his own Grand-daughter, then Infants, deſtined to marry together; diſponed, under the Conditions and Reſervations aftermentioned, his Lands to them, and the Heirs Male to be procreated of their Bodies; which failing, to the Boy's Brother, his neareſt Heirs Male; which failing, to the ſaid Grand-daughter, in Caſe of her ſurviving her own neareſt Heirs Male or Female, their Heirs and Aſſignies; reſerving a Faculty to the Diſponer to alter: The Boy was found to have Right to the Half of the Mails and Duties from the Diſponer's Deceaſe till he ſhould come to an Age fit for marrying; reſerving to conſider the Import of the Diſpoſition, in Caſe he ſhould then refuſe or decline to marry in the Terms thereof, 2 *January* 1712, *M‘creoch* contra *Alexander*.

Medals.

Medals of Gold in the Poſſeſſion of a Relict, pretending to have them from her Huſband, found not to belong to her, unleſs they were giſted by him at, or before their Marriage, *July* 8 and 23 1709, Lady *Rankielor* contra Lady *Aitoun*.

Mills. *See* Thirlage.

The building of a contraverted Mill-dam-dike, allowed to proceed with this Quality, That it ſhould be conſidered at adviſing of the Probation, as if no ſuch Allowance had been granted, *June* 20, 1705, Town of *Dumfries* contra *Heretors* upon the Water of *Nith*.

Miniſters. *See* Manſes, Glebes.

Minors. *See* Tutors and Curators, *jus mariti.*

A Minor liable for an Accompt of Mournings, taken off by him for himſelf and his Brother and Siſters, *July* 14 1705, *M‘dowal* contra *Marſhal*.

Minors reponed againſt a preſumptive paſſive Title, inferred from their Procurators proponing for them peremptory Defences, and failing in the Probation, *December* 11. 1705 *Murray* contra the Children of *Chalmers*.

A Bond of Proviſion in favours of a Daughter being ſo qualified, That the Creditor ſhould not aſſign gratuitouſly, and dying without Heirs of her Body, or without diſpoſing for onerous Cauſes, the ſame ſhould return to the Granter's Heir; the Creditor purſuing a Conſtitution of the Debt againſt the Heir, intitled to uplift in her Minority only the Annualrents; and not the Principal Sum, unleſs for an onerous Cauſe, *January* 24 1706, *Schaw* contra Sir *John Schaw*.

In a Ranking of Creditors upon an Eſtate, neither a Pupil nor his Tutors, were bound to depone upon the Verity of a Debt, for which he the Pupil, was a Creditor by Adjudication, *July* 17. 1707, the Tutors of *Gordon* of *Gordonſtoun* Supplicants.

The Expence of Coat and Confirmation of a Minor's Father's Teſtament, ſuſtained to his Curators as a Ground of Compenſation *pro tanto* of the Minor's Charge againſt him: Albeit he the Curator had neglected to give up judicial Inventories of the Minor's Effects, in the Terms of the Act of Parliament 1672, *July* 18 1707, *Yeoman* contra *Grieves*.

Curators of a Minor who ſuffered him to immix himſelf in his own Affairs, and intromet with his Rents during their Office, comptable for the whole Rents; except in ſo far as they could prove he actually intrometted: Albeit the Minor had retired and renewed Diſcharges to the Tenants, and after Majority fitted Accompts with them, as to preceeding reſts, *December* 5, 1707, *Cunningham* of *Enterkine* contra his Curators.

A Tack bearing to be granted by one, with conſent of his Curators, who did not ſubſcribe, in favours of his own Baillie and Chamberlain null, as granted by a Minor without conſent of his Curators: The Minority and having of Curators at the Time being adminiculated and ſupported by a Seſſion-Clerk's Extract of the party's Baptiſm, a Clerk of Court's Declaration, That ſuch a Perſon's Act of Curatory ſtood poſted in their Minute-Book, Two Summons's, a Suſpenſion, a Charge, and an Act, and Commiſſion at his Inſtance, with Conſent of his Curators, a Tack and Factory granted by him with their Conſent, to which the Receiver of the Tack quarrelled, was a Subſcribing Witneſs, all of Dates anterior to the ſaid contraverted Tack, together with a Summons raiſed, and a Factory granted by him, and them poſterior thereto, 20 *February* 1708, Lady *Cardroſs* contra Repreſentatives of *Hamilton*.

A Contract of Marriage, reduced at the Inſtance of a Wife againſt her Husband, upon this Ground of Minority and Leſion, That the Purſuer had in the 17 Year of her Age, diſponed the Property of her heritage to the Defender, who at the Time was *obæratus*, and not in a Condition to ſecure any ſutable Proviſion to her effectually, 27 *July* 1708, *Byers* contra *Reid*.

A Pupil not reſtored upon the Head of Leſion, by being ſerved Heir to his Father, who was *obæratus*; and accepting a Diſpoſition to his Eſtate with the burden of Debt; unleſs he reſtore the whole Rents of the Eſtate intromitted, or that might have been intromitted with by his Tutors and Curators, *December* 1 1708, *Barclay* of *Towie* contra Creditors of *Rothemay*.

A Pupil whoſe Tutors were appointed in the Terms of Act 1696, to continue Curators, not allowed to be ſequeſtred ſome Days before his Pupillarity expired to prevent his being influenced in the Election of Curators; unleſs theſe Tutors would poſitively renounce to be Curators, 11 *July* 1710, *Dunbar* of *Myretoun* and other Tutors of Sir *Robert Gordon* Supplicants.

An Heireſs who was Minor, having in her Contract of Marriage not only quitted the Fie of her Heritage, but alſo excluded her ſelf from the Liferent thereof, in the Caſe of Children of the Marriage (who happen'd to exiſt) for a Proviſion ſecured to her by her Husband's perſonal Obligement, which came to nothing by his dying Bankrupt: She was found to have Intereſt, to reduce the Contract upon Minority and Leſion, in ſo far as it cut her off from the Liferent of her own Property. Albeit ſhe was by the Contract to liferent her own and her Husband's Means, and have ſome Power of Diſpoſal failing Children of the Marriage; and had not revoked, or raiſed Reduction *intra annos utiles*: In Reſpect ſhe did it timeouſly after Diſſolution of the Marriage, and ſhe was not *valens agere ſtante matrimonio*, 25 *July* 1710, *Chalmers* contra Creditors of *Lyon*.

A Piece of Ground being declared Part and Pertinent of a Barony, by a Decreet Arbitral following upon the Baron's Submiſſion, and he having diſponed the Barony, and aſſigned the Purchaſer to the Writs and Evidents conform to Inventary, comprehending the ſaid Decreet Arbitral: The Diſponer's Grand-Child and Heir was obliged to anſwer in a Declarator of Property and Moleſtation againſt him at the Inſtance of the Purchaſer, for declaring the ſaid Piece of Ground to belong to the Purſuer, and that he ought not to be moleſted in the Poſſeſſion of it; albeit he the Defender was Minor, who *regulariter non tenetur placitare ſuper hæreditate paterna*, 25 *July* 1710. *Mckenzie* of *Allangrange* contra *Mckenze* of *Kilcowie*.

Proceſs ſuſtained againſt a Minor, albeit his Tutor, who was out of the Kingdom, was not cited upon 60 and 15 Days, nor yet edictally at the Market-Croſs of the Head-Burgh where the Minor's Lands ly, and the Summons was inrolled only againſt the Minor: In Reſpect the Minor was cited perſonally, and his Tutors and Curators in general were cited edictally at the Market-Croſs of the Head-burgh, where the Minor dwelt; and it was needleſs to inroll againſt Tutors who are only called *pro intereſſe*, and concluded againſt in the Libel as Tutors in general, 29 *July* 1710, *Fairholm* contra *Mckenzie* of *Aſſint*.

A Curator *ad litem* authoriz'd to give in for a Minor a Renunciation to be Heir to his Father, 5 *January* 1711, *Piper* Supplicant.

A Bill accepted by a Minor without conſent of his Father his Adminiſtrator of Law for 47 *lib.* 5 s. *Scots*, as the Price of Merchant-Goods ſold to another, found reducible upon Minority and Leſion: Albeit the Sum was ſmall, and the Accepter a Writer doing Buſineſs for others, had paid a Part of the Sum during his Minority, 17 *January* 1711, *Baillie Dundas* contra *Allan*.

The Brocard *Minor non tenetur placitare ſuper hæreditate paterna*, takes not Place in a Reduction upon the Dole or Fraud of his Predeceſſor, 27 *December* 1711, *Crawfurd* contra *Crawfurd*.

Monopoly.

Declared lawful to all Perſons to import and vend in a Royal-Burgh, upon Market and Fair-Days, Shoes, Boots and Slippers of all Kinds, without Diſtinction: Notwithſtanding that the Incorporation of Shoemakers there (whoſe Seal of Cauſe or Charter carried Power to make neceſſary Regulations for the Good of the Incorporation) had beyond the Years of Preſcription, been in Uſe to allow Strangers to import for Sale upon ſuch Market or Fair-Days, only Single-Soled Shoes or Pumps, and to ſeize all high heel'd Shoes Boots and Slippets ſo imported, and to commit the Importers to Priſon, 12 *January* 1711. The Inabitants and Burgeſſes of *Perth* contra Shoemakers of the ſaid Burgh.

Mortification. *See* Competition.

Moveables.

A Relict's Poſſeſſion of her Husband's Moveables 28 Years after the ſame had been confirm'd by his Executors Creditors, ſuſtained as a Preſumption that ſhe had Right thereto from the Executors confirm'd, 15 *February* 1712, *Boid* of *Drum* contra *Hay*.

Mournings.

A Relict's Mournings affect not the Dead's Part only; but come off the whole Head of the Executry, 20 *June* 1713, *Moncrief* contra *Monipeny*.

Mulcts. *See* Expences.

Mulcts ſentenc'd in Proceſſes, to be marked by the Clerk in the Minutes, for a Record thereof, *Act of Sederunt* 20 *November* 1711, § 17.

Multiple-poinding. *See* Suſpenſion.

Mutuum. *See* Depoſitum.

A Bond of borrowed Money granted by the Magiſtrates and Majority of the Council of a Burgh, without a previous Act of the Town-Council fully conveen'd for that End, to a Magiſtrate for the Time; not ſuſtained to prove its onerous Cauſe, and allowed to be the Ground of a Charge againſt the Town, in ſo far only as can be made appear that the Mony, for which the Bond was granted, was applied for the Uſe of the Community, 13 *February* 1711, *Roſs* and Captain *M'leod* her Husband contra the Magiſtrates of *Tayn*.

N

Name.

A Perſon, who but lent his Name to a Calumnious Gift and Proceſs, fined, *June* 19, 1705, *Stirling* contra *M'reoch* and *Alexander*.

Nautæ, Caupones &c.

An Inn-keeper liable to a Perſon received and lodg'd in his Houſe, for the Value of a Pair of Breeches, and what was in them, Stollen from the Lodger before the next Morning: And the Lodger allowed to give his Oath *in litem* thereupon, reſerving the Lords Modification, *June* 5, 1707 *Browſter* contra *Lees*.

Negotiorum Geſtio. See Preſumption.

A Perſon having by way of Contract ſold ſome Victual of the Growth of Lands, whereof he had taken upon him the Management, in Abſence of the Heretor, to be delivered with the ordinary Meaſure that the Tenants of thoſe Lands us'd to deliver their Farm; and the Buyer being oblig'd to pay to the Seller on his Order, a certain Price for each delivered Boll; and he having died before the Term of Payment: It was found, that the Victual was not the Defunct's, and that therefore the Price was not *in bonis ejus*, nor could be claim'd by his Execuor Creditor, *March* 15, 1707, *Baillie Hay* contra *Hay*, *Mitchel* and *Torſtoun*.

Nonentry.

A Vaſſal liable for the full Mails and Duties only from the Date of the Decreet, finding his Lands to be in Nonentry: Becauſe he had Reaſon to doubt if the Purſuer of the Declarator was his true Superior, *January* 22, 1706, *Maitland* contra *Brand*.

Citation upon a Summons of Declarator of Nonentry given to an apparent Heir, *intra annum deliberandi*; found not to intitle the Superior to the full Rent of the Vaſſal's Lands from the Citation; albeit the Day of Compearance was after elapſing of Year and Day, 29. *July*, 1710, *Baillie* of *Caſtlecarry* contra *Brown* of *Seabegs*.

Notorial Inſtruments. *See Locus pœnitentiæ.*

O

Oath. *See* Probation, Bills of Exchange, Peers, Quakers, Regality.

A Debtor in Bonds having offered to prove Payment by the Creditor's Oath; and he the Creditor having deponed, That his Wife received from the Debtor, a certain Sum owing to him by a third Perſon, which the Debtor had promiſed to pay: The Quality in the Oath was found intrinſick, and the Sum received by the Wife not imputed in Payment of the Bonds, *November* 27. 1705, *Sinclair* of *Southdun* contra *Sinclair* of *Barack*.

A Declaration upon Faith and Honeſty, given in *Holland* by Anabaptiſts (whoſe Religion does not allow them to take an Oath) ſuſtained as equivalent to an Oath, *March* 20, 1707, *Edins* and *Hume* contra *Hunter*.

A Quaker's declaring ſolemnly as in the Preſence of God, and as he ſhould anſwer to God at the Great Day, without adding the Words, *By God Himſelf*; ſuſtained as equivalent to an Oath in common Form, 19. *November* 1707, *Hodge* contra *Miller*.

Oath acknowledging the Receipt of Money purſued for; but that the ſame was expended by the Deponent in Payment of the Owner's Debt, found not to inſtruct the Payment, as being an extrinſick Quality, 23. *December* 1707, *Brown* contra *Dow*.

An Oath emitted before Arbiters choſen by the Deponent and another Party, for clearing Merchant-dealing betwixt them, conform to a Submiſſion bearing a Conſent to take their Oaths; probative of a Ground of Compenſation therein acknowledged, to meet a Debt charg'd for by the Deponent's Aſſigney: Albeit the Submiſſion broke up without taking Effect, 2. *January*, 1708, *Wright* and *Kinloch* contra *Lindſay*.

An Oath emitted before Arbiters *deferente adverſario*, ſuſtained to prove *contra deferentem*, as well as againſt the Deponent: Albeit no Decreet-arbitral followed upon the Submiſſion. But neither Conceſſions of Parties, Interlocutors nor Minutes before the Arbiters, were found probative, or binding, 30. *November* 1709, *Sochan* contra *Boſwal*.

The Debtor in a Bond purſued by the Creditor's Executor, having offered to prove Payment by the Value of Two Horſes given to the Defunct, and referred the ſame to the Purſuer's Oath; and the Purſuer having acknowledged that the Horſes were received, but in Satisfaction of an Accompt of Things furniſhed to the Defunct; and to aſtruct the ſame, produced his Accompt-Book, wherein that was ſet down by Way of

Memorandum: The Quality of the Oath was found intrinſick, 24. *June* 1708, *Pringle* contra *Manderſon*.

A Writer to the Signet in a dying Condition, not obliged ſummarly to depone upon a Petition anent his having of Writs belonging to the Petitioner, who could not ſay that he, whoſe Oath was craved, had ſuch Writs from him *ratione officii*, or as a Truſtee, 2. *July* 1708, *Temple* contra *Cuningham*.

That an aſſigned Ticket to hold Compt for a Sum was holograph, being referred to the Granter's Oath; and he having deponed acknowledging ſo much, but that in the Terms of the Ticket he had compted with the Cedent: The Quality was ſound extrinſick, *June* 20. 1705, *Grant* contra *Anderſon*; and the Cedent's Oath upon the compting allowed to be taken *cum onere expenſarum*, *ibidem*.

Intromiſſion with a Defunct's Moveables being referred to the Parties Oaths; and they having deponed, that they did meddle with ſuch Things, but that they were gifted to them by the Defunct: The Quality of being gifted was found intrinſick to the Oath, and a ſufficient Ground to aſſoilzie from Repetition, 5. *January* 1710, *Mortimer* contra *Archbald* and others.

A Purſuer allowed to controvert the Relevancy of a Defence, after requiring and getting the Defender's Oath of Calumny upon the Verity thereof, 13. *June* 1710, Lady *Craigforth* and her Husband contra *Murray* of *Deuchar*.

In a Purſuit for the Rent of a Houſe preſcribed *quoad modum probandi* by Witneſſes, and referred to the Defender's Oath; he having deponed that it was not reſting, but that Payment thereof was made, by a third Perſon's allowing allowing the like Sum to the Purſuer upon the Account thereof, which the Deponent allowed to that third Perſon in Part Payment of a greater Sum owing by him to the Deponent: The Lords found the Quality in the Oath as to the Manner of Payment intrinſick, 6. *July* 1711, *Clark* contra *Dallas*.

An Oath emitted by the Defender in a Proceſs of Forthcoming, found not to be *res jurata*, as to the Aſſignies of the Arreſter's Debtor; in reſpect the Oath was not taken *iis deferentibus*: Albeit they compeared upon the Proceſs, competed upon their Intereſt, and oppoſed the referring to the Defender's Oath, 5. *January* 1712, *Eliſes* contra *Watſon* of *Saughtoun*.

A Quaker, in a Ranking of Creditors, allowed to give a Declaration upon the Verity of his Debt, as equivalent to an Oath, 29. *January* 1713.

Offices. *See* Gift, Conſervator, Schoolmaſter, Writers to the Signet, Cocket-Dues.

WHere one having a Liferent-Commiſſion to an Office granted by the Sovereign, obtained a new Commiſſion ratifying the former, with a *Novodamus* to himſelf and his Son jointly during the Father's Lifetime; and after his Deceaſe to his Son during Her Majeſty's Pleaſure: The Father's Deprivation for Malverſations, hath the ſame Effect as natural Death againſt the Son's Right, *December* 10. 1708, Sir *Alexander Cuming* contra *Vere Kennedy*.

And a Gift in Favours of a third Perſon, after the Father's Deprivation (tho' anterior to the Interlocutor finding it equivalent to his Death) vacates the Son's Right, *February* 4. 1709, *inter eoſdem*.

The Governour of a Garriſon, whoſe Commiſſion from the Sovereign was recalled after *Whitſunday*, intitled to Half of that Year's Rent, tho' payable in Victual only, betwixt *Yule* and *Candlemaſs* thereafter, and the ſucceeding Governour was expreſly aſſign'd in his Commiſſion to that whole Year's Rent, 28. *June* 1710, Earl *March* contra Earl *Levin*.

The Judge-Admiral, whoſe Office was during Pleaſure, having demitted the ſame in Favours of a third Perſon, upon his aſſigning the ordinary Penſion annexed thereto in Favours of the Reſigner, during his Lifetime, and the Cedent's Enjoyment of the Office jointly; and the Cedent's Commiſſion having fallen by another's ſucceeding to the Office of Lord High-Admiral, from whom he procured a new Commiſſion: The foreſaid Aſſignation to the Judge-Admiral's Penſion, was ſuſtained to intitle the Aſſigny to it, not only during the Cedent's Poſſeſſion by Vertue of the firſt Commiſſion, but alſo during his Enjoyment of the Office of the new Right, 12. *June* 1711, Creditors of Sir *Robert Forbes* contra *Blackwoods*.

Officium

Officium nobile.

THE Principal Sum in a Bond being payble with Annualrent at ſuch Terms after the Granter's Deceaſe, as certain Truſtees therein-mentioned ſhould appoint; and both the Granter and theſe Truſtees having died without determining the Manner and Terms of Payment: The Lords, in a Purſuit for Payment, decerned for the principal Sum and Annualrent thereof from the Date of the Decreet, 21 *June* 1711, *Calder* contra *Middleton*.

Optio legata. *See* Houſhold-Pleniſhing.

P

Paraphernalia. *See* *Jus mariti*, Medals, Wives.

Parliament. *See* Arreſtment, Diſcharges.

THe Priviledge of Parliament, which Exempts from legal Purſuits in Time of Parliament, not ſuſtained to hinder Circumduction of the Term againſt a Member of Parliament for not reporting a Commiſſion, which an Advocat compearing for him had taken a Day for, 17 *February* 1708, *Grant* of that *Ilk* contra E. of *Sutherland*.

The Lords having ordained a Proceſs to be inrolled againſt a Member of Parliament attending the Parliament; in Reſpect the Advocat marked for him at the firſt calling refuſed to take out the Proceſs: When the Cauſe came in by Courſe of the Roll, after the Parliament was up, it was found that the Proceſs behoved to be given out to be ſeen and inrolled again in common Form. Becauſe the 12 and 13 W. 3 cap. 3. doth not diſtinguiſh betwixt preparatory Interlocutors, and thoſe *in cauſa*, 22 *June* 1709, Lady *Greenock* contra Sir *John Schaw* of *Greenock*, her Son.

Proceſs ſiſted againſt a Member of Parliamenr, albeit he was not yet attending the Parliament: In Reſpect the Parliament was ſitting and he claim'd his Priviledge, and repreſented that he was going to attend it, 15 *November* 1709, *Livingtoun* contra L. of *Preſtongrange*.

A Member of Parliament allowed to claim his Priviledge to Stop farther Proceſs againſt him, albeit he had ſiſted himſelf *in initio litis*, and proponed peremptory Defences, without founding on the Priviledge, 17 *February* 1710, Captain *Bruce* contra Mr. *William Dalrymple* and *Inglis*.

No Proceſs ſuſtained at the Inſtance of a Commiſſioner to the Parliament for his Fees, againſt the Freeholders of *Orkney*, till thoſe of *Zetland* were firſt called; albeit no Freeholder in *Zetland* had ſigned the Purſuer's Commiſſion: In reſpect thoſe Two Iſles ſtand erected by Act of Parliament. And the Ceſs-Books not allowed to be the Rule of proportioning the Commiſſioner's Fees, 13 *December* 1710, *Craigy* of *Gairſey* contra the Freeholders in *Orkney*.

Priviledge of Parliament ſuſtained to ſtop Proceſs tho' in Purſuance of an Order of the Houſe of Peers, 9 *November* 1711, Sir *Andrew Kennedy* contra Sit *Alexander Cumming*.

Part and Pertinent. *See* Servitudes.

FOurty Years uninterrupted Poſſeſſion of Land, as Part and Pertinent of that expreſs'd in the Poſſeſſor's Infeſtment, relevant to declare the Property to belong to him in Competition with one ſpecially infeſt in the ſaid Land, 22 *February* 1711, E. of *Levin* contra *Finlay*.

Paſſive-Titles. *See* Inventarii beneficium, vicious Intromiſſion, Minors, Forfeiture.

A Service as Heir ſuſtained to make one paſſive liable for the Defunct's Debts, who had a nearer Heir *in utero* the Time of the Service, *January* 15, 1706, *Wat* contra *Forreſt*.

Inventaring and rouping of Goods by vertue of a Magiſtrate's Warrand, not ſuſtained to purge a prior vicious Intromiſſion, *June* 29, 1705, *Archbald* contra *Lawſon.*

An apparent Heir's Intromiſſion with the Mails and Duties of his Predeceſſor's Lands, after his Deceaſe, relevant to make him univerſally liable for the Defunct's Debt: Albeit the apparent Heir intromitted by Virtue of a ſingular Title acquired by him in the Defunct's Lifetime, 7 *June* 1710, *Watſon* of *Sauchtoun* contra *Brown.*

One who had ſeveral Adjudications of the ſame Lands in his Perſon, having by a Minute of Sale diſponed theſe Lands in favours of a Purchaſer, with Warrandice from Fact and Deed, for an adæquate Price to be paid to him; and the apparent Heir to the Heretor, who died Infeſt in theſe Lands, having by a ſeparate Writ of the ſame Date, ſigned before the ſame Witneſſes with the Minute, and expreſly relative thereto, obliged himſelf, for the Purchaſer's farther Security, not only to exhibite and produce to him a ſufficient Progreſs of the Writs of the ſaids Lands againſt a certain Day, but alſo to warrand the Adjudger's Diſpoſition at all Hands and againſt all deadly; and farther oblige himſelf to purge ſome particular Incumberances; and to inable him the better to implement, he as Principal, and his Friend as Cautioner, obliged themſelves that he the apparent Heir ſhould infeſt himſelf in ſome other Lands as Heir to another Predeceſſor: The Lords found that the apparent Heir's granting the Bond of the Date of the Minute, imported a Behaviour as Heir, 15 *February* 1711, *Dick* contra *Carſtairs of Kilconquhar.*

Not competent to an Appriſer purſuing a Reduction and Improbation of Rights affecting the Lands appriſed, to reply to the Defenders that they could not exclude him by any Right in their Perſon, in Reſpect they repreſented his Debtor, againſt whom the appriſing was led *paſſive* as Heir to him: Without prejudice to the Purſuer to inſiſt againſt them upon the paſſive Title by way of Action as accords, 4 *January* 1712, *Wilſon* contra *Shorts.*

A Purſuer on the paſſive Titles having amended the Title of his Libel after a ſigned Interlocutor in the Proceſs admitting the paſſive Titles to Probation: The ſaid Interlocutor was found not to be ſuch a Litisconteſtation as could transfer the Action againſt the Defender's Heir as to the penal Concluſion of the paſſive Titles, 7 *February* 1712, *Stuart* contra Earl of *Bute.*

The Patron of a Church whereof the beneficed Perſon was Patron of another, found not to be Patron of that other Church without inſtructing a particular Right to the Patronage thereof, 5 *February* 1709, Magiſtrates of *Lanerk* contra E. *Murray.*

One cannot propone a Defence of Preſcription, without acknowledging the paſſive Titles, 11 *February* 1713, *Lundy* and her Huſband contra Lord *Sinclair.*

The Purſuer of an Action upon the paſſive Titles, who extracted an Act of Litisconteſtation upon one of them, failing to prove his Point, allowed to recur and inſiſt before the Ordinary, who pronounced the Act, upon the other paſſive Titles libelled, 16 *January* 1711, *Watſon* of *Saughtoun* contra *Brown.*

Payment. *See* Aſſignation, *Bona fides*, Innovation, Preſumption.

A Tutrix having oblidged her ſelf perſonally, by a Bond of Corroboration bearing Annualrent, for a Sum of bygone Annualrents of an heretable Bond upon her Pupil's Eſtate, upon getting a Backbond at the ſame Time from the Creditor, ſuſpending perſonal Execution againſt her ſelf for ſome Years, and reſerving Diligence againſt the Pupil and his Eſtate ſo be the Current Annualrents of all Sums due to the Creditor by them were punctually paid; and ſhe being charged upon the Bond of Corroboration after ſhe had made ſeveral partial Payments indefinitely: Theſe partial Payments were found applicable to the Sums charg'd for, and not to be imputed in Satiſfaction of the Annualrents of the great Sum, which the Payer was liable for *tutorio nomine*, *July* 13, 1705, Lady *Semple* contra Lady *Comiſtoun.*

Some Goods being diſponed and delivered to a Creditor in Security of a Debt, and arreſted in his Hands by another of the Diſponer's Creditors, at whoſe Inſtance the Diſpoſition was reduced upon that Act of Parliament 1696, as made after the Diſponer was Bankrupt in the Terms of that Act: The Lords found the Arreſter inſiſting in his furthcoming, oblidged upon Payment by the Defender to aſſign to him his Debt and Diligence *pro tanto*, with Reſervation and Preference of what Debt was then yet reſting to the Cedent, *December* 19, 1705, *Man* contra *Reid.*

Partial Payments marked upon the Foot of an accepted Bill of Exchange, and a Ballance ſtated as due in Figures, offered to be proved to be the deceaſt Creditor's Hand-

Writ, ſuſtained, in a Proceſs at the Inſtance of his Heir, to aſſoilzie the Accepter, except as to the ſaid Ballance: In reſpect he offered to prove by Witneſſes, that Payments were truly made conform to the ſaid Accompt, and the Bill was ſtill in the Cuſtody of the Purſuer; 9 *February* 1709, *Watſon* of *Muirhouſe* contra *Smith*.

A Diſcharge of a Year's Annuity and all Years preceeding, imports not a Preſumption that the ſame was paid yearly when it fell due; but that all was paid at the Date of the Diſcharge: Unleſs the Debtor inſtruct the particular Times when the reſpective Payments were made, 7 *February* 1711, *Carnegie* contra *Couper* of *Lochblair*.

One having Paid ſome Debts owing by his Creditor, and taken Diſcharges thereof bearing Payment to have been made by the latter's Mony: It was found that theſe Diſcharges could not be redargued, but by the Oath of the ſaid Creditor whoſe Debts were paid. Albeit they had never been delivered to him, but were ſtill in the Payer's Hand who received them, 26 *July* 1711, *Halyburton* of *Fodderance* contra *Cook* of *Ardlair*.

Nor were Diſcharges taken by a Tenant of Debt owing by his Maſter to a third Perſon, allowed to the Tenant in his Accompts: In reſpect the Diſcharges bore that the Mony was received from the Maſter himſelf. Albeit the Tenant produced with theſe Diſcharges a Declaration *ex poſt facto* under the Creditor's Hand, that he was paid by the Tenant, 28 *July* 1711, *Niſbet* of *Dirletoun* contra *Johnſtoun*.

One of Two *correi debendi* by a Bond, having paid ſeveral Years Annualrents, and taken ſome Receipts of the Mony by the Creditor from him for himſelf, and in Name and behalf of the other Co-principal Debtor, and ſome bearing only Receipt thereof from him without the Addition of *for himſelf and in Name and behalf foreſaid*: That other Co-principal was found liable to refound to the Payer the half of the Sums in the latter Diſcharges, but no Proportion of the Sums in the former Diſcharges. It being preſumed from the Tenor of theſe, that he had advanced his Share to the Payer, 27 *November* 1711, *Gordon* of *Troquhen* contra *M'ghie* of *Balmaghie*.

Peers.

PEers bound to depone in common Form, where a Libel is referred to their Oath as the only Mean of Probation, 7 *February* 1710 *Bryſſon* and *Henderſon* contra Duke of *Athole*.

Peers are to give their Word of Honour inſtead of an Oath of Calumny; but to depone in common Form, as to Things referred to their Oaths of Verity, 9 *February* 1711, the Earl of *Wintoun*'s Caſe.

A Peer called upon an incident Diligence as Haver of Writs, ought to depone in common Form as to to the having, 19 *December* 1711, Duke of *Montroſe* contra *M'aulay* of *Ardincaple*.

Penalties.

THe Debtor in an Obligement *ad factum præſtandum* under a Penalty, without the Clauſe *By and attour the Implement of the Premiſſes*, found liable only, in Caſe of not Performance, for the Penalty, *July* 27, 1706, *Bairdiner* contra *Dryſdale*.

Pendente lite nihil innovandum. See Bankrupts, Confirmation.

Perſona ſtandi in judicio.

AſſIgnation to a Plea granted for the Cedent's behoof after himſelf had been debarr'd *ab agendo*, by a regiſtred horning judicially produced, ſuſtained to afford Proceſs to the Aſſigny, without Regard to the perſonal Objection againſt his Cedent who continued unrelaxed at the Horn, *July* 10, 1706, *Young* contra *Young*.

Poor.

A *Gratis* Warrant refuſed, in reſpect the Report of the Advocates for the Poor bore not that the Petitioner had *probabilem cauſam litigandi*, but only that he deſerved the Benefit of the Poor's Roll, 16 *July* 1708.

Advocates for the Poor to be named yearly, in *November*, for the ſubſequent Year;

And thoſe named, to continue till others be put in their Place. And any Advocate who begins with a poor Body's Cauſe, muſt continue therein *uſque ad ſententiam*, or till it be brought to a Concluſion, 26 *January* 1709.

Ordered, That the Names of the Advocates and Writers for the Poor be inſert in all Remits to them upon Bills for *gratis* Warrants, 27 *July* 1710.

A *gratis* Warrant allowed to a Kirk-*Seſſion*, for proſecuting Actions at their Inſtance which they could not otherways do, without incroaching upon the Poor's Stock, 12 *February* 1713, Kirk-Seſſion of *Air* Supplicants.

Popery. *See* Juriſdiction.

AN Aſſignation by one *Roman*-Catholick to another, reduced at the Inſtance of the Cedent's neareſt Proteſtant Relation, and declared to belong to him, in the Terms of the Statute for preventing the Growth of Popery; in reſpect the Aſſigney was held confeſt, for refuſing to depone if his Right was in Truſt, for the Behoof of ſome Popiſh Society, 18 *July* 1710, *Sinclair* of *Roſlin* and his Tutor Supplicants.

An Adjudication led in the Name of a *Roman*-Catholick, upon a gratuitous Bond granted to him, found null by the Act 3 of the Parliament 1700, for preventing the Growth of Popery: Albeit the Adjudication was led for the Behoof of the Granter of the Bond, a Proteſtant, 21 *July* 1710, the Creditors of *Maxwel* of *Taraughty* contra *Maxwel*.

A Perſon being baniſhed out of *Scotland*, conform to the Act 3 Seſſ. 8 and 9 Parl. K. *W.* and Her Majeſty's Proclamation 2 *September* 1709, as a Popiſh Prieſt, by the Magiſtrates of *Edinburgh*, as Juſtices of the Peace within their Bounds, without an Inqueſt; upon Probation before them, by the Oaths of the Conſtables who apprehended him, and Women Witneſſes, and his refuſing to purge himſelf of Popery by taking the Formula: The Magiſtrates Procedure was approved as warrantable and legal, 24 *July* 1711, Magiſtrates of *Edinburgh* contra *Mackie*.

Popularis actio. *See* Magiſtrates.

Poſſeſſion. *See* Aſſignation, *Bona fides.*

A Poſſeſſory Judgment upon Infeſtment and Seven Years Poſſeſſion of a thirl Mill, not ſuſtained to hinder the building of a new Mill upon the aſtricted Lands; in reſpect the Thirlage was conſtituted with this expreſs Quality, that the ſame ſhould ceaſe upon the building of ſuch a new Mill, *July* 5, 1705, *Haigs* contra *Haliburton* and *Rutherford*.

A Perſon having entred into a Minute of Sale of Lands with the Heretor, who had been Year and Day at the Horn; and obliged himſelf for the Annualrent of the Price from a Term, and thereafter adjudged the Lands in Implement; and for farther Security, having taken and declared a Gift of the Seller's Eſcheat, affected with a Backbond to the Exchequer: His Poſſeſſion was aſcribed to the Minute of Sale; and he was found comptable for the Annualrent of the Price to the Creditors, after Deduction and Allowance to him of the Expences of the Gift and the whole Preſtations contained in his Backbond, 8 *July* 1708, Lord *Alexander Hay* contra Creditors of *Spot*.

Poſſeſſio decennalis & triennalis by a ſtipendiary Miniſter, of a ſuperplus Duty over and above the Quantity of Stipend contained in his Decreet of Locality, not ſuſtained as a ſufficient Title to purſue for Payment of that ſuperplus Duty: In reſpect of the ſpecial Decreet of Locality, *November* 1708, Repreſentatives of *Rule* contra Magiſtrates of *Stirling*. *vid.* in 23 *July* 1708.

One having, at his entering to the Poſſeſſion of Teinds, two expired Appriſings of them, and a Diſpoſition thereof in Security of a Sum in his Perſon, and the ſaid Appriſings having been afterwards opened and turned to Securities for the true Debt: He was allowed to aſcribe his Intromiſſions wholly to the Appriſings *medio tempore* till the ſame were opened; thereby to defend himſelf from compting for his Intromiſſion in that Interval, 2 *February* 1711, *Guthrie* and *Williamſon* contra *Gordon*.

A Creditor by an heretable Bond and Infeſtment in Security, containing Aſſignation to Mails and Duties, but no Power to ſet Tacks or remove Tenants, having obtained a Decreet of Mails and Duties againſt the Tenants, preferring him to other competing Creditors; found accountable for the Rents due by theſe Tenants againſt whom he obtained the Decreet; but for his actual Intromiſſions, only after their Removal, 21 *February* 1712, *Moncrief* of That-Ilk contra Creditors of *Campbell*.

Poinding.

Poinding. *See* Spuilzie.

POinding not unwarrantable for the Meſſenger's Refuſal of an Execution before the Poinding was completed. And the taking of Corns poinded from Tenants without a ſworn Metſter or Caſter found legal. In reſpect the Corns were meaſured and delivered by the Tenants themſelves, *March* 11, 1707, Colonel *Erſkin* contra Lady *Bettie Boſwel* and *Auchinleck* her Huſband.

Precedency. See Dignity, Preſcription.

THe Rolls of Sederunts of Parliament, not a Sufficient Document of Poſſeſſion of Precedency betwixt Peers therein marked preſent, *January* 24, 1706, Earl of *Sutherland* contra Earl of *Crawfurd*.

Precepts. *See* Bills of Exchange, Innovation.

THe Creditor in a Precept cut off from his Recourſe againſt the Drawer and his Cautioner, by not proteſting for not Payment, nor doing Diligence for Payment againſt the Perſon drawn upon, till he became inſolvent, *July* 10, 1706, Sir *Alexander Brand* contra *Torſtoun*.

A Precept ordering the Perſon drawn upon to compt and pay to a third Party for a certain Number of Bolls of Meal, and for ſo many Stone of Iron at ſo much *per* Stone, found not to carry a Right to the Subject in favours of that third Party without Intimation, *July* 19, 1706, *Turnbul* contra *Anderſon*.

An undated Indorſation of an inland Precept, preſumed to be of the Date of the Precept, unleſs the contrary were proved, *July* 15, 1709, *Colvil* contra Colonel *Ogilvie*.

The Creditor in a Precept payable out of the particular Effects of the Drawer when received by the Accepter, having intimated the ſame to other Havers of theſe Effects was preferred to the Drawer's Creditors who had arreſted them upon his regiſtred Bond after the ſaid Intimation: Albeit theſe Effects never came to the Acepter's Hand, 14 *July* 1510, *Mcgibbon* contra Managers of the *Woollen Manufacture* at *Newmills*.

A Colonel of a Regiment having granted Bond to the Keeper of the Signet, for the Behoof of the Secretary of State, for a certain Sum as the Secretary's Dues for ſeveral Commiſſions to the Officers of the Regiment, payable out of the firſt and readieſt of their Pay, and drawn a Precept alſo for the Sum, of the ſame Date with the Bond, upon the general Receivers, payable to the Keeper of the Signet out of the firſt and readieſt of the ſaid Pay; and the Precept being duly intimated to the Receivers, and afterwards paid in Part: The Creditor in the Precept was found not to have Recourſe againſt the Drawer for the Remainder after ſeveral Years. In reſpect he could not inſtruct he had negotiated the Precept and done Diligence for recovering entire Payment; and the Drawer had left ſtill in the general Receiver's Hand much more Pay than would anſwer the ſame: Albeit he had uplifted as much as would have ſatisfied it. But the Drawer was obliged to aſſign to the Creditor in the Precept, the firſt and readieſt of the Debentures due to him by the Government for the ſaid Regiment, for Payment of the Sum in the Precept yet reſting unpaid, 20 *December* 1711, Earl *Levin* contra Earl *Glencairn*.

Precognition.

PRoceſs ſuſtained for Reſtitution of ſome Bank-notes belonging to the Purſuer, and unwarrantably intrometted with by the Defender: Albeit the former had before commencing the Proceſs caus'd examine a Witneſs upon Oath before a Magiſtrate concerning what he knew about the Defender's having the Notes, or how they came to his Hand, 15 *February* 1712, *Buchannan* contra *Meinzies*.

Prentices.

A Prentice allowed to repete a Third of the Prentice-fee from the Repreſentative of his Maſter, for the Loſs ſuſtained by the Prentice, thro' the Maſter's dying within the Time of the Prenticeſhip, after it was more as half run: But it was ſuſtained relevant to hinder this Repetition, that the Maſter's Repreſentative kept his Shop open at his Death, and a Perſon therein capable to inſtruct the Prentice, and offered to keep him at Bed and Board during the reſt of the Time of his Apprenticeſhip, as the Defunct had done while he lived, 16 *February* 1711, *Cutler* contra *Littleton*.

Preparing Cauſes.

THe Clerks dues for prepared States modified by the Ordinary on concluded Cauſes, to be paid immediately after preparing; and the keeper of the Rolls before inrolling any ſuch Cauſe to ſee the Clerks Collector's Receipt of the ſaid Dues marked on the Proceſs: With Certification to the Party who ſhall not have paid his half thereof before calling the Cauſe, that he ſhall be made to pay to the other Party the whole Sum modified, Act of Sederunt 20 *November* 1711, § 12.

Preparing Compt and Reckonings by Advocates not imployed in the Cauſe, or other proper Perſons appointed by the Lord Ordinary, Act of Sederunt 22 *November* 1711, § 5.

Preparing Rankings of Creditors by ſuch Auditors, Act of Sederunt 23 *November* 1711, § 7.

Preſcription. *See* Juriſdiction, Cautionry, Sheriffs, Tacks, Ale and Beer, Ceſs.

COmmuning by miſſive Letters, not ſuſtained as an Interruption of Preſcription, *July* 4, 1705, Lord *Pitmedden* contra *Monro*.

Seaſin upon Reſignation in Burgage-Lands with 40 Years continued Poſſeſſion on Seaſins by Haſp and Staple, ſuſtained as a Sufficient Title of Preſcription, *December* 25, 1705, *Ker* of *Greden* contra *Abernethy*.

Preſcription found to run from the Date of the Act 15 Parliament 1685, and not from the Promulgation thereof, *January* 23 1706, Earl of *Sutherland* contra Earl of *Crawfurd*.

Proteſtations in Parliament ſuſtained as legal Interruptions of Preſcription of Precedency, *Ibidem*. Poſſeſſion before the Act 1617 leſs than 40 Years, not allowed *in computo* to make up Preſcription ſince the ſaid Act by Virtue of a Title antecedent thereto, *Ibidem*. Preſcription interrupted by a Decreet afterwards turn'd into a Lybel, *July* 4, 1706, *Scot* contra *Bryden*.

An Action of Reduction *ex capite lecti*, preſcribed *non utendo* within 40 Years, *March* 18, 1707, *Murray* of *Conheath* contra *Irving* of *Drumcoltran*.

A Decreet in Abſence for a Sum exceeding 40 *lib.* contained in a Ticket, pronounced by a Commiſſary in the Vacation-Time, without a Diſpenſation, ſuſtained as a legal Interruption of Preſcription of the Ticket, *March* 20, 1707, *Corbet* of *Hardgray* contra *Hamilton* of *Wiſhaw*.

Preſcription found to run againſt a Mortification for Maintaining of Burſars, 9 *December* 1707, Magiſtrates of *Aberdeen* contra *Irving* of *Kincauſſie*.

The three Years Preſcription of an Accompt *quoad modum probandi* by Witneſſes, interrupted by a Letter from the Debtor to the Creditor acknowledging Debt in general, and that he had ordered his Payment, 20 *February* 1708, *Eliot* contra Repreſentatives of *Veach*.

A general Charge to enter Heir, not ſuſtained to interrupt the triennial Preſcription of an Accompt not particularly therein mentioned. Nor yet was any Part of the *annus deliberandi* after the Debtor's Deceaſe deduced to hinder Preſcription againſt the Creditor; in reſpect the Debtor's Heir was ſerved and retoured within the Year. And the ſaid Accompt, tho' contracted in *England*, was found to preſcribe according to the *Scots* Law, where Payment was purſued, *July* 16, 1708 *Thomſon* and *Hay* contra Earl of *Linlithgow* and his Curators.

Preſcription of a Brewer's Accompt of Ale as to the Manner of Proof by Witneſſes, found to run againſt Minors, as well as others, 26 *January* 1709, *Brown* of *Braid* contra *Brodie*.

A Soldier's Arrears found not to fall under the three Years Preſcription *quoad modum probandi* like Servants Fees, 14 *July* 1709, *Graham* contra Earl of *Levin* and Major *Colt*.

An Account for a Perſon's Funerals, Mournings of the Family, and their Maintenance to the Term after his Deceaſe, taken off by a *Negotiorum geſtor*, who was neither Heir nor Executor; found not to continue the Currency of a former Account due by the Defunct to the ſame Merchant, to interrupt Preſcription thereof *quoad modum probandi*, 11 *November* 1709, Lord Juſtice *Clerk* and his Lady contra *Hamiltoun* of *Bangour*.

Action upon a Writer's Accompt found to preſcribe as to the Manner of Probation, notwithſtanding his having his Client's Papers in his Hands *jure hypothecæ*, 29 *November* 1709, *Meaſſon* contra Earl of *Aberdeen*. But the Preſcription was found interrupted by a ſingle Article taken on within the Three Years, 13 *December* 1709, *inter eoſdem*.

The Exception or Defence whereby an Agent claims Payment of his Accompt, doth not preſcribe as to the Manner of Probation, while the Papers are in his Cuſtody, 18 *January* 1712, *Mitchel* contra *Mᶜaddam*.

An Heretor having obtained a Valuation of his Teinds *in Anno* 1633, and a Decreet of Sale in *February* 1634, decerning the Titular to denude thereof in his Favours at the ſubſequent Term, and the Heretor to pay the Price upon the other's Performance; and in caſe of his Refuſal, or failing to denude, either to conſign the Price at the Term and intromet with and diſpoſe of his own Teinds, or detain the Price and pay the Annualrent thereof to the Titular; without Prejudice to the Heretor to require the Titular to denude in his Favours, at the ſaid Term or any Time thereafter: The Heretor, who had been always in Poſſeſſion of his own Teinds ſince the Date of the ſaid Decreet, was found not to be excluded from the Benefit thereof, by his neglecting to require the Titular within 40 Years to diſpone the Teinds to him in the Terms of the Decreet, 7 *June* 1710, Lady *Cardroſs* contra *Graham* of *Buchlyvie*.

The Performance of a Bargain entred into by Writ falls not under the three Years Preſcription *quoad modum probandi*, 21 *February* 1711, *Watſon* contra Lord *Preſtounhall*.

A Wadſet-Right affected with a Liferent *in gremio*, having been diſponed to another who afterwards acquired the Reverſion; the Liferent Right was found preſcribed, by the not commencing Action thereon for Payment within 40 Years after it took Effect, 6 *July* 1711, *Stuart* contra Children of *Pittoully*.

In an Action of Payment of a Bond, the Defence of Compenſation upon a Debt once due by the Creditor purſuing to the Debtor, preſcribed *quoad modum probandi*, and referred to the Purſuer's: Repelled, unleſs the Defender offer to prove alſo by the Purſuer's Oath that the ſaid Debt is ſtill reſting, 18 *January* 1712, *Herries* contra *Maxwel* of *Orchardtoun*.

Executing a Summons, not ſufficient Interruption of Preſcription: The Summons having fallen or expired thro' not being called or tabled within Year and Day, 24 *January* 1712, *Stuart* contra *Hill*.

An Exception upon Receipts and Diſcharges, to extinguiſh a Debt purſued for, is perpetual and not liable to Preſcription, 24 *June* 1712, *Sinclair* of *Quendal* contra *Murray* of *Clarden*. And a Reply of Recompenſation to elide ſuch an Exception, is alſo perpetual, 10 *July* 1712, *inter eoſdem*.

Accompts of Funeral-Charges not ſued for within the Three Years, being paid thereafter by One deriving Right to the Executry-Goods from the Executor, with the Burden of the Defunct's moveable Debts: Such of theſe Accompts where the Payer was not Contracter were found preſcribed; but theſe where the Payer was Contracter found not preſcribed, 23 *July* 1712, Lord and Lady *Ormiſtoun* contra *Hamilton* of *Bangour*.

One of Two Cautioners in a Bond, having paid the Debt upon Diſtreſs, and got a Diſcharge thereof: Action of Relief competent to the diſtreſs'd Cautioner, againſt the Co-cautioner, was found to preſcribe, not from the Time of the Diſtreſs, but from the Time that the Debt was paid, 12 *February* 1712, *Scot* Lady *Halkſhaw* contra Dutcheſs of *Buccleugh*.

An improper Wadſet-Right with 40 Years Poſſeſſion, ſuſtained to exclude the Repreſentative of the original Heretor of the Lands: Albeit the Right of the Granter of the Wadſet ſtood removed by a Certification in a Reduction and Improbation at his Inſtance; in reſpect he derived no Right from the Reverſer. And the Reverſer having poſſeſs'd ſome Years by a Back-Tack from the Wadſetter, till the Wadſetter, after obtaining a Declarator of Irritancy of the Back-Tack, entred to the Poſſeſſion, and adjudged for the Back-Tack-Duties unpaid: The Reverſer's Poſſeſſion by the Back-Tack, was conjoined with the Wadſetter's, to make up the Preſcription. But it was not found relevant for the Perſon who reduced the Reverſer's Right, to alledge, that the Back-Tack-Duties for which the Adjudication was led, were ſatisfied within the Legal: In reſpect he, as aforeſaid, did not repreſent the Reverſer, and the Wadſetter by entring to the Poſſeſſion had Right to the whole Rents, 19 *June* 1713, *Murray* of *Burghtoun* contra *M'clellan* of *Barclay*.

The heretable Baillie of an Earldom having, after it was erected into a Dukedom and Regality, accepted of a temporary Commiſſion from the Duke to be Baillie of his Regality, without Prejudice to his heretable Right of Bailliary of the Earldom, and commenc'd his Poſſeſſion by Virtue thereof: He and his Succeſſors incapable to preſcribe a Right to the heretable Bailliary of the Regality. Which was not found preſcribed, even by a ſingular Succeſſor purchaſing the Office of Bailliary of the Earldom, after the temporary Commiſſion was expired, and continuing to act as heretable Baillie of the Regality for the Space of 40 Years, 9 *July* 1713, Duke of *Montroſe* contra *M'caula* of *Ardincaple*.

Preſumptions.

A Son preſumed to be dead from his Father's burdening a Diſpoſition of his Eſtate with his other Children's Proviſions, without Mention of his, and from this, that the Father in a Purſuit againſt him for what belong'd to that Son, upon the Purſuer's referring to his Oath that he was dead, acknowledged that he feared the worſt, 4 *December* 1707, *Aitkin* contra *Goodlets*.

A Perſon having ſubſcribed in the Books of the *African*-Company a certain Sum for himſelf, and particular Sums for others in Co-partnery with him in a Sugary; and the Moyeties paid to the Company conform to the ſaid Subſcription being recorded in their Books, ſometimes as made by the Subſcribent and Partners, ſometimes indefinitely as paid by the Co-partners of the Sugary; and the ſaid other Perſons being ſtated as Creditors to the *African*-Company in their reſpective Sums, by a Certificate obtained from the Committee of Directors in the Terms of the Act of Parliament: The Subſcription was found to be to the Behoof of theſe other Co-partners effeiring to their ſeveral Sums, and the Mony preſumed to have been advanced by them, unleſs redargued by their Oath or Writ, that it was the Subſcribent's Mony, 24 *February* 1708, Creditors of *Corſe* contra *Pedie* and others Partners of the Eaſter Sugary of *Glaſgow*.

A Perſon who ſtood obliged to provide his Lady by their Contract of Marriage to a certain Liferent Annuity having granted her a Bond bearing important Cauſes for a Sum payable by his Heirs not of his own Body; the Bond was imputed in Satisfaction of the Obligement in the Contract: *quia debitor non præſumitur donare*, 16 *November* 1708, The Lord Juſtice *Clerk* and his Lady contra *Hamilton* of *Bangour*.

The ſaid Lady having accepted her ſaid liferent Proviſion in full Satisfaction of Terce or Third of Movables except the Pleniſhing to which ſhe was provided free of Debt; and the Husband having after his granting the foreſaid Bond (which bore to be effectual both againſt his Heirs Executors and Succeſſors, and for affecting his whole Eſtate heretable and Movable for Payment) acquired a Lodging to her in Liferent: The Lords found that the Lady could not claim both the Liferent of the Houſe and the whole Sum in the Bond; becauſe not only may the former be interpreted in Satisfaction of the latter, but Law conſtructs the Liferent of the Houſe to have been taken as a corroborative Security of the Obligement in the Contract to imploy the Sum for her Liferent Uſe, which became extinct by the original Debt's being overpaid by the Bond aforeſaid. They found alſo that the Bond abſorbed the Diſpoſition of the Houſhold-pleniſhing, ſo as ſhe could not ſeek both, 4 *July* 1712, *Hamilton* of *Bangour* contra Lord and Lady *Ormiſtoun*.

Prices. *See* Fiars.

Printing. *See* Gifts.

Priſoners.

ONe impriſoned upon a Caption for a civil Debt, having deponed in the Terms of the Act of Parliament, that he was not able to maintain himſelf, and being ſet at Liberty for that the Creditor declined to aliment him: The Lords found that he could not be ſummarly recommitted to Priſon by Virtue of the ſame Caption, but only by Warrand of their Lordſhips, *cauſa cognita*, 10 *December* 1709, *Law* contra *White*.

Unwarrantable in a Meſſenger to commit one to Priſon by Virtue of a Caption for Debt, after Intimation of a *Siſt* upon a Bill of Suſpenſion obtained by the Priſoner, who was therefore aſſoilized from the Creditor's Expences: Albeit he was in the Meſſenger's

Hands before the Siſt was intimated or procured. But the Meſſenger in reſpect of his *probabils ignorantia juris*, was not found liable to pay any Expences to the Priſoner upon the Accompt of his Incarceration, 27 *July* 1710, *Lamb* Supplicant contra *Cleland* and *Gibſon*.

Magiſtrates not liable *ſubſidiarie* for a Debtor's Eſcape out of their Priſon, whom the Creditor declined to aliment, after he was required to do it in the Terms of the Act of Parliament 1696. Albeit the Magiſtrates gave no Orders for the Priſoner's Liberation. In reſpect they might have ſet him at Liberty, *December* 13, 1711, *Glaſſels* and his Factor contra Magiſtrates of *Forfar*.

Magiſtrates obliged by the Act 32 Parliament 1696, either to modify an Aliment to a Priſoner for Debt within the Deſcription of the Statute, payable by the Perſons that did incarcerate him; or to aliment him themſelves, ſo long as they detain him in Priſon, 20 *February* 1713, *Grierſon* of *Bargatan* Supplicant contra Magiſtrates of *Dumfries*.

Prizes.

A French Privateer who took a Scottiſh Ship, pillaged a Quantity of Goods out of her, and robbed the Skipper of ſome Guineas, and alſo got a Ranſom paid, having continued upon the Coaſt of this Kingdom, till taken there a Matter of Ten Days after by the Commander of one of Her Majeſty's Ships of War; within the Bounds of his Cruiſe, who recovered the Mony and Goods aforeſaid: The Property of ſuch Mony and Goods not contained in the Ranſom-bill, found to remain with the Perſons from whom the Privateer took the ſame, and his Captor liable in Reſtitution to them, 13 *February* 1713, *Stuart* and others contra Captain *Collier*.

Probation. *See* Oath, Popery, Defences, Payment.

A Defence for an Executor's Servant, conven'd by an Executor *ad omiſſa* for Intromiſſion with Goods omitted out of the principal Teſtament; founded on a Diſcharge granted to him by his Maſter relative to particular fitted Accompts, elided by an alledgiance of Superintromiſſion over and above the Contents of the fitted Accompts, notwithſtanding of a general Clauſe in the Diſcharge, diſcharging all other Accompts and Intromiſſions whatſoever: But Superintromiſſion in this Caſe not probable by Witneſſes, *January* 15, 1706, *Spence* contra *Duncan*.

In the Reduction of a Diſpoſition granted by a Wife to her Husband *Stante matrimonio*, Women, who as Creditors to the Wife had received Payment of their Debt, not allowed to depone thereanent for proving the onerous Cauſe of the Diſpoſition, *June* 18, 1706, *Birrel* contra *Fergus*.

A cancelled Backbond with Notes written on the Back and Margin thereof, bearing that the Granter was to renew the ſame in ſuch and ſuch Terms, being recovered at the Inſtance of the Creditor in an Exhibition againſt the Granter's Repreſentatives: The Lords allowed Diligence to cite Witneſſes for proving the Notes to be the Granter's Hand-Writ, *June* 22, 1706, *Watſon* contra Repreſentatives of *Forreſter*.

A Promiſe of a certain Sum and a Quantity of Victual to a third Perſon, in Name of a Woman for her paſſing from a former Promiſe of Marriage made to her ſelf, ſuſtained probable by Witneſſes; and the ſaid third Party admitted as a habile Witneſs, *June* 26, 1706, *Andersons* contra *Gordon*.

A Note of all negative Oaths and clear Probation, muſt be given in to the Preſident's Servant, at leaſt the Night before ſummary Adviſing, that they may be inrolled upon the Wall, 6 *December* 1709.

A Bag of Mony lying by a Perſon at his Death, being given up in Inventory by one of his two Daughters his Executrix: It was not found relevant for her Executor to diſcharge her of the ſaid Mony in a Compt and Reckoning with her Siſter's Repreſentative, by offering to prove by Witneſſes, that the ſaid Mony was before Confirmation equally divided betwixt the two Siſters of Conſent, and each got her own Share, 20 *December* 1709, *M'kenzie* of *Frazerdale* contra Lord *Elibank*.

The Condition of a Legacy in Caſe the Teſtator (who was a Mariner) happened to die in his intended Voyage to the *Indies* in a certain Ship; found purified preſumptively by Affidavits made by Two of another Ship's Crew, bearing that a Sea-Captain of that ſame Name died in their Ship ſeveral Years after in the *Indies*: The Teſtator having

ing never returned, and it not being alledged that there was ſuch another Captain of that Name that died at ſuch a Time in that Place. And the Legacy was decerned to be paid, the Legatary finding Caution before extracting, to repete the Mony with the Annualrents thereof, in Caſe the Teſtator ſhould ever appear, 20 *December* 1710, *Henderſon* and *Innes* contra *Mortoun* and *Smith*.

Probation by Witneſſes of an Annualrenter's total Intromiſſion of 12 or 13 Years Poſſeſſion of Victual and Mony-Rent, where there was no Intromiſſion by the common Debtor, or any Co-creditor, relevant to make the Intrometter comptable for the Rental both of Mony and Victual, 25 *January* 1711, *Baillie* of *Lamingtoun* contra Sir *William Menzies*.

The proved Tack-duty of a Salmond-fiſhing for one Year preſumed to have been paid for it in ſubſequent Years: Unleſs the Intrometter with the Rent of the Fiſhing could elide the Preſumption by a contrary Probation, 2 *February* 1711, *Strachan* contra the Town of *Aberdeen*.

Procurators.

ONe's Procurator before an inferior Court cannot defer the Verity of a Point to the other Party's Oath, without a ſpecial Mandate for that Effect, 4 *January* 1709, *Hardy* contra *Allan* and *Chiſholm*. *Etiam in re minima*, 18 *January* 1712, *Inglis* contra *Fuller*.

Prodigals, *See* Interdiction.

Promiſes.

PRomiſe by a Vaſſal to give to his Superior a Piece of Silver Plate to a certain Value, upon his having paſs'd from the Benefit of an incurred Irritancy in the Vaſſal's Right, not probable by Witneſſes, 24 *December* 1708, Laird of *Pourie* contra *Hunter* of *Burnſide*.

A dying Perſon having deſired her Landlady to bring her a Napkin, wherein ſhe ſaid there was a 20 l. *Sterling* Bank-Note, which ſhe deſigned to give in Token of her Kindneſs to one then come to ſee her; and upon her ſeeming to be in Paſſion and troubled when the Napkin being brought was found to contain nothing but a blank Piece of Paper, the Landlady having ſaid to the deſigned Donatar, that ſhe would make up the 20 l. to him, in Caſe it was not made up another Way: She was found liable for the ſame, unleſs ſhe could inſtruct that he recovered Payment ſome other Way, 2 *January* 1712, *Reoch* contra *Young*.

Promiſſory Notes. *See* Bills of Exchange.

Prophaneneſs.

THe Lords will incourage ſuch as diſcover Perſons, who in the Seſſion-houſe, or in their Clerks-Offices, tranſgreſs the Acts of Parliament againſt Vice, Immorality and Prophaneneſs, by putting either ſubſcribed or unſubſcribed Informations in their Boxes; and will cenſure and puniſh the Offenders according to Law: And recommend to their Clerks, to ſee that no ſuch Abuſes be committed, and to delate thoſe who commit them, 20 *June* 1710, Act of Sederunt.

Toties quoties in the Act of Parliament againſt Swearing, are to be underſtood of every Oath, and not of every Conviction only; but a Fine impoſed by an inferior Judge for Thirty Oaths in the Terms of Law, modified and reſtricted to the Half, 27 *June* 1710, the Magiſtrates and Procurator-Fiſcal of *New-Galloway* contra *Canon* of *Barley*.

Proteſts for Remead of Law.

ALL Advocates diſcharg'd in any Cauſe to proteſt for Remead of Law, by the general Warrant of their Gown, in the Name of their Clients, without ſpecial Mandates from their Clients, 28 *February* 1708.

A Proteſt for Remead of Law againſt a Decreet of the Seſſion, having been lodged before the Houſe of Peers, and Judgment there given, diſmiſſing the Appeal, and ordaining the Appellants to pay Coſts, and the Lords of Seſſion to order the ſame to be levied as Coſts given by their Lordſhips are to be levied: The ſaid Lords, upon a Bill offered, with the Judgment of the Houſe of Peers, granted a ſummary Warran for Letters of Horning and other uſual Diligence againſt the Appellants, for levying the ſaid Coſts and Charges, 13 *June* 1711, Mrs. *Lyon* contra the Lord and Lady *Kinnaird.*

The Lords of Parliament having, upon a Proteſt for Remead of Law, revers'd a Decreet of the Lords of Seſſion; and ordered them to direct the Appellant's Expences to be tax'd according to the Courſe of their Court, and paid by the Appellee: The Lords refuſed to conſider theſe Expences ſummarly upon a Bill offered by the Appellant; till the Appellee were firſt legally cited by their Lordſhips Order, that he might come prepared to object againſt the Quantity of Expences to be modified. Albeit the Appellant had certiorated him under Form of Inſtrument, that he was to apply to the Seſſion to tax his Expences ſuch a Day; and the Appellee was preſent in the Houſe of Peers at pronouncing the ſaid Decree, whoſe private Knowledge was not conſidered as equivalent to a Citation, 21 *July* 1711, Sir *Andrew Kennedy* Supplicant contra Sir *Alexander Cumming.* But this Appellee being cited, and at the Day of Compearance pleading his Privilege of Parliament, againſt the ſuſtaining whereof the Appellant did again proteſt for Remead of Law; and the Apellant, without diſcuſſing that Proteſt, having, upon a ſummary Complaint given in to the Houſe of Peers, obtained a ſecond Order directed to the Lords of Seſſion, that they ſhould forthwith tax the ſaid Expences, and direct the ſame to be paid to the Complainer, purſuant to the Order and Judgment abovementioned: The Lords found the Appellee obliged to anſwer to the Appellant's Claim of Expences, without Neceſſity of any further Citation, 26 *June* 1712, *Idem* Supplicant contra *Eundem.* And found, That the Queſtion before their Lordſhips was not, Whether any Expences were due or not, but only how much Expence ſhould be decerned. In modifying whereof, the Lords, without either conſidering the Charges of diſcuſſing the Appeal, or entring into the Detail of the Appellant's Accompt of Diſburſements before the Seſſion, decerned 100 lib. *Sterling* to be paid to him by the Appellee, 30 *July* 1712, *inter eoſdem.*

A Decreet of the Seſſion, reducing a Tack of Lands and removing the Tackſman from the Poſſeſſion, being revers'd by the Houſe of Peers; and the Tackſman ordered to be reſtored to the Poſſeſſion, and to have Satisfaction for his Loſs thro' his being turned out: The Heretor was found liable for the excreſce Duty contained in a Tack ſet to the new Tenant more than was payable by the outed Tackſman, for the Years he was out of his Poſſeſſion; and for a Proportion of the Graſſum paid by the ſaid new Tenant effeiring to the ſaid Years; but not for what further Profit the Lands yielded to the new Tenant in that Interval, 17 *November* 1712, *Hamilton* of *Pumpherſton* contra Lady *Cardroſs.*

Proteſtations.

IN Caſe of a judicial Proteſtation, or Proteſtation and Remit admitted by the Ordinary for keeping up of Suſpenſions or Advocations, unleſs the Cauſe be again called by his Lordſhip, and the Suſpenſion or Advocation produced the ſame Week, they ſhall not be taken in by the Clerk, or the Party *in mora* reponed, without paying to the adverſe Party, or to the Clerk for his Behoof, Ten Shillings *Sterling.* The like Sum ſhall be paid by a Suſpender or Raiſer of Advocation to the contrary Party, or to the Clerk for his Behoof, before they be reponed againſt a Decreet finding the Letters orderly proceeded, or an Act and Remit pronounced for not debating the Reaſons of Suſpenſion or Advocation; unleſs a written Stop be obtained from the Ordinary within Six free Days; and a Clerk writing upon any Proceſs before theſe Sums are paid, is liable for the Double. A Purſuer before any inferior Court, advocating his Cauſe, and not inſiſting within Fifteen Seſſion-days, and cauſing call and give out the ſame with the Proceſs to the Defender's Procurators to ſee; the Defender may call for the Advocation, and put up a Proteſtation at the Minute-book; whereupon, if the Purſuer produce not his Advocation with the principal Proceſs, and an Outgiving thereon, the Proteſtation and Remit ſhall be given out to be extracted. The Defender, when the Advocation is ſo produced with the Proceſs and Outgiving, ſhall be allowed, before he return the Proceſs, to inroll the ſame in the Roll of Suſpenſions and Advocations upon his own Advocate's Return. The Defender's Procurators may keep up the Proceſs Six Days, and till the firſt *Saturday* thereafter in Seſſion-Time, for ſeeing and inrolling the ſame. The Clerks of the Bills or their Deputes (under the Penalty of Five Pound *Sterling toties* *quoties*, attour Performance) are ordained to give up all Proteſtation-Money conſigned or to be conſigned in their Hand, without any Fees, to the Party concerned, upon Sight of the extracted Proteſtation or Decreet finding the Letters orderly proceeded, and Receipt of the Party in a Diſcharge expreſſing the Subſtance and Date thereof, without Neceſſity to leave the Lords Warrant, Act of Sederunt *January* 1, 1709.

Q.

Quakers. *See* Oath.

THe ſolemn Affirmation or Declaration of a Quaker in theſe Words, *I do declare in the Preſence of Almighty God, the Witneſs of the Truth of what I ſay*, accepted inſtead of an Oath in the uſual Form, conform to the Statutes of *England*, 26 *February* 1710, *Anderſon* contra *Forbes* of *Blackford*.

R.

Ranking and Sale. *See* Oath.

THe Raiſer of a Proceſs of Sale and Ranking in the Caſe of Bankrupt, muſt cite the Debtor and all his real Creditors in the known, actual and real Poſſeſſion of his Eſtate by labouring or uplifting the Rents, in the common Form of Law; and cite his other Creditors or others having or pretending Intereſt edictally (conform to a Warrant to be contained in the Summons of Sale for that Effect) upon 60 and 15 Days for the firſt and ſecond Diets, at the Market-Croſs of *Edinburgh*, Peir and Shore of *Leith*; and alſo upon the 21 and 6 Days before the ſaid Days of Compearance, at the Paroch-Church-Doors where the Lands ly, after Divine Service. The Executions of which edictal Citations are to be duly return'd and recorded in a particular Regiſter at *Edinburgh*, the laſt Day to which the Citations are given: Otherways they ſhall make no Faith in Judgment. And no more than 12 Shillings *Scots* to be taken for Regiſtration of each Execution, & delivering back the Principal to the Party, under Pretence of Dues, or Drink-mony, or otherways. Which Clerks are to make exact Minute-books of the ſaid Regiſter, mentioning the Names of the Purſuer and Debtor, and the Dates of the Executions and Regiſtration. The Minute-book and Regiſter ſhall be patent to the Inſpection of the whole Lieges, without Fee or Reward; and the ſame Dues to be paid for Extracts of theſe Executions, as for Extracts of probative Writs, 23 *November* 1711, Act of Sederunt, § 1. After raiſing a Proceſs of Sale, the Purſuer ſhall have Diligence granted him againſt all Havers of the Writs of the Debtor and Bankrupt's Eſtate, to the Effect the ſame may be timeouſly exhibited in the Clerk's Hands, *Ibid.* § 3. If the Purſuer of a Proceſs of Sale and Ranking during the Dependance die, or forbear to inſiſt, or his Title and Intereſt happen to be ſatisfied or extinguiſhed; the Factor, if any be, or otherways any other real Creditor, may, upon ſpecial Warrant from the Lords, take up the Proceſs where it left, and carry it on to a final Iſſue, for the common Benefit of the whole Creditors, *Ibid.* § 4. The Proceſs, upon the Death of the Debtor, or any of the Creditors Defenders compearing and producing; ſhall not ſtop till expiring of the Year of Deliberation, but only till the apparent Heir be cited, without Neceſſity of transferring the Proceſs *paſſive*: And if no Perſon appear in the Place of the Defunct, the Lords will proceed in the Proceſs where it left, and diſcuſs the ſame in ſuch Manner as when Parties alive compear not, *Ibid.* § 5. The Proceſs of Sale and Ranking being ſeen and returned, and called in the Regulation-Roll, the Ordinary before whom it is called ſhall aſſign a Day, betwixt and which the Creditors are to produce their Rights and Intereſts; and at the ſame Time name the Lord Ordinary, who in the Courſe of the Book falls to be Ordinary to the next Ranking, before whom they are to be ranked: The Dues formerly given in with the Bill in Preſence, craving an ordinary being always paid to the Clerks Collector, and marked by him on the Proceſs. If any of the Creditors fail to produce within Eight Days of the Day prefixed, they ſhall not be allowed to produce thereafter, without paying a certain pecuniary Mulct to be modified by the Ordinary, not under Twenty Shillings *Sterling*; and to be increaſed according to the Delay the Producer is guilty of: Which Mulct is to be paid in to the Factor or Clerk, towards defraying the Charge of the Proceſs; and the Ordinary ſhall prefix a Time for the Creditors producing their Intereſts to depone upon the Verity of their Debts, who if they fail to do it at the Day appointed, ſhall not be allowed thereafter, but upon Payment of a Mulct not under the foreſaid Sum of 20 Shillings, to be increas'd and applyed as above. *Ibid.* § 6. The Ordinary is authorized to appoint one or moe Advocates who are not imployed in the Cauſe, Men of Integrity, Judgment and Experience, to conſider the whole Production, and make a State of the Intereſts produced and Points of Contraverſy, and adjuſt the Minintes for the Ordinary to give his Interlocutors upon the whole, and that with reſpect to Proceſſes raiſed, or to be raiſed. Theſe are required to be exact and diligent in their Work, and are impowered to appoint Days to the Creditors and their Procurators, with the Clerk of the Proceſs, to come and point out to them their reſpective Intereſts: With Certification if they fail, their Production ſhall not be regarded. Theſe Advocates are to mark the State when ſo prepared, and date their marking; and immediately it is to be lodged and to ly in the Clerk's Hands Eight Days, to be ſeen by all concerned, without Fee or Reward. After which Time, no Objection ſhall be received againſt the Fact ſo ſtated, but upon Payment of four Crowns to the Factor or Clerk for the Uſe foreſaid, with Power to the Ordinary to augment the Mulct if he ſee Cauſe. If any new Point occurr, the Ordinary may diſcuſs, or remit the ſame to be reconſidered by the Advocates as above: Who ſhall have ſuch Allowance for their Pains and Attendance out of the Bankrupt's Eſtate, as the Lord Ordinary ſhall modify, *Ibid.* § 7. Tho' any Perſon lawfully ſummoned in Manner abovementioned ſuffer the Decreet of Ranking to go out, without producing and competing upon his Intereſt, the Decreet of Sale ſhall not the leſs ſtand good, and the Purchaſer be bound to pay conform thereto: and the Perſon failing ſhall have no other Remedy but to purſue the Receivers of the Price and their Heirs, for Repetition, *Ibid.* § 8. The Expence of Raiſing and Carrying on Proceſs of Sale and Ranking, and extracting Decreets thereon, ſhall upon Application be advanced out of the Bankrupt's Eſtate as formerly: With this Proviſion, that an Accompt of the whole Expence be produced before the Ordinary of the Sale, to be by him conſidered, liquidated and ſtated upon the Price at ſo much *per cent*; that it may be proportioned among the Creditors according to their ſeveral Shares. Which Expence, ſhall immediately after the Sale, be paid in by the Purchaſer to the Factor, if any be, or elſe to the Clerk of the Proceſs, to be compted for by them to the Creditors, or to the Purſuer of the Sale and Ranking, in Caſe he advanced the ſame; and ſhall be allowed to the Purchaſer out of the firſt End of the Price, or retained by him off the Creditors having Right as accords, *Ibid.* § 9.

Recognition.

Recognition not incurred by the granting of baſe Infeftments within the half of the Value of the Ward-fee; tho' the Vaſſal, by granting a Poſterior publick Infeftment did not retain the Major Part, *March* 21, 1707, Laird of *Grant* contra Creditors of *Halgreen*.

Recognition incurred by the deeds of the Reverſer, and not of the Appriſer, during the Courſe of the Legal, *July* 15, 1707, The Creditors of *Edinglaſſie* contra *Gordon* of *Carnouſſie*.

Preſcription by 40 Years uninterrupted Poſſeſſion of Ward-lands by the Heritor, after the major Part had been alienated, without the Superior's Conſent, relevant to exclude Recognition; and Poſſeſſion by baſe Infeſtments of Annualrent, after the Death of the Vaſſal who granted the ſame, reckoned equivalent to the Granter's own Poſſeſſion, in order to make up the Years of Preſcription, for excluding the Recognition. But poſterior Deeds of Alienation within the Preſcription allowed to be conjoined with the Deeds of Alienation before the Commencement of Preſcription to inferr Recognition *quoad exceſſum*, with the Burden of theſe anterior Deeds, 25 *July* 1712, *Moncrief* of *Mornipea* contra Heirs and Creditors of *Ballo*.

Recoinage.

THe Directors of the Bank, who, by Agreement with the Privy-Council, undertook the Burden of the Recoinage of all the current Coin of *Scotland*, by advancing *Engliſh* Mony for all the old Species brought to them by all Perſons, and giving the ſame into the Mint; being to receive a Certificate for the Loſs in Recoining upon the Commiſſioners of the Equivalent, with one half *per cent* to be paid on Demand, and the Maſter of the Mint's Bond for the reſt payable in Weight and Tale in the Terms of the Act of Parliament 1686; and there happening in the Coining an Excreſce on the Tale over and above the Maſter of the Mint's Bond: That Benefit by the Aug-

quoties, attour Performance) are ordained to give up all Proteſtation-Money conſigned or to be conſigned in their Hand, without any Fees, to the Party concerned, upon Sight of the extracted Proteſtation or Decreet finding the Letters orderly proceeded, and Receipt of the Party in a Diſcharge expreſſing the Subſtance and Date thereof, without Neceſſity to leave the Lords Warrant, Act of Sederunt *January* 1, 1709.

Q.

Quakers. *See* Oath.

THe ſolemn Affirmation or Declaration of a Quaker in theſe Words, *I do declare in the Preſence of Almighty God, the Witneſs of the Truth of what I ſay*, accepted inſtead of an Oath in the uſual Form, conform to the Statutes of *England*, 26 *February* 1710, *Anderſon* contra *Forbes* of *Blackford*.

R.

Ranking and Sale. *See* Oath.

THe Raiſer of a Proceſs of Sale and Ranking in the Caſe of Bankrupt, muſt cite the Debtor and all his real Creditors in the known, actual and real Poſſeſſion of his Eſtate by labouring or upliſting the Rents, in the common Form of Law; and cite his other Creditors or others having or pretending Intereſt edictally (conform to a Warrant to be contained in the Summons of Sale for that Effect) upon 60 and 15 Days for the firſt and ſecond Diets, at the Market-Croſs of *Edinburgh*, Peir and Shore of *Leith*; and alſo upon the 21 and 6 Days before the ſaid Days of Compearance, at the Paroch-Church-Doors where the Lands ly, after Divine Service. The Executions of which edictal Citations are to be duly return'd and recorded in a particular Regiſter at *Edinburgh*, the laſt Day to which the Citations are given: Otherways they ſhall make no Faith in Judgment. And no more than 12 Shillings *Scots* to be taken for Regiſtration of each Execution, & delivering back the Principal to the Party, under Pretence of Dues, or Drink-mony, or otherways. Which Clerks are to make exact Minute-books of the ſaid Regiſter, mentioning the Names of the Purſuer and Debtor, and the Dates of the Executions and Regiſtration. The Minute-book and Regiſter ſhall be patent to the Inſpection of the whole Lieges, without Fee or Reward; and the ſame Dues to be paid for Extracts of theſe Executions, as for Extracts of probative Writs, 23 *November* 1711, Act of Sederunt, § 1. After raiſing a Proceſs of Sale, the Purſuer ſhall have Diligence granted him againſt all Havers of the Writs of the Debtor and Bankrupt's Eſtate, to the Effect the ſame may be timeouſly exhibited in the Clerk's Hands, *Ibid.* § 3. If the Purſuer of a Proceſs of Sale and Ranking during the Dependance die, or forbear to inſiſt, or his Title and Intereſt happen to be ſatisfied or extinguiſhed; the Factor, if any be, or otherways any other real Creditor, may, upon ſpecial Warrant from the Lords, take up the Proceſs where it left, and carry it on to a final Iſſue, for the common Benefit of the whole Creditors, *Ibid.* § 4. The Proceſs, upon the Death of the Debtor, or any of the Creditors Defenders compearing and producing; ſhall not ſtop till expiring of the Year of Deliberation, but only till the apparent Heir be cited, without Neceſſity of transferring the Proceſs *paſſive*: And if no Perſon appear in the Place of the Defunct, the Lords will proceed in the Proceſs where it left, and diſcuſs the ſame in ſuch Manner as when Parties alive compear not, *Ibid.* § 5. The Proceſs of Sale and Ranking being ſeen and returned, and called in the Regulation-Roll, the Ordinary before whom it is called ſhall aſſign a Day, betwixt and which the Creditors are to produce their Rights and Intereſts; and at the ſame Time name the Lord Ordinary, who in the Courſe of the Book falls to be Ordinary to the next Ranking, before whom they are to be ranked: The Dues formerly given in with the Bill in Preſence, craving an ordinary being always paid to the Clerks Collector, and marked by him on the Proceſs. If any of the Creditors fail to produce within Eight Days of the Day prefixed, they ſhall not be allowed to produce thereafter, without paying a certain pecuniary Mulct to be modified by the Ordinary, not under Twenty Shillings *Sterling*; and to be increaſed according to the Delay the Producer is guilty of: Which Mulct is to be paid in to the Factor or Clerk, towards defraying the Charge of the Proceſs; and the Ordinary ſhall prefix a Time for the Creditors producing their Intereſts to depone upon the Verity of their Debts, who if they fail to do it at the Day appointed, ſhall not be allowed thereafter, but upon Payment of a Mulct not under the foreſaid Sum of 20 Shillings, to be increas'd and applyed as above. *Ibid.* § 6. The Ordinary is authorized to appoint one or moe Advocates who are not imployed in the Cauſe, Men of Integrity, Judgment and Experience, to conſider the whole Production, and make a State of the Intereſts produced and Points of Contraverſy, and adjuſt the Minintes for the Ordinary to give his Interlocutors upon the whole, and that with reſpect to Proceſſes raiſed, or to be raiſed. Theſe are required to be exact and diligent in their Work, and are impowered to appoint Days to the Creditors and their Procurators, with the Clerk of the Proceſs, to come and point out to them their reſpective Intereſts: With Certification if they fail, their Production ſhall not be regarded. Theſe Advocates are to mark the State when ſo prepared, and date their marking; and immediately it is to be lodged and to ly in the Clerk's Hands Eight Days, to be ſeen by all concerned, without Fee or Reward. After which Time, no Objection ſhall be received againſt the Fact ſo ſtated, but upon Payment of four Crowns to the Factor or Clerk for the Uſe foreſaid, with Power to the Ordinary to augment the Mulct if he ſee Cauſe. If any new Point occurr, the Ordinary may diſcuſs, or remit the ſame to be reconſidered by the Advocates as above: Who ſhall have ſuch Allowance for their Pains and Attendance out of the Bankrupt's Eſtate, as the Lord Ordinary ſhall modify, *Ibid.* § 7. Tho' any Perſon lawfully ſummoned in Manner abovementioned ſuffer the Decreet of Ranking to go out, without producing and competing upon his Intereſt, the Decreet of Sale ſhall not the leſs ſtand good, and the Purchaſer be bound to pay conform thereto: and the Perſon failing ſhall have no other Remedy but to purſue the Receivers of the Price and their Heirs, for Repetition, *Ibid.* § 8. The Expence of Raiſing and Carrying on Proceſs of Sale and Ranking, and extracting Decreets thereon, ſhall upon Application be advanced out of the Bankrupt's Eſtate as formerly: With this Proviſion, that an Accompt of the whole Expence be produced before the Ordinary of the Sale, to be by him conſidered, liquidated and ſtated upon the Price at ſo much *per cent*; that it may be proportioned among the Creditors according to their ſeveral Shares. Which Expence, ſhall immediately after the Sale, be paid in by the Purchaſer to the Factor, if any be, or elſe to the Clerk of the Proceſs, to be compted for by them to the Creditors, or to the Purſuer of the Sale and Ranking, in Caſe he advanced the ſame; and ſhall be allowed to the Purchaſer out of the firſt End of the Price, or retained by him off the Creditors having Right as accords, *Ibid.* § 9.

Recognition.

RECognition not incurred by the granting of baſe Infeftments within the half of the Value of the Ward-fee; tho' the Vaſſal, by granting a Poſterior publick Infeftment did not retain the Major Part, *March* 21, 1707, Laird of *Grant* contra Creditors of *Halgreen.*

Recognition incurred by the deeds of the Reverſer, and not of the Appriſer, during the Courſe of the Legal, *July* 15, 1707, The Creditors of *Edinglaſſie* contra *Gordon* of *Carnouſſie.*

Preſcription by 40 Years uninterrupted Poſſeſſion of Ward-lands by the Heritor, after the major Part had been alienated, without the Superior's Conſent, relevant to exclude Recognition; and Poſſeſſion by baſe Infeftments of Annualrent, after the Death of the Vaſſal who granted the ſame, reckoned equivalent to the Granter's own Poſſeſſion, in order to make up the Years of Preſcription, for excluding the Recognition. But poſterior Deeds of Alienation within the Preſcription allowed to be conjoined with the Deeds of Alienation before the Commencement of Preſcription to inferr Recognition *quoad exceſſum*, with the Burden of theſe anterior Deeds, 25 *July* 1712, *Moncrief* of *Mornipea* contra Heirs and Creditors of *Ballo.*

Recoinage.

THE Directors of the Bank, who, by Agreement with the Privy-Council, undertook the Burden of the Recoinage of all the current Coin of *Scotland*, by advancing *Engliſh* Mony for all the old Species brought to them by all Perſons, and giving the ſame into the Mint; being to receive a Certificate for the Loſs in Recoining upon the Commiſſioners of the Equivalent, with one half *per cent* to be paid on Demand, and the Maſter of the Mint's Bond for the reſt payable in Weight and Tale in the Terms of the Act of Parliament 1686; and there happening in the Coining an Excreſce on the Tale over and above the Maſter of the Mint's Bond: That Benefit by the Augmentation of the Tale, was found to accrue to the Bank, as well as to any other private Proprietar of Bullion; and not to be imputable *pro tanto* in Payment of what is allowed in Satisfaction of the Loſs ſuſtained by the giving in and giving out of the Mony, 11 *February* 1709, *Governour and Directors of the Bank* contra *Commiſſioners of the Equivalent*.

Reduction. *See* Improbation, Competition, *vis et metus*, Bankrupts, Fraud, Form of Proceſs, Certification.

A Diſpoſition to a conjunct Perſon preſumed gratuitous, notwithſtanding of a Bond for a great Sum of the ſame Date given by the Granter to the Receiver, and founded on by him as the onerous Cauſe of the Diſpoſition; and the Diſpoſition reduced as in Prejudice of a prior baſe Infeſtment of Annualrent out of the ſame Subject, not clothed with Poſſeſſion before Publick Infeſtment followed upon the Diſpoſition. Albeit it was alledged, that the Diſponer had a ſeparate Eſtate ſufficient to pay the Debt *January* 24, 1706, *Wilſon* contra Lord *Saline*.

A Sum a Father obliged himſelf, in his Son's Contract of Marriage, to pay to him and his Heirs, being diſcharged by the Son betwixt the Minute of the Contract, and the extending thereof; the Diſcharge was reduced at the Inſtance of the Son's Relict, as *contra fidem tabularum nuptialium et bonos mores*, *December* 1, 1705, *Grieve* contra *Thomſon*.

A Sheriff's Decreet confiſcating Wool, upon Preſumption of a deſigned Exportation contrary to Law, and upon the Owner's being Held as confeſt for declining to purge himſelf by Oath; reduced, and the Seizers of the Wool, with the Procurator Fiſcal of the Court, who rouped and diſpoſed thereof, found liable in Repetition to the Owner at the prime Coſt, deducing the Expences of the Roup, but not for Damages. Becauſe, the Lords having reponed the Owner of the Wool to his Oath, he deponed that he had no formed Deſign of Exporting thereof, *June* 19, 1706, *Binning* contra the Woollen Manufactory of *Newmilns* and the Procurator-Fiſcal of the Sheriff Court of *Linlithgow*.

Each of the Parties in a Tack, having, conform to the *Engliſh* Cuſtom, ſign'd but one Double or Side thereof; an Extract of the Double ſign'd by the Tackſman produced by the Setter's ſingular Succeſſor, ſuſtained to ſatisfy the Production in a Reduction of the Tack at his Inſtance againſt the Tackſman, *July* 27, 1706, Marquiſs of *Montroſe* contra *Walkingſhaw* of that *Ilk* and the Lord *Blantire*.

A Purchaſer at a Roup, having tranſacted with all the Creditors except one, againſt whoſe Debt he procured a Declarator of Extinction in Abſence, who, to ſtop his getting up his Bond for the Price, according to the Act of Parliament 1696, raiſed a Reduction of the Declarator, as null, for being obtained upon a new Summons intented after an extracted Act in a former Proceſs of Mails and Duties, at the Inſtance of the Reducer's Predeceſſor, wherein the Purchaſer's Author was compearing; he the Purchaſer was allowed, to repete a Reduction of the Act ſummarly without a wakening or transfering, 28 *January* 1708, Lord *Preſident of the Seſſion* contra Sir *John Inglis*.

Proceſs in Reduction and Improbation of a real Right ſuſtained, without Neceſſity upon the Purſuer to call the Defender's Author: In reſpect the ſaid Author was not liable to the Defender in any Warrandice, no not from Fact and Deed; and ſo had no Manner of Intereſt in the Cauſe, *December* 18, 1708, Colonel *Erſkine* contra *Hamilton*.

Perſonal Bonds not a ſufficient Title to the Creditor to reduce, upon the Act of Parliament 1621, a Diſpoſition of Lands granted by the Debtor; albeit no Infeſtment hath followed thereon, 24 *June* 1709, *Brown* younger of *Thorniedykes* contra *Brown* his Brother.

Reaſons of Reduction of a Decreet againſt an Heir ſerved *cum beneficio inventarii* inſtantly verified, allowed to be received *incidenter*, in a Proceſs of Adjudication upon the Decreet. But Reaſons of Reduction not inſtantly verified, reſerved only *contra executionem*, both as to Relevancy and Probation, 8 *November* 1711, Lord and Lady *Ormiſtoun* contra *Hamilton* of *Bangour*.

A Charge againſt the Superior upon an Adjudication, ſufficient to intitle the Adjudger to reduce real Rights, clothed with Infeſtment: Tho' the Adjudication was led by a Truſtee to the Behoof of an apparent Heir, upon his own Bond, to his own Behoof, and he was not ſerved Heir and infeſt, 28 *January* 1713, *M'pherſon* contra *M'pherſon*.

A perſonal Creditor who inhibited his Debtor, ſufficiently intitled to reduce real Rights granted by the Debtor after Inhibition, tho' completed by Infeſtment, 17 *February* 1713, *Kennedy* of *Kilbinzie* contra Sir *James Agnew* and others.

Reduction and Improbation of Rights to Lands, purſued by One infeſt therein upon a Charter of Adjudication, excluded *perſonali exceptione*, upon a Renunciation of all Right to theſe Lands, and Diſpoſition by the Purſuer's Author, in Favours of the Defender's Predeceſſor, anterior to the Bonds whereupon the Purſuer's Adjudication was led; Theſe Bonds being gratuitous; albeit the Rights produced by the Defender were only perſonal, not completed by Infeſtment, 23 *July* 1713, Captain *Blair* contra *Blair* of *Glaſclune*.

Regality. *See* Earldom, Preſcription.

A Charter erecting Lands into a Regality in Favours of One therein appointed hereditary Baillie of Regality, with all the Priviledges competent to any Lord of Regality, *cum eſchetis, vitalibus, reditibus & foriſfacturis omnium perſonarum quæ infra dictam Regalitatem quocunque modo caderent, intromittendi, levandi, aſſignandi & inſuper diſponendi, &c.* ſuſtained to give him Right to gift ſingle Eſcheats fallen within that Regality: Which Right he was found not to have loſt by his not taking the Oaths in the Terms of the Act of Parliament 1693, 25 *June* 1713, *Gib* of *Caſtletoun* contra *Robertſon*.

Regiſtration.

WArrant to give up a principal Bond out of the Commiſſary Court-Books of *Edinburgh*, after it was booked there, in order to regiſter the ſame in the Books of Seſſion, that an Adjudication might be led thereon, 23 *June* 1705, *Matthie* Supplicant contra Commiſſary-Clerk of *Edinburgh*.

Regiſtration in the Commiſſary-Court Books ſuſtained as competent, *January* 16, 1706, *Young* and *Man* Supplicants.

A Bond bearing only, Conſtitute our Procurators, not regiſtrable in order to Diligence, but only in order to Conſervation, 27 *July* 1710, Colonel *Erſkin* Supplicant.

A Clauſe in a Writ, *Conſenting to the Regiſtration thereof in the Books of Council and Seſſion, that all Execution might paſs thereon in Form as effeirs,* without the uſual Words, *that a Decreet might be interponed thereto,* ſuſtained as a ſufficient Warrant for ſummary Diligence by Horning, 29 *July* 1713, *Montgomery* and his Lady contra *Montgomery* of *Wrae*.

Relative Writs. *See* Bonds.

A *Scots* Bond being granted by a Principal and Cautioner, with this Clauſe, *That if Payment were made of the Mony by Virtue of a Bond* Engliſh Form, *ſign'd and ſeal'd by the principal Party, the Obligation ſhould be null:* The Cautioner was found liable, unleſs he could prove Payment of the *Engliſh* Bond by the Principal; without putting the Creditor to produce the ſaid Bond, *June* 26, 1706, Sir *William Sharp* contra Archbiſhop of *Glaſgow*.

Relief. *See* Cautionry, *correi debendi*.

A Relict, who, by Tranſaction with her Husband's Heir of Line, got the whole Right of Succeſſion diſponed to her, and obliged her ſelf to relieve the Heir of all his Predeceſſor's Debts, conveenable for Payment of one of theſe Debts, at a Creditor's Inſtance, without calling the Heir, 3 *July* 1711, *Wellwood* contra *Scougal* and *Semple* of *Fulwood*.

Removing.

NOt relevant to aſſoilzie the Defender in a Proceſs of Removing from Lands, that he had removed himſelf and his Subtenents from the Lands, unleſs the Poſſeſſion were void and rid, or offered to the Purſuer when void, 21 *July* 1713, *Bridge* contra Sir *James Sinclair*.

Rentals.

ONe poſſeſſing by Tack from a Rentaller, being ſummarly removed after his Death between Terms, without a previous Warning: The Removing was found to be unwarrantable, albeit the Rentaller's Heir had, after his Predeceſſor's Death, renounced the Poſſeſſion; and the Tack, by an expreſs Clauſe therein, was to be null upon the expiring of the Rental, 12 *July* 1711, *Carmichael* contra *Bertram* of *Niſbet*.

Reparations.

THe Lords refuſed to authorize a Tackſman put in by themſelves upon an Eſtate, to pay a Proportion of the Expences of repairing the Pariſh-Church; or yet to declare, that the Falling thereof for Want of Reparation ſhould not be imputed to his Neglect, *July* 20, 1705, *Aliſon* Supplicant.

Nor yet would they authorize ſuch a Factor, either to imploy Workmen to repair the Manſion-houſe that was ruinous, or declare him free of any Blame for ſuffering the ſame to go to Ruin, 30 *June* 1708, *John Linn* Supplicant.

The Fee of a burnt Tenement repaired by the Liferenter, affected with the principal Sum expended in the Reparation, *February* 20, 1706, *Haliday* and *Temple* contra *Garden* of *Greenhill*. But not burdened with Annualrent of the Reparations during the Liferenter's Lifetime, 17 *February* 1708, *Iidem* contra *Cuninghame*.

Reports.

THe Lord Reporter of any Cauſe in the Inner-houſe, may immediately after Adviſing thereof, come with the Proceſs to the Bar in the Outer-houſe, and report and apply the Interlocutor *in præſentia*; but not hear any new Point, Act of Sederunt 20 *November* 1711, § 9.

Reſignation.

REſignation of a Tenement in *Edinburgh* by the Symbols of Earth and Stone, ſuſtained; in reſpect it had been long an ordinary Practice ſo to do: But Reſignations in Time coming, made by any other than the proper Symbols of Staff and Baſton, to be null, Act of Sederunt 11 *February* 1708.

Reſtitution. *See Jus mariti.*

Retention. *See* Cautionry, Competition.

A Perſon having diſponed his Eſtate to Two of his Friends under Truſt for certain Uſes, with this Quality, That what remained thereof, after Payment of his Debts and Legacies, ſhould be equally divided betwixt his Two Brothers; and One of theſe Brothers chancing to die after the Diſponer, before Execution of his Will by the Truſtees, who afterwards lodg'd the *Superplus* of the Free-gear in the Hands of the ſurviving Brother, to be kept and made forthcoming by him to ſuch as ſhould be found to have beſt Right: The Depoſitary, who was Creditor to his Brother laſt deceas'd, was found to have no Right of Retention of his Share of the depoſited Mony for Payment of his Debt, in a Competition with other Creditors that had confirmed the Subject as Executors Creditors to the common Debtor; but all his Creditors were found preferable, according to the Degree of Diligence uſed by them to affect the ſame, 16 *July* 1709, Creditors of *Stuart* contra *Stuart*.

Reverſion. *See* Wadſets, Irritancy.

REverſion of Lands ſuſtained ſeveral Years after elapſing of the Time prefix'd for uſing Redemption: Albeit the Reverſer had after the ſaid Term purſued for Part of the

Price, and a Compliment was promiſed to his Wife at the making of the Bargain, *February* 15, 1706. *Young* and her Husband contra *Craicks*.

The Granter of a Wadſet of his Lands redeemable for a certain Sum containing a Backtack for Payment of the Annualrent, and a Clauſe that no Redemption ſhould be made, till the whole Backtack Duties, termly Failzies, and all other Sums wherein he ſhould be Debtor to the Wadſetter were ſatisfied, together with the Principal; having thereafter granted a ſeparate Declaration, bearing that the Wadſetter was ingag'd to a third Perſon for another Sum borrowed and applyed for the Uſe of the Granter of the Wadſet; and declaring that the Wadſet-right ſhould not be redeemable upon the repayment of the firſt Sum therein contained, unleſs the Wadſetter was freed of his engagement for the laſt Sum, Annualrent and Expences; which Declaration (tho' having only a Clauſe of Regiſtration in the Seſſion-Books, that Diligence might paſs thereon) was recorded in the Regiſter of Saſines and Reverſions: The Declaration was found not ſuch a valid Eik, as to be a Title of the Wadſetter's Poſſeſſion, to which his Intromiſſion might be aſcribed, as well as if the Eik had been added to the Principal Wadſet, 18 *February* 1708, Lord *Preſident of the Seſſion* contra Sir *John Inglis*.

A Perſon having ſome Months after his purchaſing a Piece of Ground, granted Backbond to the Diſponer, allowing him and his Eldeſt Son to redeem the Subject diſponed within two or three Years at fartheſt, by repayment of the Price; and no Offer to redeem having been made for the ſpace of four Years thereafter, while the Son lived: The Subject was found become Irredeemable. Albeit the Diſponer and his Eldeſt Son's Heir uſed an Order of Redemption before any Declarator of the Irritancy, 28 *July* 1709, *Stuart* of *Blackhall* contra *Stuart* of *Carſewell*.

Rolls.

THat the Keeper of the Books of Inrolment exact but four Shilling *Scots* for inrolling each Cauſe for the Outer-houſe, and prefix Arithmetical Figures of 1, 2, 3 &c. to the Cauſe, as they ſtand inſerted in the Books. And at the firſt coming out of each Weekly Ordinary to the Outer-houſe upon Tueſday Morning, lay before him the ſaid Books, with a Docker ſubjoined cloſe to the laſt Cauſe taken up upon the Saturday immediately preceeding in theſe Words, *The total Number of Actions and Cauſes inrolled upon Saturday laſt, ſuch a Day of the Month, extends to ſuch a Number*, which Day of the Month and Number of Cauſes is to be expreſs'd in Words, and not in Arithmetical Figures, under the Pain of thirty Pounds *Scots toties quoties* in Caſe of failzie, and Impriſonment till Payment be made thereof to the Poors-box without Mitigation. The Lord Ordinary is to ſubſcribe the ſaid Docket when preſented to him, and upon Wedneſday Morning to report to the whole Lords whether the ſaid Books of Inrolment had been duly preſented and ſubſcribed the Tueſday preceeding, 27 *December* 1709, *Act of Sederunt*.

A Deliverance upon the appointing Cauſes to be heard ſummarly muſt be ſigned by the Preſident, of which the Clerk of the Proceſs gives a Copy ſubſcribed by himſelf without Fee or Reward to any of the Parties demanding the ſame: Without prejudice to the Clerks Dues for Hearings in preſence appointed by the 8 Article of the Regulations 1696. Upon Production of this Copy to the Keeper of the Inner-houſe Rolls, at the ordinary Time and Place for inrolling Cauſes, he ſhall Inroll the ſame as in the Act of Sederunt, 20 *November* 1711, § 11.

Roup.

IT being an Article of the Roup of a Ship, that the higheſt Offerer ſhould be preferred, he furthwith giving Bond and ſufficient Caution to Pay in the Price offered to the Clerk of Court within a certain Time after the Roup under a Penalty; and in Caſe of his failing ſo to do, the immediate preceeding Offerer to be preferred, he under the like Penalty granting Bond and Caution as above: The higheſt Offerer who refuſed to ſign his Offer and to give Bond and Caution for the Price, was allowed to free himſelf from Payment thereof by reſiling; but found liable for the Penalty, or ſo much thereof as the Lords ſhould modify, 27 *January* 1710, *Hamiltoun* contra *Gordon*.

Ship Goods having been inventared and ſome Months after rouped by Warrant of the Admiral, and the higheſt Offerer having, without Proteſtation or Complaint, given Bond for the Price: The Goods were preſumed to have been in the ſame condition at the Roup, as at the inventaring, unleſs the contrary were proved; and to have been in the ſame condition when delivered to the Buyer, as they were in, when rouped, 29 *June* 1711, *Hamilton* contra *Pyper* of *Newgrange*.

S.

Sale and Ranking. *See* Ranking and Sale.

A Minute of Sale of Lands not found to be paſt from, by a Letter from the Purchaſer to the Seller, bearing, that if a certain third Party were ambitious of the Bargin, they ſhould be welcome to it for ſome Conſideration; ſo as to put the Seller *in bona fide* to Bargain for theſe Lands with that third Party, *January* 18, 1706, *Campbel* contra Sir *Alexander Anſtruther*.

Nor was the Purchaſer found obliged to let the third Party have the Bargain, *February* 13, 1706, Dutcheſs of *Hamilton* contra *Campbel*.

The Lords Price ſet upon Lands expoſed to Roup, lower'd a Year's Purchaſe, upon Application from the Creditors, repreſenting that no Body was like to offer ſo much, and that a Diſtribution of the Eſtate among them was impracticable, *July* 7, 1709, Creditors of *Cleland* Supplicants.

The Purſuer of a Sale and Ranking of a Bankrupt's Eſtate having carried on the Proceſs upon his own private Expence till the Decreet of Ranking was ready to be extracted, and the Sale to be adviſed: The Lords remitted to the Ordinary in the Ranking to modify a Sum both for reimburſing the Purſuer of what he had expended, and for perfecting the Sale and Ranking, 29 *December* 1709, *Duff* of *Bracco* Supplicant.

Proceſs ſuſtained upon a Summons of Sale paſt without a previous Bill, in reſpect of the former Cuſtom ſo to do. But ſuch Summons hereafter is only to be expede upon Bill, 31 *December* 1709, *Wedderburn* contra *Nicolſon* and others.

A Perſonal Creditor for a Debt not bearing Annualrent, preferred upon his Inhibition in a Ranking ſeveral Years after a judicial Sale of the Common Debtor's Eſtate, not having adjudged till after the Ranking; found to have no Right to Annualrent of the Sum for which Inhibition was us'd, preceeding the Ranking, 30 *June* 1713, *Carmichael* contra *Lockhart*.

Scandal. *See* Juſtices of Peace.

A Libel of Scandal ſhould be Special as to Perſons, Time, and Place. The giving private Information to the Commiſſioners of the Cuſtoms againſt any Perſon imployed under them, is not relevant to found a Proceſs of Scandal: Nor can theſe Commiſſioners be conveen'd as Witneſſes to Depone upon ſuch private Information, *December* 31, 1708, *James* contra *Watkins*.

Schoolmaſter.

A Schoolmaſter, whoſe Act of admiſſion bore neither during Life, nor during Pleaſure, not allowed to be turn'd out of the Office arbitrarily by the Patrons that put him in and paid his Salary. But it was found that they might deprive him for reaſonable Cauſes, ſuch as Ignorance, or Inſufficiency; without Neceſſity to prove Malverſations, 17 *January* 1710, The Town of *Montroſe* contra *Strachan*.

Scoring Writs. *See* Gift, cancelling Writs.

SCoring a Decreet in the Minute-Book, not a Nullity in the Extract, 3 *July* 1708, *Kinloch* of *Gilmertoun* contra *Forbes* of *Tolquhon*.

Seamens-Wages. *See Exercitoria Actio.*

SEamens-Wages not a Debt of Bottomry upon the Keel of the Ship, or affecting the Cargo, but are a Debt affecting the Fraught, 6 *January* 1708, *Sands* and others contra *Scot*.

Saſine. *See* Competition, Preſcription, Burgage-Lands.

A Perſon deriving Right from a Son as Heir to his Father, preferred to another whoſe Right flowed from a Daughter, as Heir to the ſame Father paſſing by the Brother; albeit the Brother's Saſine was not regiſtred conform to the Act of Parliament, 30 *June* 1705, *Keith* of *Ludquhairn* contra *Sinclair* of *Diren*.

A Saſine by Haſp and Staple equivalent to a Saſine upon a Precept of *Clare Conſtat*; and ſo a ſufficient Title of Preſcription, 28 *November* 1705, *Ker* of *Graden* contra *Abernethy*.

Service of Heirs.

TWo Competitors who had taken out Brieves to be ſpecially ſerved Heir of Tailzie to a Defunct in certain Lands, being heard upon their ſeveral Claims and Titles, produced before the Macers of the Seſſion and their Aſſeſſors; and the Debate reported to the Lords: The Service was ſtopped till it were ſummarly determined *in jure*, who had beſt Right to ſerve Heir, 28 *November* 1712, Sir *Alexander Don* of *Newtoun* contra *Don*.

Servitudes.

INhabitants of a Burgh of Barony, who in their Erection-Charter had *omnimodam poteſtatem eſſe piſcatores & piſcium mactatores, cum poteſtate ſalmones alioſque id genus piſcium condendi in dolia ſolitos committendi*, &c. were found not to have Right to the Servitude and ſole Right of being Fiſhers, and Mactaters, Salters and Packers of Fiſh upon an adjacent Water; altho' the Heritor of the Fiſhing and his Tackſmen had imployed them that Way in regular Bands, and given them a certain Proportion of Fiſh in Wages, according to the Number taken for the Space of 40 Years, 14 *March* 1707, the Creditors and Donatar of *Dumfermling* contra Laird of *Innes*.

Sheriffs. *See* Supplement.

AN heritable Right of Sheriffſhip *cum omnibus feodis divoriis, ſeu caſualitatibus ſeu ſpectan. aut quæ ad dictum jus & officium pertinere dignoſcentur*, ſufficient to found a title of Preſcription to ſet up Weights and uplift the Duties thereof in an annual Fair at a Burgh of Barony within the Shire: Albeit the Baron's Charter of Erection carried Power to him to hold Fairs, and exact all the Profits and Duties thereof, 27 *December* 1709, *Cunningham* of *Craigends* contra Earl of *Eglintoun*.

Sheriff-Clerks.

SHeriff-Clerks may be named by the Secretaries of State, when the Sheriffs have not that Power expreſt in their Charters or heritable Rights, 17 *July* 1705, *Richardſon* contra Earl of *Eglintoun*.

Side-Bar.

TWo Lords only in one Day muſt come out to the Side-Bar *ſucceſſive*, according to their Seniority, from 10 to 12 in the Forenoon; and each muſt continue there in his Turn no longer than an Hour, except the Ordinary upon the Bills, who may come out for calling theſe at any Time. The Keeper of the Rolls for the Outer-Houſe ſhould affix upon the Wall each *Monday* Weekly the particular Days, Hours, and Names of Lords that are to be Ordinaries at the Side-Bar that Week: In which Roll the Ordinary in the Outer-Houſe is to be paſt over as to theſe Hours falling to him of Courſe betwixt 10 and 12. No Cauſes to be called at the Side-Bar except what are contained in a Roll affix'd on the Outer-Houſe Wall the Night preceeding, ſubſcribed by the reſpective Lord Ordinary's principal Servant, containing the total Number of Cauſes therein prefixed in Words, and not in Figures; and the particular Cauſes ſet down by Number thus, 1, 2. 3, 4, &c. who interline or add any Cauſes to the ſaid Roll, ſhall be debarr'd from, and declared incapable of any Employment or Service about the Parliament-Houſe for ever, beſides reſounding to the Party leſed his Damage and Expences. The Lords are not to exchange Days or Hours. And in caſe any Lord ſhall happen not to go thro' all the Cauſes in his Side-Bar-Roll, he ſhall at the next Side-Bar Calling, begin with the Cauſe he formerly left at, and ſo proceed orderly to call all the Cauſes in his precedent Roll, before calling any Cauſes in the ſubſequent Roll. All Decreets, Acts, Sentences and Interlocutors pronounced at the Side-Bar, and written contrary to the Orders and Regulations above-mentioned, void and null, Act of Sederunt 11 *November* 1708.

Signet.

KEepers of the Signet appointed to provide good and ſufficient Wax, fit to receive the Impreſſion of the Signet, and not to neglect ſtamping the ſame upon the Wax: and a Ring of Paper to be upon the Wax, ſo large as to receive the Impreſſion, Act of Sederunt, 14 *February* 1706.

In all Writs paſſing the Signet, the Day of the Month and Year of God, are to be expreſſed in Words and not in Figures, under which the Keeper or his Depute muſt write ſigned by me, and ſubjoin his ordinary Subſcription, 4 *February* 1713, Act of Sederunt.

Spuilzie.

IN a Spuilzie of a Caldron and Stell-pot, the ſpilt Browſt and Expence of the Purſuit allowed in Name of Damage; but not the Rent of the Brewary as laid waſte, and the Loſs of the Purſuer's Trade by the Spuilzie; nor yet the Price of Brew-Looms that fell down for Want of Uſe, or of Malt ſpoiled through Want of the Caldron to brew in, 5 *February* 1706, *Ker* contra *Dunbar* of *Thundertown*, and Others.

Juramentum in litem allowed to the Purſuer of a Spuilzie of Pewter Veſſel and other Kitchin-Furniture taken out of an Inn-keeper's Houſe, *February* 21, 1706. *Henderſon* contra *Dunbar* of *Thundertoun*.

The Defender in a Spuilzie and Ejection having died after the Summons was called, ſeen, returned and inrolled, before Litiſconteſtation; and the Purſuer having proved the Spuilzie after the Action was transferred againſt the Defunct's Heir: He the Purſuer was not allowed to prove his Damages by his Oath *in litem* againſt the ſaid Heir, 5 *July* 1711, *Lewars* contra *Carmichael* of *Mauldſly*.

Poinding Plough Goods 15 *June* before the Owner's Bear-Seed was ended, when there were other poindable Goods upon the Gronnd found to be a Spuilzie, tho' the Labouring had been over a Matter of 14 Days before in the reſt of the Neighbourhood, 20 *June* 1712, Sir *David Arnot* contra *Greigs*.

Stops.

STops Verbal diſcharg'd, and the Clerks ordain'd upon the Application of Parties, to give out Extracts of any Decreet, Act or Proteſtation, after elapſing of 24 Hours from reading thereof in the Minute-Book, notwithſtanding any verbal Stop. Written Stops are to be ſubjoined to a Repreſentation craving the ſame, and not to continue above a Fortnight in Time of Seſſion, or if granted during the Vacation to expire after the Eighth Day from the down-ſitting of the next Seſſion; except they be renewed Act of Sederunt, 11 *November* 1708.

Subſcriptions.

AN Execution of a Summons annulled, for that one of the two Witneſſes therein ſubſcribed by the initial Letters of his Name, 18 *June* 1707, *Meek* contra *Dunlop*.

Subſcription by a Notar for a Woman ſuſtained, albeit the Notar's Aſſertion bore not that ſhe touched the Pen, but only that at her Command, who could not write herſelf, as ſhe affirmed, he had ſubſcribed for her, 7 *July* 1710, *Maver* and *Cowback* contra *Ruſſel*.

Subſtitution. *See* Bonds.

ANnualrents of a Sum in a moveable Bond, payable to one, he being on Life; and failzieing of him by Deceaſe to another reſting unupliſted before the Inſtitute's Death, found to be *in bonis defuncti*, and not to be carried by the Subſtitution, 26 *January* 1711, Lord *Elibank* contra *M'kenzie* of *Frazerdale*.

A Sum payable to one, which failing by Deceaſe to another or to the former's Aſſignies whatſoever, found to belong to the Executor Creditor of the Inſtitute; in a Competition with the Subſtitute's Executors Creditors within three Years of the Inſtitute's Death by the Act 24. Parl. 1. Seſſ. 1. Ch. 2. reſerving to them Action of Recourſe againſt the Repreſentatives of the Inſtitute as accords, 9 *February* 1711, *Graham* contra *M'quean*, and *Drummond*.

Succedaneous. *See officium nobile.*

Summons. *See* Citation, Executions, Form of Proceſs.

NO Proceſs ſuſtained on a Summons bearing a Warrand to cite upon 20 Days for the firſt Diet; albeit 21 Days elapſed from the Date of the Execution to the firſt Diet of Compearance as marked in the Summons, *February* 1, 1706, *Ramſay* contra *Gibſon* of *Dury*.

Summons not called within Year and Day after elapſing of the laſt Diet of Compearance, falls and cannot be wakened, 27 *July* 1708, *Drummond* of *Megginſh* contra *Stuart* of *Innernytie*.

No Proceſs ſuſtained upon the paſſive Titles, albeit the Defender had debated againſt the Purſuer's Title; in regard there was no paſſive Title libelled, but that of charged to enter Heir, and no ſuch Charge was produced. Nor was the Purſuer allowed to amend his libel, 13 *December* 1709, Earl of *Lauderdale* contra Lord *Teſter*.

No Proceſs ſuſtained upon a Summons where in the firſt Day of Compearance was beyond Year and Day of the raiſing of the Summons: Albeit the ſame was executed with in the Year, 3 *July* 1711, *Brown* of *Braid* contra *Carſtairs*.

Reduction of a Diſpoſition of Lands upon the Act of Parliament 1621, being raiſed, but not ſuſtained at the Inſtance of the Granter's perſonal Creditor: The Proceſs, which ſiſted during the Time that the Creditor was expeding his Adjudication, was allowed to go on after he obtained and produced it, without neceſſity to raiſe a new Summons, 3 *July* 1712, *Spotſwood* contra *Brown*.

No new Concluſion can be added to a Summons after extracting Act or Decreet thereon, 3 *July* 1712, *Calquhoun* Lady *Monboddo* contra Laird and Lady *Newmains*.

A Purſuer who inſerted in the Summons Days of Compearance that fell within the *Chriſtmas*-vacation, allowed to amend the wrong Days filled up, 23 *June* 1713, *Inter Eoſdem*

Superinduction. *See* Gift.

Superiority. *See* Feuduties.

AN Univerſity, who acquired Right to an Adjudication of Lands for Debt exceeding the Value thereof, having charged the Superior, who was in Poſſeſſion by a Declarator of Nonentry, to enter them, and offered him a Charter with a Year's Rent, and upon his Refuſal purſued a Mails and Duties againſt the Tenants: The Lords found, that the Superior muſt either enter the Univerſity, or pay the Debt due to them, to the Value of the Lands adjudged, as the Value ſhall be determined by the Lords, upon a Probation thereof. And found, that the Univerſity muſt transfer their Right and Debt to him, upon his paying the Value of the Lands, with abſolute Warrandice for the Sum they receive: Reſerving always to them their Right againſt the common Debtor, in ſo far as they ſhall not be ſatisfied by the Superior; in regard the Debt due to the Univerſity is more than the Value of the Lands. And found that the Superior muſt be comptable for his Intromiſſions with the Rents of the Lands, or Annualrents of the Value thereof in his Option, from the Time the Univerſity did firſt charge him to enter them, and made their Offer of a Charter and a Years Rent to him, 24 *July* 1713, Univerſity of *Glaſgow* contra *Hamilton* of *Dalziel.*

Jus tertii to a Superior to quarrel an Appriſing of a Charter granted by his Predeceſſor to the Appriſer's Debtor, for want of the Grounds and Warrands thereof, 31 *January* 1712. Earl *Forfar* contra *Gilhagee.*

No Caſualty of Superiority falls thro' the Death of an Apprizer denuded within the Legal, by a Diſpoſition in favours of the Reverſer, recorded in the Regiſter of Reverſions, 12 *February* 1713, Colonel *Erſkin* contra Sir *George Hamilton.*

A Charter of Wardlands from the Sovereign containing a *novodamus*, and a Change of the holding from Ward to Blench; with the Words *non obſtante quod eædem terræ per ſervitium wardæ & Relevii antea tenebantur, quam Tentionem & omne beneficioum ejuſdem nos in perpetuum renunciamus & exoneramus*, found to impart a Diſcharge of Caſſualties of Ward and Marriage formerly fallen, *eodem Die, inter eoſdem.*

Supplement.

ONe Sheriff cannot grant Letters of Supplement to another, for citing and examining Witneſſes within the former's Juriſdiction, 30 *July* 1712, *Gordon* of *Daach* contra *Gordon* of *Techmuiry.*

Surrogatum. See Bonds.

Suſpenſion. *See* Cautionry, Atteſters.

A Charger having applyed for and procured a Warrand to diſcuſs ſummarly a Suſpenſion upon multiple Diſtreſs; the Suſpenders who had raiſed and executed a Summons of Multiple poinding, not obliged to debate till the ſame came in by Courſe of the Roll; and the Charger was not allowed to paſs from the Warrand for ſummary Diſcuſſion, ſo as to oblige the Suſpenders to expede their Suſpenſion in common Form, 3 *February* 1708, *Arnot* of *Woodmiln* contra Commiſſioners of the Equivalent.

A Suſpender's Advocate not allowed to propone any new Reaſon of Suſpenſion, neither libelled originally, nor eiked and given out to, and ſeen by the Charger's Advocates, without Conſignation as in the 24 Article of the Regulations 1672, Act of Sederunt 20 *November* 1711 § 8.

Swearing. *See* Prophaneneſs.

T.

Tacks. *See* Tithes.

A Tack not relevant to prove the Rent of Lands, without proving Poſſeſſion and Payment conform, 20 *July* 1708 *Nicol* contra *Park* of *Fulfoordlies.*

A Tackſman of Mills allowed no Abatement of his Tack-duty, in conſideration of a ſupervening Declarator of Immunity, in favours of ſeverals who at the ſetting of the Tack were thought to have been thirled to the ſaid Mills, and were in uſe to grind all their Grains for Baking and Brewing thereat: In reſpect no more was ſet but the Mills and Multures thereto belonging, *July* 1, 1709, Adminiſtrators and Treaſurer of *Heriot's Hoſpital* contra *Angus.*

The Benefit of the Act of Parliament 1669, whereby Mails and Duties of Tenants not purſued within five Years after their removing from the Ground, preſcribe *quoad modum probandi*; competent only to Tenants who labour by themſelves, or Subtenants: And not to the Fiar of Lands, who had entered to the Poſſeſſion by Virtue of a Tack from the Liferenter; whoſe Tack-duties were found not ſo preſcribed by elapſing of five Years after expiring of the Tack, and his commencing to poſſeſs as Proprietary, 9 *December* 1709, *Murray* of *Philiphaugh* contra *Trotter* of *Mortounhall.*

Some of ſeveral Tackſmen of a Paper-Miln having aſſigned their Intereſt in the Tack, Inſtruments, Materials and Trading-ſtocks to one of their own Number for ſo many Years; upon his obliging himſelf not only to relieve them of the principal Tack-duty, but alſo to pay to each of them a ſuperplus Duty dearly for their Shares of Profit; and to leave the Inſtruments, *&c.* in the ſame Condition: Theſe annual Preſtations of a ſuperplus Duty found to fall under the Act of Parliament 1669, about the Quinquennial Preſcription, 2 *January* 1711, *Daes* of *Coldingknows* contra *Semple* of *Fulwood*.

Tailzies. *See* Clauſes, Heirs, Deathbed.

HEretor of a tailzied Eſtate, in a Capacity to diſpone for neceſſary Cauſes, notwithſtanding of the Tailzie which was made by himſelf, contained no Irritancy and was recorded only in the Commiſſary-Books, *December* 11, 1705, *Young* of *Roſebank* contra *Bothwels* of *Glencorſe*. The neceſſary Cauſes being always prior to the making of the Tailzie, *December* 18, 1705, *Inter Eoſdem*.

A Perſon having, without Conſent of Curators, obliged himſelf in his Contract of Marriage to tailzie his Eſtate to himſelf and the Heirs Male of that Marriage; which failing, to his neareſt Heirs Male whatſoever; and the Heir Male of that Marriage having diſponed it to his younger Brother, his Heirs and Aſſignies whatſoever, who was upon the Diſpoſition infeft, entred by the Superior, and continued to poſſeſs after the Granter's Death: This Diſpoſition ſufficient to evacuate the Proviſion of Tailzie in Favours of Heirs Male in the Contract of Marriage. Altho' it was offered to be proved, that the Granter of the Diſpoſition was fatuous and Furious before and after the making of it, *December* 13, 1705, *Livingtoun* contra *Menzies* and Heirs of Line of *Saltcoats*.

A Perſon having tailzied his Eſtate to one and to certain Heirs ſubſtitute, with this Proviſion, That it ſhould not be lawful to the Heir Inſtitute, or any of the Subſtitutes, to do any Act or Deed that might fruſtrate and prejudice the Tailzie and Courſe of Succeſſion; and that any Thing done in the contrary ſhould be null, and reducible at the Inſtance of the next apparent Heir of Tailzie: The Lords found, That the ſaid Clauſe, tho' inſerted in the Seaſin and Retour, containing no Irritancy of the Heir Inſtitute his Right, is not ſufficient to annul Debts contracted by him as Deeds prejudicial to the Tailzie; or to liberate his Heir from a paſſive Title, *March* 11, 1707, *Bruce* Lady *Riedheugh* contra *Forſyth* and *Wilſon*.

The next Member of a Tailzie in being at the Predeceſſor's Death, allowed to ſerve Heir to the Predeceſſor: Albeit there was a Poſſibility of a nearer Heir ſubſtitute, 2 *January* 1708, Lord *Montſtuart* contra Lady *M*^{c}*kenzie* and her Huſband.

One having tailzied his Eſtate, with Clauſes irritant in Favours of certain Heirs; which failing, to his own Heirs and Aſſignies whatſomever, to whom the Succeſſion devolved thro' Failure of the former: The Deviſor's Heirs and Aſſignies in the laſt Termination were found not affected with the Irritancies, 29 *December* 1710, *Leſly* and *Johnſton* of *Knockhill* contra *Dick* of *Grange*. A Deed done by an Heir of Tailzie before the Succeſſion devolv'd on him, found not to import an Irritancy, *Eodem die inter Eoſdem*.

A Tailzie with a Clauſe prohibiting the Members thereof to contract Debt, and declaring Debts contracted by them to be void and null for affecting the tailzied Eſtate, but containing no Irritancy of the Contravener's Right: Found not to hinder the Eſtate to be equally affected for Debts contracted by one of the Members of Tailzie, as for the Debts of the Maker thereof, according to their Priority of Diligence, 22 *July* 1712, Competition betwixt the Creditors of Mr. *Thomas* and Mr. *Robert Craigs* of *Riccartoun*.

A Gentleman having made one Tailzie of his Eſtate *in Anno* 1665, and another in the 1681 to himſelf in Liferent, and to his eldeſt Son and his Heirs Male of a certain Marriage in Fie, which failing to the ſecond Son and the Heirs Male of his Body, which failing to a third Son and the Heirs Male of his Body; and failing theſe and other Heirs thereinmentioned, to the Father Maker of the Tailzie his neareſt Heirs and Aſſignies whatſoever; with and under the Proviſions, Reſervations, Reſtrictions and Limitations following, *viz.* That if any of the Heirs of Tailzie aforeſaid ſhould ſell, anailzie or diſpone the Lands, or do any Deed whereby the ſame might be evicted from any of them; the Deed of Contravention ſhould be null, and the Tranſgreſſor forfeit his Right to the next Heir of Tailzie, who (tho' ſerved Heir to him) ſhould not be liable to perform his Deeds or pay his Debts. The Maker of this Tailzie, in the Year 1685, purchaſed another Eſtate for a certain Sum of Mony delivered to the Seller by him, for himſelf and in Name and Behalf of his ſecond Son, and took the Right thereof to himſelf in Liferent, and after his Deceaſe to his ſaid ſecond Son and the Heirs Male of his Body; and failing theſe and other Heirs thereinmentioned, to the Father and his Heirs Male of Tailzie and Proviſion contained in his Infeftments of the former Eſtate; and under the Proviſions, Limitations and Conditions contained in his ſaid Infeftments.

The ſecond Son thereafter altered this laſt Tailzie, making a new Tailzie of his Eſtate in Favours of the third Brother's ſecond Son, and died without Children. In a Competition for his Eſtate, betwixt this third Brother's Son, and the eldeſt Son of the eldeſt Brother: The Lords found the latter to be the next Heir of Tailzie of the Defunct's Eſtate, by the Failure of Heirs of his Body. And found the Clauſe in the Tailzie of that Eſtate 1685, mentioning the prohibitory and irritant Clauſes in the Tailzie of the Grandfather's old Eſtate; hath Reſpect not only to him and the Heirs after him, but alſo to the ſaid Defunct and the Heirs of his Body; and that the Tailzie referred to in the Tailzie 1685, is the laſt Inveſtiture in the Year 1681. And found, That the Tailzie 1685, bearing the Price of the Lands therein diſponed to be paid by the Grandfather; and the Right being taken to him in Liferent, and to his Son the Defunct in Fie; he the Son was a qualified Fiar, who could not gratuitouſly alter the Order of the Succeſſion. And farder found, That the Tailzie 1685, relating to Conditions, Limitations and Proviſions in the Tailzie 1681, doth comprehend Irritancies; and that theſe Irritancies, tho' not expreſt, but only related to in the Tailzie 1685, do affect the ſame, ſo as the Fiar could not gratuitouſly invert the Order of Succeſſion, 5 *February* 1713, *Don* of *Newton* contra *Don*.

One having, without an antecedent onerous Cauſe, tailzied his Eſtate with the uſual prohibitory and irritant Clauſes, to himſelf in Liferent, and to his Father in Fie; and failing of him by Deceaſe to the Heirs Male lawfully to be begotten of his own Body; and ſo furth failing theſe to other Heirs of Intail: The ſaid Tailzie while it remained in the Terms of a perſonal Right, not perfected by Charter and Seaſin, was found revocable and revoked by the Maker thereof, with Conſent of the firſt Inſtitute, 23 *June* 1713, *Scot* of *Raeburn* contra *Scot* of *Haycheſter*.

Taylors.

SEals of Cauſe granted by the Town of *Edinburgh*, to the Taylors there, ratified by the Sovereign, whereby Taylors not free in *Edinburgh*, being apprehended taking out or bringing in to the Burgh, any Work ſhaped or unſhaped, the Deacon or Maſters of the Incorporation are authorized to ſeize and keep the Work till redeem'd by Payment of 40 Shillings by the Workman, and as much by the Owners; found effectual as to Burgeſſes, and ſuch as bear Scot and Lot in *Edinburgh*. 16 *June* 1708, Taylors of the *Canongate* contra Taylors of *Edinburgh*. But that the Taylors of *Edinburgh* had no Right to ſeize any Work brought into the Town, and made by the Taylors of the *Canongate*, belonging to Strangers and others reſiding within the Burgh who do not bear Scot and Lot, 27 *November* 1708, *inter eoſdem*, *Vid.* in 16 *June* 1708.

Tenor of Writs.

IN a proving the Tenor of a Contract of Marriage, repeted *incidenter* to ſtop Certification in a Reduction and Improbation, the *caſus amiſſionis*, that a Perſon whom the Purſuer repreſented, did *viis & modis* abſtract the Contract, being inſtructed by the Abſtracter's ſubſcribed Declaration; and for Adminicles of the Tenor and Exiſtence of the Contract, a Decreet of Conſtitution for Implement of the Proviſions therein, with an Appriſing and Infeftment following thereon, clothed with 30 Years Poſſeſſion, being produced; and two honeſt, but not inſtrumentary Witneſſes, having deponed, that they ſaw the Contract about 38 Years ago, ſubſcribed by the Wife, and her Brother as a Witneſs, and remembred of a Liferent Proviſion therein made to her. The Adminicles were found proved and relevant to exclude Certification; no Qualification of Falſhood being inſiſted in. Albeit the Declaration about the *caſus amiſſionis* was granted on Deathbed, ſubſcribed by the Declarant with his Name *ad longum*, who ſome few Days before had ſigned Papers by two initial Letters only; and bore that he delivered it to a Perſon who in an Exhibition denied to have ever ſeen the ſame; and the Decreet of Conſtitution bore, that the Contract therein produced was regiſtred in the Time of the *Engliſh* Judges a Year after the Huſband's Death; and the Witneſſes adduced declared that they did not remember the whole Contents of the Contract, or that they ſaw the Huſband's Subſcription at it, 21 *November* 1707, *Waddel* contra *Waddel* and *Gilhagie*.

The Purſuer of a Reduction not allowed to repete *incidenter* a proving the Tenor of a Writ neceſſary to make up his active Title, 2 *July* 1709, *Inglis* contra Lord *Alexander Hay*.

The Depoſitions of the Drawer and Writer of a Diſpoſition allowed to be taken ſummarly for ſupplying two Sheets of the Narrative thereof, which had been torn off thro' careleſs keeping in the Hands of an Agent, whoſe Papers fell in confuſion after his Death: The whole diſpoſitive Part Subſcription and Margins of the Writ, being ſtill entire, 17 *July* 1712, *Hume* Lady *Eccles* Supplicant.

The Tenor of an Adjudication not found proved by the following Adminicles; 1. The Contract that was the Ground of the Debt, with a Decreet of Conſtitution againſt the Debtor's Heir, containing theſe Words indorſed, *Given out to Dundas to ſee four Executions, ſpecial Charge, and Execution of this Decreet.* 2. The Letters of ſpecial Charge extracted from the Signet, not containing an expreſs Warrand to cite the Tutors and Curators of the Party charged who was Minor. 3. The Summons of Adjudication from the Signet. 4. A Certificate from the Keeper of the Minute-Book, bearing a Decreet to be put up of the Date libelled, and *Charles Oliphant* Clerk thereto, with an Extract of the Allowance of the ſaid Adjudication, mentioning *John Hay* to be Clerk: Which Decreet bears Date 20 *February* 1678, The Allowance is in *April* thereafter, and the Reſponde-Book of the Office bears the Decreet to be extracted in the ſubſequent *July*. 5. Horning on the Decreet raiſed and executed againſt the Superiors, with a Charter of Adjudication, and Infeſtment. 6. The Exiſtence of the Decreet was offered to be proved by unexceptionable Witneſſes who ſaw the ſame; and this *cauſa amiſſionis* being condeſcended on, That the Purſuer's Tutor's Houſe was Burnt where probably the Adjudication periſhed; and that the Warrands and Records thereof were probably loſt by a double Diſorder that happened in the Clerks-Office, occaſioned firſt from a Fire in the Neighbourhood, and then by the great Fire in the *Parliament-Cloſs*: But tho' the ſaid Diſorder by the Nighbouring Fire happened ſix Years after the contraverted Decreet, the ſame was not booked with others in the Regiſter of Decreets, nor were the Warrands put up with other Warrands of that Date, *June* 21, 1707, Laird and Lady *Airth* contra *Blackwood* and *Telfer*.

And the Lords would not ſuſtain the Adjudication crav'd to be made upon the foreſaid Adminicles, as a real Security for the Principal Sum due to the Adjudger; but ſtopped Decreet in the Mails and duties till a certain Day, betwixt and which they might lead a new Adjudcation, and ſo be in a Capacity to compete with real Creditors, *July* 4, 1707, *Inter Eoſdem.*

In a proving the Tenor of a Diſpoſition, this Alledgance, That the Writ craved to be ſo made up was innovated, cancelled and retired, repelled *hoc loco*, reſerving to the Defender to be heard thereon after the Tenor is proved, 7 *July* 1713, Creditors of *Orbiſtoun* contra *Hamilton* of *Dalziel.*

A Decreet proving the Tenor of a Bond therein libelled blank as to Writer's Name and Witneſſes, and not proved in the Proceſs of Tenor to have had theſe Solemnities, found null. Becauſe, that Decreet could be no more effectual, than if the Bond it ſelf were produced blank in the Writer's Name and Witneſſes, 17 *July* 1713, *Blackwood* contra *Hamilton* of *Grange.*

Terce. *See jus mariti*, Wives.

NO Terce due to a Relict out of Lands wherein her Husband died not Infeſt, *January* 29, 1706, *Inter Eoſdem.*

Terce due to a Relict out of Wardlands in which her Husband ſtood laſt publickly Infeſt in the Property; notwithſtanding of a baſe Infeſtment granted by him to his Son and apparent Heir, upon a Diſpoſition in his Contract of Marriage; and preferable to the Superior claiming Mails and Duties, by Reaſon of the Minority of the Husband's Heir Apparent, 15 *February* 1712, Marquis of *Annandale* contra *Scot* Lady *Gillesby.*

Teſtament. *See* Confirmation, Writs.

A Teſtament not found null for not bearing that the Executor at the Confirmation made faith and deponed on the Inventory, but only that it was faithfully made and given up by him; albeit the Inſtructions to the Commiſſaries require Executors to make faith, *December* 10, 1707, *Lees* contra *Dunwoodie.*

A written Teſtament reduced for Informality, not ſuſtained as a Nuncupative Legacy 20 *July* 1711, *Moncrief* and her Husband contra *Monipenny.*

A Perſon having in his Teſtament ordered a Monument to be builded to him by the Executrix therein named; ſhe was allowed Deduction of the Expence thereof in a Compt and Reckoning at the Inſtance of the Defunct's neareſt of Kin who had reduced the Teſtament. Albeit before the building of the Monument began, the Reduction was raiſed, and the Executrix got a Bond from the Heir to relieve her of the Expence thereof in Caſe the Teſtament ſhould happen to be reduced. She got no Allowance for the Expence of defending againſt the Reduction thereof, 19 *February* 1712, *Inter Eoſdem.* But the ordinary Expence of confirming the Teſtament was allowed in ſo far as it was profitable to the Executrix *qua* neareſt of Kin, 20 *June* 1712, *Inter Eoſdem.*

The Expence of confirming the Defuncts Teſtament doth not affect the Dead's part only, but comes off the whole Head of the Executrie, 20 *June* 1713, *Moncrief* contra *Monipeny.*

Thirlage. *See* Milns, Servitudes.

AN ancient Charter of Lands *cum molendinis & multuris*, ſuſtained to infer Immunity from Thirlage, in favours of a ſucceeding Heretor in theſe Lands; altho' he inſtructed no Connection of his Title thereto from the Obtainer of the Charter; becauſe Lands once become free are not brought under Servitude again, but by the poſitive Deed of the Proprietor for the Time, *June* 11, 1706, *Dundaſs* of *Brieſtmiln* contra *Sinclair* of *Carloury.*

A Clauſe thirling all that tholes Fire and Water, doth not import that all Malt brewed, but only what is kilned and cobled within the Thirle, ſhould pay Multure, *February* 22, 1707, Adminiſtrators of *Heriot's Hoſpital* and their Tackſman contra Brewers in the *Canongate.*

A Perſon being Infeſt in a Miln *cum multuris & divoriis* thereof, and particularly the Multures of all Lands and Tithes in a certain Pariſh, upon a Charter granted by an Abbot and his Convent in the Year 1562; and an Heretor in the Pariſh having in the Year 1591, thirled the whole Corns of his Lands (except Wheat and Malt for his Family) to the ſaid Miln perpetually, except his Heir after his Deceaſe happen'd to build a Miln of his own upon theſe his Lands, the then Fewar of the Miln, and his Spouſe being Dead; and the Heretor of the Miln and his Succeſſors having been in immemorial Poſſeſſion of the inſucken Multures of theſe Lands: The Lords found that the Faculty competent to the Heretor of the Lands of building a Miln within his own Bounds, conform to the Conſtitution of Thirlage 1591, did not preſcribe: And that he might build tho' both the Ends of the Miln-dam were not on his own Ground, to free him from the Thirle of ſuch Corns as can be grinded at his own Miln. But found the Thirle to the other's Miln continues ſtill, whenever the Heretor's own Miln cannot grind. And that the Abbot's Feu-charter 1562, having thirled the Tithes of the Pariſh (within which the Heretors Lands ly) the building of the Miln conform to the Faculty reſerved *Anno* 1591, can operate no Liberation from the Thirle of the Teinds, *March* 14, 1707, *Halyburtoun* of *Newmains* contra *Haig* of *Bemmerſide.*

A Burgeſs Brewer of *Edinburgh* poſſeſſing a Tenement of Land there, found thirled to Milns acquired by the Good-Town and annex'd to the Royalty many Years after the Erection thereof: Such Burgeſſes by ſeveral Acts of the Town-Council being ordained to go to theſe Milns with their Grain under the Pain of Eſcheat of what is abſtracted, and Payment of double Multure, 31 *July* 1708, *Montgomery* contra *Alexander.*

Some Lands of an united Lordſhip belonging to the King, being feued out *cum molendinis & multuris* in the *tenendas* by a Charter *Anno* 1535, and other Lands thereof with the Mill being feued to another Perſon in the Year 1541, with the Multures of the Lands formerly diſponed; and it being proved that about 40 Years ago the Tenants of theſe Lands paid ſeveral Years Outtown-multure, but no Services to the Miln: They were found aſtricted thereto *quoad* ſuch a Quantity of Multure, without being liable to Mill Services. Not as if the Charter 1541, had been conſidered as an original Conſtitution of Thirlage, but becauſe it was preſumed *retro* that the King had been in Poſſeſſion of theſe Multures before his granting either of the foreſaid Charters, *November* 24, 1708, *Halkertoun* of *Rathillet* contra *Melvil* of *Mordecarny.*

This Thirlage was underſtood with the Exception not only of Seed and Horſe-corn, but alſo of the Maſter's Farm not conſumed in his Family reſiding within the Thirle, and of any excreſce Bolls more as are a ſufficient Maintenance for the Tenants and other Inhabitants upon the Ground, ſold by them. But ſo much of the Farm as is ſpent in the Heretor's Family within the Thirle is aſtricted. And alſo any Foreign-Corns bought in lieu of the Growth of the Ground ſold by the Tenants or Cottagers pays Multure: Yet thoſe bought by them for the Maintenance of their Families in Caſe of a ſcanty Crop, that is not ſufficient for that Uſe, are free of any Aſtriction, 19 *January* and 1 *February* 1709, *Inter Eoſdem.*

A Clauſe in Feuars Charters obliging them to come to a certain Mill, with all grindable Corns growing upon their Lands, which they ſhould happen to grind, and to pay Multures and perform Mill-ſervices uſed and wont, and alſo to grind thereat all other Corns imported within the Bounds of the ſaid Lands for Outſucken-multure, found to import a Thirlage, 22 *July* 1709, Feuars of *Dundaff* contra *Madril* of *Muirmill.* Extending to all grindable Corns growing upon the aſtricted Lands in ſo far as neceſſary to the Conſumption of the Families within the Thirle: But that the Superplus of the Growth of the Ground may be freely exported; and that if the *Grana creſcentia* are not ſufficient for their Conſumption, what is imported for that End pays out ſucken Multure, 23 *December* 1709 *Inter Eoſdem.*

A Charter granted by King *Robert* the *Bruce* to the Town of *Edinburgh* giving granting and confirming to the Burgeſſes thereof the ſaid Burgh of *Edinburgh*, *Una cum portu de* Lieth & *cæteris pertinentiis ſuis*, to be holden of the Sovereign, with all Privileges belonging to the Town in King *Alexander's* Time, found to conſtitute a Thirlage within the Royalty to the Town's Mills: Whereby the Town is inabled to reſtrain and hinder the Brewers to uſe Hand-Mills, or other Engines, or do any other Thing whereby the ſaid Thirlage may be prejudiced and diverted, 19 *December* 1710, Magiſtrates of *Edinburgh* and Tackſmen of their Mills contra *Alexander*.

Poſſeſſion upon a Bond of Thirlage obliging the Granter to grind at a Mill for free Multure and good Services, proved againſt a ſingular Succeſſor by voluntary Acts of coming ſome Times to the Mill, tho' he went to other Mills when he pleas'd, and never paid dry Multure to that Mill. But the Depoſitions of theſe Witneſſes being made uſe of to inſtruct Poſſeſſion upon the Bond of Thirlage, the good Services therein mentioned as the Condition of coming to the Mill, were explained by the Depoſitions, *viz.* That the Defender ſhould not be liable to Knaveſhip, and that his Loads ſhould be carried to and from the Mill upon the Mill-horſes, 29 *July* 1712, *Blair* contra *Edgar* of *Kethick*.

Tithes. *See* Preſcription.

HEretors who, upon the Dependance of a Valuation and Sale of their Teinds before the Commiſſion, had obtained a Warrand to draw them, and found Caution to make the valued Duty furthcoming at the Eveent of the Proceſs, found liable ſimply according to uſe of Payment till the finding of Caution: And as to Years ſubſequent to the Caution, liable ſo with this Quality, That the Teindmaſter before extracting find Caution to them, to refound or allow in the firſt end of the valued Duty to be decerned by the Commiſſion, what more they pay than that extends to, *February* 27, 1706, Earl of *Roxburgh* contra Heretors of *Lilliesleaf*.

A Perſon decerned by a Decreet-arbitral to procure in favours of the other Submitter a Decreet of Prorogation of a Tack of Biſhops Teinds for three Nineteen Years, found to have implemented the Decreet-Arbitral, by procuring a 4 Ninteen Years Tack from the Soverign who became Titular by Suppreſſion of Biſhops: In reſpect the former Tack being expired before the Date of the Decreet-Arbitral, it could not be prorogated; and the Tack from the Sovereign was Equivalent to the *Facturn impræſtabile.* 9 *January* 1708. Repreſentatives of Major *Chieſly* contra Sir *Alexander Brand*.

A Right to a certain Teindfiſh imported to ſuch a Harbour, not extended to Fiſh imported in order to be exported only, whereof the Teind was drawn in another Place than where they where taken, *January* 20. 1708, *Kirk-Seſſion* of *North-Leith* and *Williamſon* contra *Skene* and *Brown*.

Annuity not due by the Queen's Tackſman, for Teinds belonging to the Sovereign in Property, at the Time when Annuity was Eſtabliſhed by Law: Albeit the Sovereign had Right to Annuities *jure coronæ*, and to theſe Teind *jure privato*, 13 *February* 1608, Marquis of *Tweddale* contra *Orrock* of that *Ilk*.

An Heretor found liable for the Teind-duties of his Lands to the Titular's Tackſman the Years that he poſſeſs'd as Heretor: Albeit he was not proved to have been in the natural Poſſeſſion, or to have received a Joint-duty for Stock and Teind. In reſpect it is preſumed that he intromitted with the whole Rent comprehending both Stock and Tiend: Seeing it is not alledged that any other Perſon uplifted the Teind, 10 *July* 1713, *Crawfurd* contra *Kennedy*.

Titles Active. *See* Clauſes.

THe Title to an Action raiſed by an apparent Heir, for declaring a Right competent to his Predeceſſor, tranſmitted by a Service as Heir to the Raiſer of the Proceſs, and to the ſaid Predeceſſor, *January* 9, 1706, Lord *Balmerino* contra Earl of *Strathmore*.

A perſonal Bond granted by an apparent Heir, ſuſtained as an Active Title in a Reduction and Declarator of Extinction of Debts and Deeds that might affect the Defunct's Eſtate; the Purſuer completing his Title by Adjudication upon a ſpecial Charge before he can farther inſiſt, *March* 13, 1707, *Robertſon* contra Dame *Anna Houſtoun* and the Lord *Juſtice-Clerk* her Husband. That is, Proceſs allowed to be carried on without any new Citation, but the Citation has no force as to other Effects, except from the completing of the Title, 20 *March* 1707, *Inter Eoſdem.*

Titles (Paſſive.) *See* Paſſive Titles.

Tranſaction. *See* Fraud.

Truſt, *See* Factory, Fraud, Bills of Exchange.

A Perſon imployed by another to influence a third Party to legate a Bond bearing Annualrent, in favours of the Imployer's wife, having writ to him, *That he could not bring about what he deſired, and that rather than another ſhould get the Legacy, he had taken it to himſelf; but to ſhew that what he did was purely for the Imployer's Son's Profit, he promiſed him Repetition whenever he paſs'd his Minority, reſerving always the Property to himſelf in Caſe the Son either diſobliged his Father, or took irregular Courſes*: The Truſtee was ordained to find Caution to make both Principal and Annualrent forthcoming to the Son at his Majority, upon the Conditions contained in the Miſſive; but was declared to be free, in Caſe the Son either diſoblige his Father, or take Irregular Ways, or die before he be Major, *January* 6, 1708, *Sinclair* contra *Maxwell* of *Tinwal*.

One having with Reſervation of his own Liferent, and a Proviſion to his Wife, diſponed his whole Eſtate heretable and movable to his Son, and the Heirs of his Body; which failing to other Perſons ſubſtitute; which Diſpoſition named one of the Subſtitutes to be Tutor to the Inſtitute, and bore that the Writs were inſtantly delivered to the Tutor, in Name of his Pupil and the other Subſtitutes; and the Wife having the ſame ſaid Day procured from her Husband another Diſpoſition of all his Movables to the ſaid Pupil, and failing of her in favours of her ſelf, which Diſpoſition was inſtantly perfected with an Inſtrument of Poſſeſſion to her, and thereafter by Tranſaction betwixt her and the Tutor transferr'd to him: One of the Subſtitutes being ſerved Heir to the Inſtitute, and to an other Subſtitute deceas'd, was preferred to the Diſponer's Relict, and got the Diſpoſition to her reduc'd, 24 *June* 1712, *Wright* and *Kinloch* contra *Wright*.

Turpis cauſa. See Condictio ob turpem cauſam.

Tutors and Curators. *See* Minors, Decreets.

ACtion of Compt and Reckoning ſuſtained againſt the accepting Tutors nominate, without calling the reſt who did not accept nor act, *June* 23, 1705 *Murrays* contra *Murray*.

A Bond granted payable to two Co-tutors *nominatim*, for the uſe and behoof of their Pupils, in Contemplation of a Diſpoſition granted by theſe Tutors of ſome Movables belonging to their Pupils, being aſſigned to them after their Majority: It was found, that the Debtor could not prove Payment by the Oath of the ſurviving Tutor one of the Cedents, the other being dead, and both *officio functi*, *July* 16, 1707, *Waddels* contra *Wadderſtoun*.

A Tutor found liable to compt as ſuch to the Minor for Rents, that were no Part of the *patrimonium pupillare*; in reſpect theſe had been uplifted and diſcharged by him *tutorio nomine*. But the Minor being neareſt of Kin to the Perſon to whom they belong'd, was ordained to eſtabliſh a Title in her Perſon, as Executrix to him, that ſhe might upon Payment diſcharge effectually the Tutor's Repreſentatives, *December* 31, 1708, *Bruce* Lady *Riddoch* contra *Forſyth* of *Garvel*.

A Tutor found liable for Annualrent of the Pupil's Mony run on unuplifted during his Office, and not allowed to diſcharge himſelf therewith, as yet reſting in the Hands of reſponſible Debtors. But the Minor was ordained to furniſh him with the Bonds for procuring Payment of theſe outſtanding Annualrents; and was to give him Allowance for Ceſs, Teind and Feu-duty of Years he compts for the Rents of the Lands, upon procuring Declarations from the Collectors of the Ceſs, and the Chamberlains of the Titular and Superior, that ſuch Ceſſes, Teind and Feu-duties were paid, and finding Caution to relieve the Minor thereof: Albeit the particular Receipts were not produced. But he got no Allowance for incident perſonal Charges in the Pupil's Affairs not particularly inſtructed; in reſpect Inventories were not given up in the Terms of the Act of Parliament 1672: Albeit the Tutor had done the Equivalent by ſigning an Inventory of the Pupil's whole Eſtate, Writs and Evidents, in Preſence of the neareſt Relations on the Father and Mother's Side, and giving up the ſaid Inventory to be kept by them as a Charge againſt him, *June* 11, 1709, *Inter Eoſdem*.

Perſons named by One in his Teſtament to be Tutors to his Son, who had ſucceeded to an Eſtate as Heir of Tailzie to his Uncle by the Mother, with this Condition, That they ſhould not be liable for Omiſſions, but only for their actual Intromiſſions; and alſo elected Curators by the Minor himſelf with the ſame Quality; found *qua* Tutors to be anſwerable only in the Terms of the Father's Nomination for their actual Intromiſſions, and not for Omiſſions: But *qua* Curators, found liable both for Omiſſions and Intromiſſions, 1 *February* 1710, *Rankine* alias *Little* of *Libbertoun* contra *Johnſtoun* and *Henderſon*.

One being purſued for Payment of a Debt as owing by him to the Purſuer's Father *per* Ticket, having deponed *(referente adverſario)* That he paid the Mony to the Purſuer's Tutor, who thereupon delivered him up his Ticket: The Lords found, that the Oath proved the Payment; and therefore aſſoilzied the Defender, *January* 13, 1711, *Forreſter* contra *Forreſter*.

Four Proteſtants and Five Papiſts being named by a Father in his Teſtament to be Tutors to his Son, and Three of them to be a Quorum (a Roman Catholick being always One) the Proteſtant Nominees were authorized to officiate and act by Vertue of the foreſaid Nomination, as if the *ſine quo non* and other Roman Catholicks had not been mentioned, 3 *July* 1711. Tutors of *Wauchop* of *Niddery* Supplicants.

Curators having once accepted the Office, cannot reſign when they pleaſe; and if complained of for Miſmanagement, may be obliged by Sentence of the Lords to conſent to the Nomination of a Factor to manage the Minor's Eſtate. But a Minor having given in a Nomination of a ſufficient Perſon to be his Curator, in place of thoſe who offered to demit; the Lords accepted of their Demiſſion, 22 *February* 1712, *Gordon* of *Gordonſtoun* contra his Curators.

A Tutor who had intrometted as ſuch, with ſeveral Years Rents of his Pupil's Lands held Taxward of the Crown, no further liable after his Office of Tutory was expired to the Donatar of the Taxward Duties of the ſaid Lands, than *in quantum* he had in his Hands of the Pupil's Rents, 18 *February* 1713, Counteſs of *Caſſils* contra Earl of *Ruglen*.

V.

Vinco vincentem. *See* Competition.

Vis & metus. *See* Wives.

A Perſon being taken with Caption for a Debt in cold Winter Weather, and carried Priſoner thro' the Hills from Place to Place in his Night-gown and Slippers, when valetudinary and unable to put on his Clothes; and his Son, to redeem him from the Meſſenger's Hands, having granted a Bond of Corroboration of the Debt,

ſuperſeding Payment for two or three Years, and obliging the Creditor to uſe Diligence againſt the Father by Adjudication and Inhibition for affecting his Eſtate; and having got from his Father an Aſſignation to a Debt for his Relief, which he tranſmitted to a third Party: The Son was found by ſo doing to have tranſacted his Father's Debt, and homologated his own Bond of Corroboration, ſo as he could not quarrel or reduce the ſame *ex capite vis & metus*, *July* 11, 1706, *Grant* of *Dalahaple* contra Major *Anderſon*.

A Wife's Conſent to her Husband's Diſpoſition of Land, wherein ſhe ſtood infeſt, found not reducible at her Inſtance 24 Years after, when clothed with another Husband, upon this Ground, that the ſame was elicited from her by frowning, and undue Importunities uſed by her firſt Husband ſeveral Hours in a Tavern, and a Promiſe of Mony laid upon a Table, which ſhe was not allowed to uplift after ſigning the Writ, which was not read to her, 1 *July* 1708, *Johnſton* contra Repreſentatives of *Napier*.

Vicious Intromiſſion. *See* Paſſive Titles.

AN Executor's Confirmation within Year and Day of the Defunct's Death, ſuſtained to purge the Vicioſity of his anterior Intromiſſion; notwithſtanding he was cited at a Creditor's Inſtance before Confirmation: But Super-intromiſſion with Goods not given up in the Inventary after the Citation, ſuſtained relevant to make the Intrometter univerſally liable, 13 *December* 1709, *Drummond* contra *Campbell* of *Burnbank*.

An Intrometter with a Defunct's moveable Effects, tho' univerſally liable to his Creditors, is liable only according to the Extent of his Intromiſſion to his Heir, who had paid ſome moveable Debts, and was Creditor for Relief thereof out of the Executry, 15 *June* 1711, *Ewing* contra *Rowan*.

Intromiſſion with the Goods and Gear of a Perſon deceas'd, which the Intrometter afterwards confirmed as Executor Creditor to him, before intenting any Action by the Defunct's Creditor, not ſuſtained to infer a paſſive Title upon the Act 20, Parl. 1696, 18 *June* 1712, *Moor* contra Sir *Alexander Maxwell*.

Vicious Intromiſſion not inferred by once intrometting with ſo ſmall a Sum as 7 lib. 10 ſh. *Scots*. 22 *January* 1713, *Stark* and *Tom* contra *Jolly*.

U.

Union-Treaty. *See* Cocket-dues.

Uſury. *See condictio ob turpem cauſam*.

ACTS of Uſury comprehended under the Queen's ſubſequent Indemnity, ſo as Informers could pretend to no Share or Benefit upon the Account of Information given after her Majeſty's Proclamation, *June* 27. 1707, *M'micken* contra *Kennedy* of *Glenour*.

A Diſcharge bearing the Receipt of 45 lib. *Scots* as one Year's Annualrent of 1200 Merks, Retention being allowed conform to Act of Parliament, found not to infer Uſury. And the Twenty Shilling of more Annualrent than Law allowed imputed to an Error in the Calcul: Notwithſtanding of a Note upon the Back of the Diſcharge written by the Granter, bearing that only Three Quarters Retention was allowed; That being underſtood as done by him for Memory's Sake, after his Senſe of the Miſtake, to the End the Debtors might be redreſs'd at the next Payment, *July* 24 1706, *Donaldſon* contra Magiſtrates of *Brechin*.

A Bond for a perpetual Annuity above the legal Annualrent, redeemable by the Debtor upon Payment of the principal Sum and the bygone Annuities reſting at the Time, found to be uſurious: Albeit the principal Sum was ſunk *quoad* the Creditor, who could not charge for Payment thereof upon the Bond. But the Penalty of Uſury taken off by the Sovereign's Indemnity, 26 *January* 1709, *Colvil* contra *Irving* of *Drum*.

One purſuing a Bond, which acknowledged the Granter to be juſtly addebted and owing to the Purſuer's Cedent a certain Sum, and obliged him and his to pay the ſame to the Purſuer his Heirs and Aſſignies at the Time therein mentioned, with Annualrent from a Term Five Months and Twelve Days before the Date of the Bond, not guilty of Uſury, becauſe the Mony was ſuppoſed to have been borrowed at the ſaid preceeding Term, 7 *November* 1711, *Scot* contra *Baillie*.

W.

Wadſets. *See* Reverſion, Preſcription.

A Wadſet being affected by a Back-Tack with this Proviſion,that incaſe Two Terms Payment of the Back-tack-duty run in the Third unpaid, the Back-tack ſhould expire and become null without Declarator; and the Granter of the Wadſet be obliged to enter the Wadſetter to Poſſeſſion of the Lands to be poſſeſs'd, as his own Heretage till Redemption; and the Irritancy being *de facto* incurred, and the Wadſetter having attained Poſſeſſion without Declarator by the Granter of the Wadſet's voluntary ceding the ſame,after he was denuded of the Reverſion in Favours of a 3d Party: A ſingular Succeſſor to the Wadſetter by Progreſs,was ordained to count & reckon for the Rents during his Poſſeſſion. Iu reſpect the Conveyance to his immediate Author, bore an expreſs Quality, that he ſhould be comptable. Nor was a Decreet of Abſolvitor in a Proceſs of Removing, and Mails and Duties againſt him before an inferior Judge, ſuſtained as a Title of *bona fide* Poſſeſſion to free him from counting for his Intromiſſions, *March* 12, 1707, *Nicol* contra *Park* of *Fulfoordlees*.

A proper Wadſet with Poſſeſſion being granted to a Creditor; and thereafter another having appriſed the Reverſion, and diſponed his Appriſing to the Wadſetter, who obliged himſelf by a Backbond to denude thereof in favours of the Debtor; excepting & reſerving as much of theRights appriſed as would pay what was or ſhould be due by him to the Granter of the Backbond before denuding; and a Third Creditor having afterwards adjudged the Backbond, and offered Security to the Wadſetter for the Annualrents of the principal Sum in his Wadſet, and craved that he might cede Poſſeſſion of the wadſet Lands,or be countable for the ſuperplus Rent thereof,over and above the Annualrent of the Sum in the Wadſet, conform to the Act of Parliament 1661: The Lords found, That the Adjudger had ſufficient Title and Intereſt to make the Offer; But that the Wadſetter's Super-Intromiſſions ſhould not be imputed for extinguiſhing the Wadſet, but other Sums due to him in the firſtPlace, 10 *Feb.* 1710, Earl of *Levin* & others contra *Moriſou* of *Bognie*. And the Adjudger's Offer of Security after producing his Adjudication to the Wadſetter, ſuſtained as legal; albeit the Adjudication was not read to the Wadſetter, ſince he deſired not to have it read. The notorial Inſtrument, bearing, that Security was offered and refuſed, and mentioning the Tenor of the Security, and the Wadſetter's retaining Poſſeſſion of the wadſet Lands, found to inſtruct the ſame ſufficiently, without producing the Bond offered. But a Wadſetter in the natural Poſſeſſion accepting offered Security, cannot be removed till he be lawfully warned 40 Days before the ordinary Term; 21 *Decemb.* 1710, *Inter Eoſdem.*

The Granter of a Wadſet having, upon the Wadſetter's Requiſition and Charge for Payment of the Mony, offered and conſigned it by way of Inſtrument to the Wadſetter; was not afterwards allowed to paſs from his Requiſition and Charge, and recur to his Right of Wadſet; albeit the Reverſer had uſed no Order of Redemption by Premonition and Declarator againſt him, 25 *July* 1710, *Roſs* of *Aldy* contra *Roſs* of *Ey*.

A Wadſetter allowed after uſing Requiſition and charging for Payment of his Mony,to paſs from theCharge & recur to hisRight of Wadſet,by inſiſting in a Proceſs of removing againſt the Granter, albeit he conſigned the Mony in the Clerk's Hands after the Removing was judicially called, without Prejudice to the Reverſer to uſe an Order of Redemption, as accords, 14 *November* 1710, *Inter Eoſdem.*

An Order of Redemption made by a ſingnlar Succeſſor to the Reverſion, without producing his Title at the uſing of the Order, not ſuſtained; albeit the Papers were at the Time in the Hands of the Wadſetter's Lawyers,in another Proceſs before the Lords, 13 *November* 1711, *Douglaſs* of *Dornock* contra *Carruthers* of *Nutholm.*

An Adjudication of Wadſet-Lands intrinſically null, not a ſufficient Title for uſing the Offer of Caution to the Wadſetter in the Terms of the Act of Parliament 1661, in order to reſtrict him to his Annualrents, and oblige him to hold Compt for the Superplus, 10 *February* 1713, Earl of *Levin* contra *Moriſon* of *Bognie.*

Wakening. *See* Form of Proceſs, Summons.

PRoceſs commenc'd againſt a Principal and Cautioner bound conjunctly and ſeverally, having ſlept, may be wakened againſt the Repreſentatives of the Cautioner, without Neceſſity to call the Repreſentatives of the Principal, *March* 18, 1707, Sir *James Hall* contra the Lady *Pitfirren*.

A Cauſe found not to be ſleeping, tho' nothing was done therein from the 14 *February* 1706 to the 30 *June* 1707: In reſpect the Seſſion was under Adjournment from the Firſt of *November* 1706 to the Fourth of *February* 1707; and in order to the ſleeping of a Cauſe, the Time of Adjournment was to be conſidered as *tempus inutile*, and to be made up by ſo long of Seſſion, without reckoning the Vacation, *July* 22, 1707, *Maitland* contra *Brand*.

Two Defenders being called in one Summons, concluding a Declarator of Right to an Appriſing againſt the one, and that the other ſhould be liable for Payment of the Sums therein contained: Proceſs was found to ſleep as to the latter; notwithſtanding the Purſuer's continued inſiſting againſt the former, to remove all Objections againſt his active Title; which ſeem'd a prejudicial Queſtion to be determined before he could effectually inſiſt upon the Concluſion of Payment, 2 *February* 1710, Earl of *Lauderdale* contra Lord *Teſter* and *Seatoun* of *Barns*.

Warning to remove.

A Particular Precept from a Magiſtrate not neceſſary to authorize an Officer to warn Perſons within Burgh by Chalking their Doors, *June* 24, 1709, *Bartoun* contra *Duncan*.

A Precept of Warning found null; for that the Writer, tho' named therein, was not deſigned in the Terms of the Act of Parliament, 23 *January* 1711, *Roſs* of *Aldie* contra *Roſs* of *Eye*.

A Precept of Warning held to be duly executed, tho' the Publication thereof at the Pariſh-Church-Door was ſome Days before the Execution againſt the Tenant, 2 *December* 1712, *Stirling* contra *Gordon*.

Warrandice. *See* Aſſignations.

A Perſon having ſometime poſſeſs'd an Eſtate by Vertue of his Wife's Jointure-Right which did not equal the Rent, and then acquired an Appriſing thereof; and having ſome Years after diſponed that Appriſing to his Step-ſon, with Warrandice from Fact and Deed: The Warrandice was found incurred by his Superintromiſſions with the Rents of the Eſtate above his Wife's Jointure, preceeding the Conveyance, *July* 11, 1706, *Brown* of *Carſluth* contra *Maxwel* of *Cuil*.

The Exception of a Right in the Warrandice of a Diſpoſition, not ſuſtained to hinder the Receiver of the Diſpoſition to quarrel and reduce the excepted Right, 18 *July* 1710, *Gibſon* of *Dury* contra *Trotter* of *Mortounhall* and the Executors of *Clerk* of *Pitteuchar*.

Witneſſes. *See* Probation, Improbation, Scandal.

AN Artificer's Servants admitted *cum nota* as Witneſſes for their Maſter, to prove Sufficiency of a Piece of Work ſold by him and wrought by them, *July* 11, 1705, Lord *Inverury* contra *Gordon*.

A remote Subſtitute in a firſt Tailzie, revoked by a ſecond, not ſuſtained a Witneſs for proving that the ſecond Tailzie was elicited from the Granter on Deathbed, by Importunity or undue Inſinuations, when his Judgment was diſturbed by Sickneſs: Albeit the ſaid Subſtitute was content to renounce his Expectation by the firſt Tailzie, *June* 14, 1707, *Livingtoun* contra *Menzies*.

A Witneſs allowed to depone about the Condition his deceas'd Maſter was in, at the doing of a Deed upon his Death-bed; albeit it was objected againſt him, that he was heard ſay, that he would depone favourably for any of the Parties that would pay the Fees reſting to him by his Maſter. But then the Objector was allowed to adduce Witneſſes to confront the Deponent, *June* 17, 1707, *Inter Eoſdem.*

No Expences allowed to a Witneſs compearing to depone after extracting a ſecond Diligence againſt him; but Expences allowed for his Journey before; and Caption granted againſt the Adducer's Agent, till Payment thereof were made, *June* 19, 1707, Feuars and Merchants of *Frazerburgh* contra Lord *Saltoun.*

A Witneſs after 10 or 12 Years acknowledging his Subſcription, but not remembring that he ſaw the Parties ſubſcribe, or own that they had ſubſcribed; but that he knew their Subſcriptions, and was ſure he would not have ſubſcribed Witneſs except in Preſence of the Parties, found Probative: Notwithſtanding the Act of Parliament 1681 requiring Witneſſes to ſee the Parties ſubſcribe, or acknowledge their Subſcriptions, which doth not import that a Witneſs ſhould after a Tract of Years diſtinctly remember that, *Nov.* 27, 1708, *Sym* and *Scot* contra *Donaldſon.*

Menial Servants ſuſtained to prove the Terms of a Bargain of Salt to the Maſter's Behoof, 31 *Decemb.* 1708, *Smith* contra *Matthie.*

Subtenants and Cottagers to moveable Tenants, ſuſtained Witneſſes in the Cauſe of the Heretor. And a Perſon admitted to bear Witneſs for one whoſe Service he left not till after he was cited to depone, 4 *February* 1709, Lady *Cardroſs* contra *Hamilton* of *Pumpherſtoun.*

Women not habile Witneſſes to prove that Perſons were married, or held and reputed married, 9 *February* 1709, *Forbes* and *Auchmuty* contra *Forbes* and *Monro.*

An Objection againſt a Witneſs that he had been under Sentence of Death for keeping out the *Baſs* againſt the Government, found taken off by the Articles of Capitulation betwixt the Government and the Garriſon; whereby it was expreſly agreed, *That none of the Garriſon ſhould ſuffer any Manner of Way on Account of their outſtanding and oppoſing the Government, July* 7, 1709, *Forbes* and her Husband contra *Forbes* and her Husband.

A Witneſs being under Fee, or having a Trade, may be ſuſtained, albeit he have nothing in real Effects. But if he have neither Fee nor Trade to truſt to, and being interrogated if he believe himſelf to be worth the Queen's Unlaw, ſhall ſay that he doth not believe it: Such a One ought not to be admitted to bear Witneſs, 24 *November* 1709.

A Witneſs repelled, as being within the forbidden Degrees of Propinquity to the Adducer; albeit the other Party had *ex intervallo* before adduced him, *Eodem die, Montieth* contra Heretors of *Abbotſcarſe.*

One of Two Perſons under mutual Lawburrows, received a Witneſs againſt the Other; the former purging himſelf by Oath of any Malice towards the latter, 16 *November* 1711, *Armſtrong* and *Irving* contra *Sharp* of *Hoddam.*

A *Jew* admitted to bear Witneſs, 17 *January* 1712, *Menzies* and *Clerk* contra L. *Preſtoungrange.*

Witneſſes not to be interrogated as to a Perſon's concurring by Advice with another in a certain Act of Adminiſtration, but only as to Words or Facts they heard or ſaw that Perſon ſay or do, 28 *June* 1712, Earl of *Wintoun* contra *Hay* of *Drummelzier.*

A Perſon called as a Party in a Proceſs, being paſt from *ſimpliciter* by the Purſuer, allowed to be examined as a Witneſs *cum nota*, 9 *July* 1712, *Hay* contra Sir *Samuel Forbes.*

A movable Tenant of a Dwelling-Houſe in a Country-Town, ſuſtain'd as a habile Witneſs for his Land-Lord, 26 *July* 1712, *Corſbie* contra *M'lair.*

In a Proceſs for a verbal Injury done to a preſent Magiſtrate, purſued after he was out of Office; his Collegue, who fined the Offender for that Injury, being alſo exauctorated, was admitted as a Witneſs for the Purſuer. And the common Town-Officers were alſo received Witneſſes for him, 18 *November* 1712, *Tod* contra *Cruikſhanks.*

A Witneſs deponing that he uſed to ride when he travelled, and that he came on Horſeback to depone in the Cauſe; allowed the Expence of his Horſe, 11 *June* 1713, *Chalmers* contra *Grant* of *Dalrachny.*

A Perſon who was a ſubſcribing Witneſs to a Diſpoſition granted in Favours of his Nephew, quarrelled *ex capite lecti*, not admitted as a Witneſs for the Nephew, to prove that the Diſponer was in *Liege pouſtie* when he granted it, 19 *June* 1713, Creditors of *Orbiſtoun* contra *Hamilton* of *Dalziel.*

Wives. *See* Terce, Husbands, *Vis & metus.*

BOnds granted by a Wife *ſtante matrimonio*, null and not obligatory upon her: Albeit the Husband was a Simple-Man, and ſhe at the Date of theſe Bonds, ſtood impowered by an Act of Privy-Council to uplift and diſcharge a certain yearly Aliment for ſubſiſting the Family, *November* 15, 1705, *Duncan* contra *Forbes* Lady *Drum.*

A Wife having granted a Bond of borrowed Mony without Conſent of her Husband, and pledged her *Paraphernalia* in Security thereof: It was found, that the Nullity of the Bond did not annul the Pledge; and that ſhe might pledge her *Paraphernalia* without Conſent of her Husband, 13 *July* 1711, *Pringles* contra *Irving* of *Gribtoun.*

A Wife's Bond *ſtante matrimonio* for Mony advanced to her by Friends (after her Husband's Refuſal when inſtrumented to do it) for defraying the Charges of her Journey to the *Bath* in *England*, adviſed by Phyſicians as neceſſary for her Health, found null: But Action ſuſtained againſt the Husband for Repayment of the Sum advanced, in ſo far as the ſame was neceſſary, 19 *July* 1711, the Lady *Kinfauns* and Others contra Laird of *Kinfauns.*

A Wife who in her Husband's Abſence delivered to his Creditor certain Goods belonging to her Husband, in Satisfaction of the Debt, having got up the Inſtructions with a Diſcharge thereof; and the Husband having after his Return retained the Writs without ever ſeeking back the Goods, or reclaiming againſt what ſhe had done: The Property thereof was found effectually transferr'd to the Receiver; ſo as they could not be affected with another Creditor's Diligence, 26 *December* 1711, *Brown* contra *Dickſon.*

A Wife having ſubſcribed Conſenter to a Diſpoſition granted by her Husband of a Subject liferented by her; the Want of a judicial Ratification was not ſuſtained as a Reaſon of Reduction thereof: Since neither Force nor *juſtus metus* were pretended in the Caſe, *June* 28, 1706, *Hay* contra *Cumming* of *Birneſs.*

Writer to the Signet.

AN Agent a Writer, to whom one delivered an executed Horning, in order to cauſe denounce the Party charged, and raiſe a Caption, having imployed a Meſſenger, who denounced before expiring of the Days of the Charge, and having upon that Denunciation raiſed a Caption; and the Party at whoſe Inſtance it was raiſed having been fined by the Lords for executing thereof in 20 l. *Sterling* paid to the Perſon injured by that unwarrantable Diligence: The Writer to the Signet who ſigned the Caption, was decerned to reimburſe his Client, by repaying to him the ſaid 20 l. of Damages, 28 *November* 1710, *Wood* contra *Fullertoun.*

Wool. *See* Reduction.

Writs. *See* Cancelling of Writs, Scoring Writs, Deſignation, Holograph, Edicts, Gifts, Warning, Arbitration.

INdentures made according the Forms and Laws of *England*, ſuſtained as the Title and Foundation of an Action to claim a Succeſſion of Heretage or real Rights in *Scotland*; and to quarrel Deeds in Prejudice thereof, *July* 5, 1706, Colonel *Cuningham* contra the Lady *Semple.*

A Writ ſince the Act of Parliament 1681, ſubſcribed by two Witneſſes found null, for that but one of theſe Witneſſes were rightly inſert in the Body of it: The other being inſerted under a wrong Name, tho' with a right Deſignation, which agreed not to any Perſon of that Name, *July* 15, 1707, *Abercromby* contra *Innes* of *Dunkinty.*

A Writ before the Act of Parliament 1681 found null, for having but one Witneſs inſerted and deſigned therein, tho' it was ſubſcribed by two; and not allowed to be ſupplyed by condeſcending upon the Deſignation of the other Witneſs, whoſe Name was not inſerted in the Body of the Writ, 5 *December* 1707, *Bell* contra *Campbell.*

A Bond not found null upon this Ground, That the ſame was ſo folded up that the Witneſſes thereto ſaw nothing of the Body of the Writ above the Granter's Subſcription, *January* 21, 1708, Lady *Ormiſtoun* and her Husband contra *Hamilton* of *Bangour.*

In a Writ bearing Date and Place at the Top, and immediately after the Clauſe of Regiſtration theſe Words, *Before theſe Witneſſes*, Thomas Jamiſon *Writer hereof, and* Alexander Jamiſon *at* Leckie, *Day, Month, and Year of God foreſaid:* The Words *at Leckie* were ſuſtained as ſufficient to deſign the Writer; it being proved that they lived in *Leckie* at the Time, 14 *December* 1708, *Jamiſons* contra *Sheriff.*

A holograph Writ not found null upon this Ground, that it mentioned not the Place where it was granted, 14 *July* 1709, *Vallange* of *Poſſils* contra *M'dougal* of *Freugh.*

Extract of an Aſſignation, narrating 3500 Merks to be due to the Cedent by ſome third Party, and that the Aſſigny had advanced to him a certain Sum in lieu of the foreſaid Sum of 3500 Merks; and that therefore the Cedent did aſſign him to the foreſaid Sum of 3000 Merks, and obliged him to warrant the Aſſignation of 3500 Merks from his Deeds, done or to be done: Suſtained to carry Right to the whole 3500 Merks; albeit

beit that Sum was interlined in the diſpoſitive Clauſe. But the Interlining was found to be unwarrantable and puniſhable, 21 *December* 1709, Miſtreſs *Lyon* contra Earl *Aboyn.*

An Aſſignation granted by a Wife with Conſent of her Husband,and ſigned by Two Notaries for her,null: In reſpect both the Notaries did not ſubſcribe before Four Witneſſes, in ſo far as One of the Four adjected to his Name, Witneſs to the Co-Notarie's Subſcription. Albeit the Docket of the Writ bore it to be ſigned at one Place, and Time, before ſuch Four Witneſſes; which general Words were explained by thoſe adjected to the Witneſs's Subſcription, ſo as not to imply that all the Four ſaw both Notaries ſubſcribe. Nor was the Nullity found ſupplyed by the Husband's ſubſcribing ſimply as Conſenter, 24 *December* 1709, *Anderſon* contra *Cock.*

An Obligement ſince the Act of Parliament 1681, null for Want of the Writer's Deſignation, and not ſuppliable by offering to prove by Oath of the Granter's Heir, that it was truly ſubſcribed by his Predeceſſor, and never ſatisfied, 4 *January* 1710, *Logie* contra *Ferguſon.*

A Writ containing a competent Number of Witneſſes inſerted, but wanting the Subſcription of One, being judicially produced, and that Witneſs having afterwards ſigned: The Writ was annulled, and the original Defect not ſuppliable *ex intervallo*, 19 *January* 1710, *Straitoun* contra *Robertſon.*

A printed Bond granted to an Incorporation, wherein the Names of Debtor and Creditor, Sums, Date, Witneſſes Names and Deſignations, are filled up in Writ; found null upon this Ground, That the Upfiller was not named and deſigned; unleſs it were proved that the written Part of the Bond is holograph all written by the Debtor, 25 *January* 1710, *Forbes* of *Ballogie* contra *Allardice.*

An *Iriſh* double Bond made in *Ireland*, purſued in *Scotland*, reſtricted to the Half of the Sum in the Bond, and Annualrents thereof conſorm to the Law of *Scotland*: And the Creditor decerned, upon Payment thereof, to diſcharge the Bond *ſimpliciter*; without any Reſervation to ſue in *Ireland* for what could not be recovered by our Law, 25 *January* 1710, *Savage* and *Dun* contra *Craig.*

The Want of Writer's Name and Deſignation in a Bond before the Act of Parliament 1681, allowed to be ſupplyed by a Condeſcendance and Probation, 2 *February* 1710, *Sharp* of *Hoddam* contra Earl of *Nithſdale.*

A Bond ſuſtained, albeit the Name and Deſignation of the Writer thereof, till after the Clauſe of Regiſtration, was not inſerted with his own Hand, but by him who wrote the reſt of the Bond, and filled up the Blanks, Date, Place and Witneſſes, 9 *June* 1710, *White* contra *Henderſon* and others.

A Teſtament reducible upon this Ground,That contrary to the Act of Parliament 1681 the Witneſſes did not ſee the Teſtator ſign his whole Name and Sirname without Aſſiſtance, but only his Name and the half of his Sirname; he being aſſiſted by the Writer's leading his Hand (when it began to waver thro' Faintneſs) to finiſh the other half, 14 *July* 1710, *Moncrief* contra *Monipenny.*

A mutual Agreement being written on half a ſheet of Paper, whereof the Articles to be performed by the one Party upon the firſt Page were ſigned by both Parties and Witneſſes, without inſerting or deſigning the Writer and Witneſſes; and theſe to be performed by the other Party upon the ſecond Page, at the Foot whereof both Parties obliged themſelves to perform the above and within Articles; and then the Writer and Witneſſes inſerted and deſigned, ſubſcribed again with both the Parties: The Lords found the Writ to be valid and probative; in reſpect the laſt Page was relative to the firſt, 21 *November* 1710 *Hamilton* of *Wiſhaw* contra *Moir* of *Cairnhill.*

A Contract of Marriage ſuſtained, albeit the Writer thereof was no otherways deſigned than *future Spouſe to the other Party Contracter*, to whom he therein aſſigned ſome Bonds that did ſpecially deſign him, 22 *December* 1710, *Dickſon* and *Heriot* contra *Logan.*

One aſſigned to 1000 l. owing to the Cedent *per* Bond by a certain Nobleman yet living, which Bond the Aſſignation bore to have been granted in the Year 1606; found to have Right to 1000 l. Bond granted by that Nobleman to the ſame Perſon *in Anno* 1696: Seeing another 1000 l. Bond *Inter Eoſdem*, *in Anno* 1606,could not be condeſcended on, and neither of the Parties was then born, 16 *February* 1711, *Inter Eoſdem.*

A Writ ſubſcribed by Two, and ſide-ſcribed at the joining of the Sheets only by One of them, ſuſtained as valid *quoad* both, 8 *June* 1711, Creditors of *Paton* of *Panbolls* competing.

Date and Place not eſſential to the Validity of a Writ: And the Deſignation of Witneſſes to a Writ before the Act of Parliament 1681 allowed to be ſupplied; tho' the Witneſſes were not ſo much as named in the Body of the Writ, 21 *July* 1711, *Ogilvy* contra *Baillie* of *Lamingtoun.*

A Writ bearing, *As Witneſs my Hand,* without farther Mention of Writer or Witneſſes, ſuſtained; the Perſon to whom it was granted, proving the ſame to be holograph, 12 *June* 1711, *Donaldſon* contra *Walker*.

A printed Bond of Cautionry granted to the Tackſmen of the Cuſtoms for their Collector wherein the Filler up of the Blanks, *viz.* the Debtor's Name and Deſignation, Date and Witneſſes, was fully deſigned, ſuſtained; notwithſtanding the Act of Parliament requiring the Writer's Name and Deſignation, as an Eſſential in all Writs, 30 *November* 1711, Creditors of *Spot* competing.

A Writ found null, in reſpect it was not ſigned by Two Notaries and Four Witneſſes preſent at the Time, in the Terms of the Act 80, Parl. 6. *Jam.* 6, but was only ſigned at firſt by One Notary and Two Witneſſes, and at ſome Time thereafter by another Notary & other Two Witneſſes, 27 *Decem.* 1711, *White* of *Bennochie* contra *Knox*.

The Acts of Parliament requiring VVriter's Name and Witneſſes in probative VVrits, found not to take Place in a Writ whereby the Colonel of a Regiment obliged himſelf to procure to a Major, Precepts from or upon the general Receivers for a certain Sum before his Departure from ſuch a Place; and incaſe the Major ſhould make Intereſt with the Receivers, obliged himſelf to allow it to them out of the firſt and readieſt of any Precepts drawn by the Treaſury for the Regiment: In reſpect the Writ was betwixt Officers concerning their Pay, and of the Nature of a Letter of Credit, 18 *January* 1712, *Montgomery* and *Alves* contra Marquis of *Lothian*.

A Bond, whereby one as Principal and another as Cautioner, bound and obliged them conjunctly and ſeverally, for a Sum borrowed, ſuſtained valid againſt the Cautioner; albeit the Bond (written by the principal Debtor) did after the Clauſes of Relief and Regiſtration conclude thus, *In Witneſs whereof, I have written and ſubſcribed theſe Preſents,* &c. 14 *February* 1712, *Orr* contra *Wallace* of *Camſeſcan*.

A Writ ſigned in *Edinburgh*, ſuſtained: Albeit it bore only, *written by* John Ruſſel *Writer*, and the Deſignation held to be ſufficient, 20 *February* 1712, *Rules* contra Creditors of *Riccartoun*.

A Bond payable at Three ſeveral Terms in the Year of God therein mentioned, not null for want of a Date to the Party's Subſcription; nor yet null for bearing only to be written before Witneſſes, and not the Words, *I have ſubſcribed theſe Preſents*; ſeeing it bears to be ſubſcribed by Notaries for the Granter, who could not write, before Four Witneſſes, 1 *July* 1712, *M'ildownie* contra *Graham* of *Dougalſtoun*.

A Bond obliging the Granter for good Conſiderations, to pay a Sum to one of his Lady's Relations at a certain Age, and to ſome other of her Friends other particular Sums a Year after her Deceaſe, under a Condition and Proviſion, all cancelled and torn away, ſave the laſt Words, bearing the Bond to be *in Satisfaction of all that any of his Lady's Relations could claim from him or his Succeſſors any manner of Way, as Paraphernalia, Donatien,* &c. found not to be a binding Obligation, even in Favours of the Perſon whoſe Sum was payable at ſuch an Age, and did not immediately precede the proviſional Clauſe, 18 *July* 1712, Earl of *Bute* contra *Haliburton* of *Pitcur*.

Gentleman not ſuſtained as a good Deſignation of the Writer of a Paper in *Dublin* in *Ireland*, not bearing to be ſign'd, ſeal'd and deliver'd according to the *Iriſh* Form, but written after the *Scots* Form, with a Conſent to Regiſtration in the Books of Council and Seſſion in *Scotland*, in relation to a Debt there, 22 *July* 1712, *Murray* of *Broughton* contra Lady *Semple*.

The Writer of a Bond before the 1681 being deſigned Servant to One, not deſigned; a Condeſcendance upon the Deſignation of that undeſigned Perſon, aſtructed by an Aſſignation from the original Creditor in the Bond, wherein one of that Name was ſo deſigned, ſuſtained ſufficient to ſupply the Defect in the Writer's Deſignation, 28 *January* 1713, *Scot* Lady *Hackſhaw* contra D. *Buccleugh*.

A Receipt of Writs ſubjoined to an Inventory thereof, containing an Obligement to reproduce them upon Demand, granted by an Advocate to a Perſon not in a publick Office, not being holograph, nor having Writer's Name and Witneſſes, found to make the Granter no farther liable for theſe Papers, than to give his Oath what he knew concerning them, what became of them, and how they were diſpoſed of, 10 *February* 1713, *Blair* of That-Ilk contra *Cunninghame*.

Y.

Yards.

AN Orchyard diſcontiguous from the Manſion-houſe, found to fall under the general of Houſe and Yards, 23 *December* 1709, *Bruce* contra Mr. *Will. Dalrymple*.

FINIS.

MVSEVM BRITANNICVM